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## Broussard v. Rogers

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**DETERMINATION OF CHILD CUSTODY: “SHARED  
CUSTODY V. JOINT CUSTODY” REFLECTED IN  
*BROUSSARD V. ROGERS***

Aster Lee\*

When a couple with children divorces, child custody and support become significant. If the couple does not reach consensus on those issues, they must bring them to a trial court to determine. The recent case of *Broussard v. Rogers*<sup>1</sup> illustrates some of the difficulties that arise in making awards for child support. This case note will explore the standards considered by Louisiana trial courts when determining whether custody is “shared” or “joint”—a threshold question for the calculation of the amount of child support owed. This determination, it will be shown, properly focuses on the percentage of time spent by the children with each of their divorced parents.

I. BACKGROUND

Ms. Broussard and Mr. Rogers married in 1997 and had their first child in 2000.<sup>2</sup> In 2003, Ms. Broussard and Mr. Rogers entered into a joint custody agreement (“Agreement”) and were divorced thereafter.<sup>3</sup> The contents of the Agreement were as follows: 1) The parties shared legal joint custody with alternating one week periods; 2) The agreement did not designate either party

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1. *Broussard v. Rogers*, 54 So. 3d 826 (La. Ct. App. 5 Cir. 2011).
2. *Id.* at 828.
3. *Id.*

as a custodial parent; and 3) The agreement did not mention anything about the issue of child support.<sup>4</sup>

Approximately five and half years after the divorce, Ms. Broussard filed a Rule to Change Custody, requesting that the court change the custody status of her child because the previous agreement was no longer workable.<sup>5</sup> Specifically, she requested that the court designate her as a custodial parent.<sup>6</sup> Ms. Broussard also filed a Rule to Establish Child Support, requesting that the court award support based on her status as the custodial parent.<sup>7</sup> The trial court granted both motions.<sup>8</sup> With respect to custody, the court allowed Mr. Rogers visitation every other weekend from the end of the school day on Friday until 6 p.m. on Sunday, plus every Tuesday and Thursday from the school day's end until 8 p.m., plus two unnamed days per week with overnight visitation.<sup>9</sup> Child support was awarded in the amount of \$225.00 per month based upon the court's determination that custody was "shared" under the meaning of Louisiana Revised Statutes [hereinafter L.R.S.] section 9:315.9 and its application of the corresponding calculation schedule. Ms. Broussard appealed this decision, alleging that the trial court erred in calculating child support based on the argument that the trial court used the wrong schedule.

## II. DECISION OF THE COURT

The Louisiana Fifth Circuit Court of Appeal in *Broussard* focused on the issue of whether the custody of the child was shared

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. This visitation schedule is reflected in the court's interim judgment. *Id.* An interim judgment, or interlocutory judgment, is an intermediate judgment that determines a preliminary or subordinate point or plea but does not make a final determination in the case. A final judgment is a court's last action, which settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment. *Judgment*, BLACK'S LAW DICTIONARY (9th ed. 2009).

custody under the meaning of L.R.S. 9:315.9 or joint custody under L.R.S. 9:315.8.<sup>10</sup> The Louisiana Revised Statutes provide differing methods for the calculation of child support depending upon whether custody is “joint” or “shared” as defined by law. According to L.R.S. 9:315.9, when custody is “shared,” each parent has physical custody of the child for an *approximately equal amount of time*.<sup>11</sup> In cases of shared custody, Schedule B is utilized to calculate support.<sup>12</sup> For all other “joint” custody arrangements in which custody is not “shared,” support is determined according to Schedule A. However, there is no statutory guideline to determine the issue of “an approximately equal amount of time.”<sup>13</sup> Louisiana Revised Statute 9:315.9 does not bind the trial court to a threshold percentage determined solely on the number of days spent with the child.<sup>14</sup> Instead, the trial court has discretion in determining whether a particular arrangement constitutes “shared custody,” justifying the application of L.R.S. 9:315.9.<sup>15</sup>

The trial court in *Broussard* held that the custody agreement between Ms. Broussard and Mr. Rogers, which provided Mr. Rogers every other weekend and 2 days a week visitation, constituted “shared custody.”<sup>16</sup> On appeal, Ms. Broussard argued that the trial court erred on this point based on the calculation that Mr. Rogers had custody for only 42.85% of the

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10. *Broussard*, 54 So. 3d at 829. At first glance, the issue seems to be related to the child support issue rather than child custody (Ms. Broussard alleged that the trial court used the wrong schedule because the trial court used Schedule B (LA. REV. STAT. ANN. § 9:315.9 (2012)) instead of Schedule A (LA. REV. STAT. ANN. § 9:315.8 (2004)). However, the real issue is the type of child custody, because the court’s determination of which schedule to use ultimately depends on the determination of which type of child custody the court recognizes. (e.g., the court shall utilize Schedule A when the type of the child custody is shared custody under L.R.S. 9:315.8.).

11. LA. REV. STAT. ANN. § 9:315.9 (2012) (emphasis added).

12. *Id.*

13. *Broussard*, 54 So. 3d at 829.

14. *Id.*

15. *Id.*

16. *Id.*

time, arguing that the Friday and Sunday visitations constituted one-half day each.<sup>17</sup>

The Court acknowledged that there is no definition of a “day” for the purposes of custody in L.R.S. 9:315.8 and L.R.S. 9:315.9, but noted that L.R.S. 9:315.8(E)(2) provides that the court may determine what constitutes a day for the purposes of support, as long as it consists at least 4 hours.<sup>18</sup> Although there is no statutory basis to allow a court to use L.R.S. 9:315.8(E)(2) in determining the meaning of a “day” for the purposes of support, the majority of the Court found that there is no provision to prohibit it, either.<sup>19</sup>

Thus, based on its review of the trial court’s custody decree, the Court did not find any abuse of discretion in the trial court’s finding of shared custody.<sup>20</sup> As long as the trial court’s ruling on the determination of shared custody was correct, the hearing officer’s use of Schedule B to calculate the child support was appropriate.

### III. COMMENTARY

The Court’s decision in *Broussard* can only be evaluated in light of the history of Louisiana’s statutory scheme for child support. Prior to the 1989 enactment of uniform guidelines for determining child support awards, Louisiana, like many other states, conferred wide judicial discretion to a trial court to determine support on a case-by-case basis.<sup>21</sup> In order to curtail potential divergent results among states and within a state due to the provided judicial discretion, Congress aimed at creating more uniform child support awards.<sup>22</sup> As a result of this effort, Congress

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17. *Id.* at 829-830.

18. However, the trial court did not state that it used L.R.S. 9:315.8(E)(2) in determining the custody. *Id.* at 830.

19. *Id.* at 830. (Note, however, that in the dissent, Judge Rothschild pointed out that there is no provision to allow the trial court to use 9:315.8(E)(2) to determine what constitutes a day for the purposes of custody. *Id.* at 832.)

20. *Id.* at 830.

21. *Guillot v. Munn*, 756 So. 2d 290, 294 (La. 2000).

22. *Id.* at 295.

enacted the Support Enforcement Amendments of 1984, which required states to establish numeric guidelines to determine appropriate amounts of child support.<sup>23</sup> However, the federal legislation did not require that the state guidelines be binding, and thus did not operate as a powerful enforcement mechanism for the state judiciary.<sup>24</sup> Subsequently, Congress enacted the Family Support Act of 1988, *mandating* that states establish presumptive guidelines no later than October 13, 1989.<sup>25</sup> In response to 1988 legislation, the Louisiana legislature adopted presumptive guidelines to establish or modify child support.<sup>26</sup> The purposes of the Louisiana's guidelines were: (i) to address the inconsistency in the amounts of child support awards; and (ii) to solve the problem of inadequate amounts of child support awards.<sup>27</sup>

Since the federal law mandated that the guidelines be presumptive, the presumption is rebuttable when the court finds the application of the guidelines to the circumstances unjust or inappropriate.<sup>28</sup> The Louisiana Supreme Court in *Guillot* explicitly provides a three-prong test for Louisiana trial courts if they are to deviate from the uniform guideline.<sup>29</sup> First, the trial court must determine whether the visitation by the non-domiciliary parent is in fact extraordinary.<sup>30</sup> If a non-domiciliary father visits merely a

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23. *Id.*

24. *Id.*

25. *Id.*

26. 2001 La. Acts No. 1082, §1.

27. The underlying public policy as a foundation for the guidelines was the best interest of the child. But more specifically, Louisiana's guidelines use an "income shares model" to determine and calculate the appropriate amount of child support. The "income shares model" is founded upon the tenet that the children should receive the same level of parental income that would have been provided to them as if their parents had lived together with them. Thus this approach focuses on the contribution by each parent in proportion to his or her resources. In other words, Louisiana has established its standard to determine the appropriate amount of support: the parent obligation to support their children is conjoint upon the economic capability of the parent. *Stogner v. Stogner*, 739 So. 2d 762, 766 (La. 1999).

28. *Guillot v. Munn*, 756 So. 2d at 296.

29. *Id.*

30. *Id.* at 299.

few days more than typical visitation under the guideline, it will usually not be considered extraordinary visitation warranting deviation.<sup>31</sup> Second, the trial court must consider whether the extra time spent with the non-domiciliary parent causes him or her to bear a greater financial burden and consequently causes the domiciliary parent to bear a lesser financial burden.<sup>32</sup> This consideration closely conforms to the Louisiana legislature's intent in enacting L.R.S. 9:315.8.<sup>33</sup> Last, it seems that the Louisiana Supreme Court wanted to provide a safe harbor by setting up minimum requirements for the trial court's discretion.<sup>34</sup> It requires the trial court to determine that the application of the guidelines in the particular circumstances under consideration would not be in the best interest of the child or would be inequitable to the parties, thus emphasizing fundamental policy and equity in child custody and support.<sup>35</sup> The Louisiana Supreme Court in *Guillot* did not intend to draw a bright line as to what constitutes mathematical formula in determining shared custody, but it still warned the trial court to deviate "only to the extent not assumed in the statute."<sup>36</sup>

Subsequent to *Guillot*, the Louisiana legislature codified the requirements of *Guillot* in cases where physical custody of a non-domiciliary parent reaches extraordinary levels; in other words, in cases of shared custody.<sup>37</sup> The newly-enacted L.R.S. 9:315.9 established the threshold percentage for shared custody at 49% for cases where the "approximately same amount of time" was spent with the non-domiciliary parent.<sup>38</sup>

However, even when the children live with one parent for less than 49% of their time, the status of shared custody is not automatically denied. The Louisiana Supreme Court in *Guillot*

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 301.

37. LA. REV. STAT. ANN. § 9:315.8 (2001).

38. LA. REV. STAT. ANN. § 9:315.9, cmt.(a) (2012).

provided a long explanation about the circumstances in which the trial court may deviate from the amount of child support provided for by the guidelines. The Louisiana Supreme Court presumed that the intention of the legislative branch in enacting child custody and support laws was to achieve a consistent body of law.<sup>39</sup> In most cases, it is in the child's best interest to have regular contact with both parents and to split the custody equally between the parents.<sup>40</sup> Accordingly, the Louisiana Supreme Court distinguished joint custody and shared custody: in a joint custody scheme, a domiciliary parent shares most of the time with the children, but he or she should allow a typical amount of visitation based on the guidelines conferred by statutes; and in a shared custody scheme, the non-domiciliary parent spends a non-typical, or extraordinary, amount of time with the children so that the amount reaches the heightened level required by statute. On this point—of determining whether the non-domiciliary parent spends as much time as the domiciliary parent with the child—the trial court is offered ample discretion to deviate from the guideline's threshold percentage. The Louisiana Supreme Court in *Guillot* confirmed this wide discretion allowed to the trial court in such circumstances as consistent with legislative intent.<sup>41</sup>

Since *Guillot* and the promulgation of L.R.S. 9:315.9, courts have wrestled with the threshold percentage and its exceptions, as applied for characterizing custody as shared or joint.<sup>42</sup> For example, in *Lea v. Sanders*, the Louisiana Third Circuit Court of Appeals found that L.R.S. 9.319.9 requires 50%–50% (same) or 49%–51% (approximately same) as the “threshold” percentage for shared custody.<sup>43</sup> The *Lea* court held that 43% was insufficient to

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39. *Guillot v. Mund*, 756 So. 2d at 298.

40. *Id.*

41. *Id.* at 300.

42. Robert C. Lowe, *Steps for calculating total support obligation—Shared custody arrangement and child support under 2001, 2002, and 2003 legislation*, in 1 LA. PRAC. DIVORCE § 8:47 (West 2012 ed.)

43. *Id.* (citing *Lea v. Sanders*, 890 So. 2d 764 (La. Ct. App. 3d Cir. 2004)).

establish shared custody.<sup>44</sup> However, in the year following the *Lea* decision, the Louisiana Third Circuit Court of Appeals held that a 45.5%–54.5% sharing was sufficient to trigger Schedule B, which was to be utilized for a shared custody situation.<sup>45</sup> There has not been a Supreme Court case after *Guillot* on this issue. In *Janney*, the Louisiana First Circuit Court of Appeals held that 45.3% of the year was sufficient for shared custody, and this is the lowest percentile for the recognition of shared custody before *Broussard*.<sup>46</sup>

In *Broussard vs. Rogers*, Ms. Broussard calculated that Mr. Rogers had custody for 42.85% of the time.<sup>47</sup> This percentile was far higher than the 37% which the Louisiana Supreme Court in *Guillot* declined to categorize as shared custody, but still lower than any Louisiana case acknowledging shared custody status. *Broussard v. Rogers* thus expands the limitations of the shared custody designation beyond the existing jurisprudence.

The majority's justification for this rests on a calculation of days spent by the child with Mr. Rogers based on L.R.S. 9:315.8(E)(2), which states that a day consists of at least 4 hours for the purposes of *support*. As the dissent pointed out, there is no legal support for the use of such a calculation—which was supposed to be utilized in determining child *support*—to be used in order to determine child *custody*.<sup>48</sup> The dissenting opinion in *Broussard* has some legal merits since there is no statutory basis for the trial court in *Broussard* to find that a “day” consists of 4 or more hours for the purposes of custody. However, the majority's position, in a practical sense, provides a uniform measurement for the counting of a “day” for both child custody and child support. If

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44. *Id.*

45. *Id.* (citing *DeSoto v. DeSoto*, 893 So. 2d 175 (La. Ct. App. 3d Cir. 2005)).

46. *Id.* (citing *Janney v. Janney*, 943 So. 2d 396 (La. Ct. App. 1st Cir. 2005)).

47. 54 So. 3d at 830-31.

48. *Id.* at 832.

there are two different methods of counting a “day” for custody and support, there would be less legal consistency between them and it might lead to a myriad of redundant arguments by attorneys who attempt to count a “day” in the manner most advantageous to their clients. In addition, the legislative intent is to provide wide discretion to trial courts, so long as this does not severely erode the uniformity of the guidelines conferred by the statutes. Generally, the trial court is the best place to balance several pertinent factors in determining whether, and how much, to deviate from the guidelines, especially on the issue of measuring the time spent by each parent with the child. As a result, this case is a good example to show that a case-by-case approach provides better flexibility for courts to find the most appropriate ways to achieve the best interest of the child.