1993 Custody and Child Support Legislation

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I. INTRODUCTION

In 1983, the Persons Committee of the Louisiana State Law Institute undertook a revision of Book I, of Persons, of the Louisiana Civil Code. As a result, in 1991, a package of bills was introduced in the House of Representatives upon recommendation of the Law Institute through its Council, proposing revisions of the law of divorce, spousal support, child custody, child support, claims for contributions to a spouse's education, incidental proceedings in an action for nullity, and a "housekeeping" revision of various statutory provisions occasioned by the proposed changes. All, with the exception of the bill concerning spousal support, have been enacted into law. The changes in child custody and in child support are contained in Act 261 of 1993, effective January 1, 1994. The purpose of this article is to review these revisions.

II. CUSTODY

Since time immemorial, the state, through its representatives, has been called upon to decide custody disputes between two or more persons, each of whom seeks custody of a child. Laws have historically stated preferences as between the mother and the father. Originally, in Louisiana the provisional custody

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2. See Lois E. Hawkins, Joint Custody in Louisiana, 43 La. L. Rev. 85 (1982), for an interesting and detailed review of the history of child custody determinations and state policies preferring one parent or the other.
during the pendency of the suit was awarded to the father unless there were strong reasons to deprive him of it.\textsuperscript{3} In 1888, the statutory preference was granted to the mother.\textsuperscript{4} In 1979, Louisiana Civil Code article 146 was amended to provide that provisional custody should be granted to the husband or the wife, in accordance with the best interest of the child.\textsuperscript{5} This amendment introduced the “best interest of the child” concept as the statutory test for a provisional custody award. No preference between the husband or wife was stated. In spite of this, courts continued to give preference to the mother under the maternal preference rule and the tender years doctrine.\textsuperscript{6} In 1981, the article was again amended to provide for a provisional award of joint custody, but only if both husband and wife agreed to joint custody and the court deemed it to be in the best interest of the child.\textsuperscript{7} Joint custody was defined as meaning that the husband and wife shared the physical custody of the child and enjoyed the natural cotutorship of the child.\textsuperscript{8} No other details were provided, except that if

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\item \textsuperscript{3} La. Civ. Code art. 146 (1870) provided:
   \begin{quote}
   If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband, whether plaintiff or defendant, unless there should be strong reasons to deprive him of it, either in whole or in part, the decision whereof is left to the discretion of the judge.
   \end{quote}
\item \textsuperscript{4} 1888 La. Acts No. 124 amended La. Civ. Code art. 146 (1870) to read:
   \begin{quote}
   If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the wife, whether plaintiff or defendant; unless there should be strong reasons to deprive her of it, either in whole or in part, the decision whereof is left to the discretion of the judge.
   \end{quote}
\item \textsuperscript{5} 1979 La. Acts No. 718, § 1 amended La. Civ. Code art. 146 (1870) to read:
   \begin{quote}
   If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband or the wife, in accordance with the best interest of the children. In all cases, the court shall inquire into the fitness of both the mother and the father and shall award custody to the parent the court finds will in all respects be in accordance with the best interest of the child or children. Such custody hearing may be held in private chambers of the judge.
   \end{quote}
\item \textsuperscript{6} Fulco v. Fulco, 259 La. 1122, 254 So. 2d 603 (1971); Messner v. Messner, 240 La. 252, 122 So. 2d 90 (1960); Sampognaro v. Sampognaro, 215 La. 631, 41 So. 2d 456 (1949); Ard v. Ard, 210 La. 869, 28 So. 2d 461 (1946); Willis v. Willis, 209 La. 205, 24 So. 2d 378 (1945); Black v. Black, 205 La. 861, 18 So. 2d 321 (1944); Tullier v. Tullier, 140 So. 2d 916 (La. App. 4th Cir. 1962). Black also contains a lengthy list of supporting cases. Black, 205 La. at 867, 18 So. 2d at 323. Ard acknowledged the general rule of maternal preference; however, the court granted custody to the father based on the factual circumstances of the case. Ard, 210 La. at 871-73, 28 So. 2d at 462.
\item \textsuperscript{7} 1981 La. Acts No. 283, § 1 added to La. Civ. Code art. 146 (1870) the following language:
   \begin{itemize}
   \item A. [I]f both husband and wife agree to joint custody and the court deems it in the best interest of the children, the court may award joint custody. . . .
   \item B. An award of joint custody shall be made only when the husband and wife are domiciled in the State of Louisiana. If either parent changes his or her domicile to another state, the other may petition for sole custody.
   \end{itemize}
\item \textsuperscript{8} La. Civ. Code art. 146(B) (1870), as amended by 1981 La. Acts No. 283, § 1.
either parent removed his domicile to another state, the other could petition the court for sole custody. In 1982, a non-consensual provisional joint custody act was adopted. Although amended a number of times, it provided the framework for provisional joint custody until the enactment of Act 261, which comprehensively amended the child custody provisions.

Until 1977, Louisiana Civil Code article 157 provided that, in the case of separation and divorce, custody should be granted to the party who obtained the separation or the divorce unless the judge should, for the greater advantage of the child, order that custody be granted to the other party. However, the jurisprudence required application of the maternal preference rule and the tender years doctrine to prefer the mother in awarding permanent custody, as it did in case of provisional custody. Thereafter, amendments to Article 157 were made paralleling those made to Article 146, establishing joint custody as the preferred custody arrangement both in provisional custody and in permanent custody. A basic policy decision to strengthen the joint custody preference is reflected in the 1993 amendments to the existing child custody statutory provisions.

The best interest of the child was the controlling criterion in custody and visitation awards in prior Article 131. It provided: "There shall be a rebuttable presumption that joint custody is in the best interest of a minor child." The article represented a legislative determination that the best interest of the child was served by providing a descending order of preference in awarding custody: (1) to both parents jointly, (2) to either parent, (3) to the person in whose home the child has been living in a wholesome and stable environment, or (4) to any other person deemed by the court to be suitable and able

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9. Id.
12. See the cases cited supra note 6.
13. Former La. Civ. Code art. 157 (1870), as amended by 1977 La. Acts No. 448, § 1, provided in part: "In all cases of separation and divorce, permanent custody of the child or children shall be granted to the husband or the wife, in accordance with the best interest of the child or children."
to provide an adequate and stable environment.\textsuperscript{18} The presumption in favor of joint custody could be rebutted by a showing, after consideration of evidence introduced with respect to twelve enumerated factors,\textsuperscript{19} that joint custody was not in the best interest of the child.\textsuperscript{20} The burden of proving joint custody would not be in a child’s best interest was placed upon the parent requesting sole custody.\textsuperscript{21}

Act 261 retains the best interest of the child as the overriding test to be applied in all child custody determinations.\textsuperscript{22} However, one change has been made in the descending order of preferred custodial arrangements. Additionally,

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\item The presumption in favor of joint custody may be rebutted by a showing that it is not in the best interest of the child, after consideration of evidence introduced with respect to all of the following factors:
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\item The love, affection, and other emotional ties existing between the parties involved and the child.
\item The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his religion or creed, if any.
\item The capacity and disposition of the parties involved to provide the child with food, clothing, medical care, and other material needs.
\item The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
\item The permanence, as a family unit, of the existing or proposed custodial home or homes.
\item The moral fitness of the parties involved.
\item The mental and physical health of the parties involved.
\item The home, school, and community record of the child.
\item The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
\item The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
\item The distance between the respective residences of the parties.
\item Any other factor considered by the court to be relevant to a particular child custody dispute. However, the classification of persons according to race is neither relevant nor permissible.
\end{enumerate}
\item\textsuperscript{21} Owen v. Gallien, 477 So. 2d 1240 (La. App. 3d Cir. 1985); Lake v. Robertson, 452 So. 2d 376 (La. App. 3d Cir. 1984).
\item\textsuperscript{22} La. Civ. Code art. 131 provides: "In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child." La. Civ. Code art. 131 cmt. (a) affirms that the article “retains the best interest of the child as the overriding test to be applied in all child custody determinations.”
\end{enumerate}
\end{itemize}
the preference of joint custody as being the custodial arrangement that is in the best interest of the child, absent an agreement between the parents designating the person who is to have custody, has been substantially strengthened.

Prior Article 131 created a rebuttable presumption that joint custody is in the best interest of a child, but permitted the parents to agree to an award of custody to one parent. The article did not state whether the parents had the unqualified right to name one of them as custodian or whether this parental right was subject to a best interest of the child analysis or to the rebuttable presumption in favor of joint custody.

In the prior act, the best interest of the child test and the order of preference established were substantive statutory provisions. However, the act also provided a rebuttable legal presumption that joint custody was in the best interest of a child. A presumption is a consequence the law or the court attaches to a known fact for the purpose of establishing the existence of another and unknown fact. A presumption established by law is a dispensation of the need to furnish proof of the unknown fact. In a custody inquiry, the known fact is joint custody. The unknown fact is whether joint custody is in the best interest of a child. The law presumes it is. The application of this legal presumption, in the absence of contrary evidence, establishes that joint custody is in the best interest of the child. Other proof of the unknown fact is not required.

Since the presumption in former Louisiana Civil Code article 131(C) was rebuttable, it could be controverted in the manner provided in former Louisiana Civil Code article 131(C) (1870), redesignated as La. Civ. Code art. 131 by 1990 La. Acts No. 1008, § 8, and 1990 La. Acts No. 1009, § 10, provided: "There shall be a rebuttable presumption that joint custody is in the best interest of a minor child. (1) However, the parents may agree to an award of custody to one parent."
Code article 131(C)(2)(a)-(l). The Legislature mandated both that the controlling criterion for custodial awards was the best interest of the child and that the child's interest was protected in the statutory order of preference of custodial arrangements, the first of which, absent a contrary parental agreement, was joint custody. No legal presumption in favor of joint custody was necessary.

This rebuttable presumption in favor of joint custody contained in the prior law has been suppressed. In its place is the "best interest of the child" test with a mandatory descending order of types of custodial arrangements that may be ordered by the court. This listing reflects the legislative determination as to which alternate type of custody arrangement is in the best interest of the child in each of the circumstances enumerated.

The new legislation mandates that if the parents agree as to who will have custody, the court "shall award custody" in accordance with the parents' agreement unless the best interest of the child requires a different award. This agreement may be one in which the parents have joint custody, one in which one parent has sole custody, or one in which a third party has custody. During the marriage, the decisions of the parents with respect to their children, absent serious harmful effects to the children, are not reviewable by the state. This provision reflects the view that, in the marriage-terminating and post-marriage periods, the agreement of the parents as to custody, absent harm to the child, should continue to be respected.

ed." See also Turner v. Turner, 455 So. 2d 1374, 1379 (La. 1984).

30. See supra note 19.


32. La. Civ. Code art. 131 states in part: "In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child."

33. La. Civ. Code art. 132 states:

If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.

In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.

La. Civ. Code art. 133 states:

If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.

34. The first paragraph of La. Civ. Code art. 132 provides: "If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award."

35. La. Civ. Code art. 132 cmt. (b). The right of the parents to designate the custodian of their children is broader than that conferred in prior Civil Code art. 131(C)(1), which limited the parents to an agreement of an award of custody "to one parent."

If the parents do not agree as to who is to have custody, or if their agreement is found not to be in the best interest of the child, the court “shall award custody to the parents jointly.”37 No longer is joint custody simply presumed to be in the best interest of the child; it is mandated absent an appropriate parental agreement for another custodial arrangement.

Absent agreement between the parents, custody in one parent may be granted only if it is shown “by clear and convincing evidence” that this type of custody will serve the best interest of the child.38

Two changes in the burden of proof are evident in the revision. Prior Article 131 established a presumption in favor of joint custody39 and the jurisprudence placed the burden of proof that joint custody would not be in the child’s best interest on the party seeking sole custody.40 Normally in Louisiana, the burden of proof is satisfied by adducing a reasonable preponderance of the evidence,41 i.e., when the entirety of the evidence establishes the fact sought to be proved is more probable than not.42 A substantially higher burden is now placed on the parent seeking sole custody—that of “clear and convincing evidence.”43 This standard of proof requires more than a preponderance of the evidence but less than beyond a reasonable doubt.44 Under this standard, the existence of a disputed fact must be “highly probable,” that is, much more probable than its non-existence.45

37. See the second paragraph of La. Civ. Code art. 132, supra note 33.
39. See supra note 23.
42. Lasha, 625 So. 2d at 1005; Miller, 588 So. 2d at 81.
43. La. Civ. Code art. 132. This conforms to the mandate of Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982), that due process requires proof at least by clear and convincing measure before the fundamental rights of parents can be extinguished. See the comment to La. Ch. Code art. 1035.
44. Succession of Lyons, 452 So. 2d 1161, 1165 (La. 1984); Succession of Dowling, 633 So. 2d 846, 855 (La. App. 4th Cir. 1994).
45. Lyons, 452 So. 2d at 1165; Dowling, 633 So. 2d at 855. Examples of this burden of proof are found in La. Ch. Code art. 1035 (involuntary termination of parental rights), La. Civ. Code art. 209(B) (proof of filiation to deceased parent), La. Civ. Code art. 1482 (proof that donor lacked capacity at time donor made a donation inter vivos or executed a testament), La. Civ. Code art. 1483 (challenge of a donation because of fraud, duress, or undue influence), and a similar jurisprudentially developed burden of proof necessary to overcome the presumption that all things in the possession of a spouse during the existence of the legal regime are presumed to be community. See Prince v. Hopson, 230 La. 575, 89 So. 2d 128 (1956); Terry v. Terry, 565 So. 2d 997 (La. App. 1st Cir. 1990); Albright v. Albright, 561 So. 2d 125 (La. App. 3d Cir.), writs denied, 565 So. 2d 445, 454 (1990); Allen v. Allen, 539 So. 2d 820 (La. App. 3d Cir.), writ denied, 541 So. 2d 840 (1989); Norwood v. Norwood, 519 So. 2d 338 (La. App. 2d Cir.), writ denied, 521 So. 2d 1169 (1988); Lee v. Manning, 505 So. 2d 902 (La. App. 2d Cir. 1987); Succession of McVay v. McVay, 476 So. 2d 1070 (La. App. 3d Cir. 1985); Succession of Adger, 457 So. 2d 146 (La. App. 2d Cir. 1984); Smith v. Smith, 311
Also, the focus of the inquiry is shifted. Under prior Article 131, the focus was on the joint custody arrangement and whether it was in the child's best interest. The inquiry was directed toward the quality of the relationship existing between the parents with respect to the rearing of the child. With this focus on the effect of joint custody on the child, most of the cases emphasized that, for joint custody to work, there must be a willingness and ability on the part of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. When the evidence showed the parents could not or would not work together to the extent required in a joint custody arrangement, sole custody was mandated. Unfortunately, the inquiry was frequently directed at the parents and their relationship, not the welfare of the child.

Under present Article 132, the focus of the inquiry is not on the joint custody arrangement; it is on sole custody in a particular parent. It must be shown, by clear and convincing evidence, that custody in that parent will serve the best interest of the child. The question changes from why joint custody is not in the best interest of the child to why sole custody in a particular parent is in the best interest of the child. Although these issues may overlap, the burden on the parent seeking sole custody is to demonstrate that the granting of custody to that parent alone will be in the best interest of the child.

The provisions regulating an award of custody to a third person, rather than to one or both parents, have been changed in several respects. Prior Article 131 required a dual finding that an award of custody to a parent or to both parents would be "detrimental" to the child and that the award to a non-parent was...
required to serve the best interest of the child.\textsuperscript{51} The test in present Article 133 is whether a parental award of custody would result in "substantial harm" to the child.\textsuperscript{52} The new test recognizes the primacy of a parent's right to custody as against any nonparent.\textsuperscript{53} In this situation, the focus is on the parent or parents and the harmful effect on the child of a parental custody award, because of the parental primacy concept firmly rooted in the prior statutes and jurisprudence.\textsuperscript{54} Arguably, the elimination of the dual test and the substitution of a single "substantial harm" test effects a substantive change in the test. "Substantial harm to the child" is a more stringent evidentiary burden than "detrimental to the child."\textsuperscript{55} The new language was adopted from the jurisprudence as an efficient means of giving effect to a parent's paramount right to custody as against any nonparent.\textsuperscript{56}

One of the deficiencies of prior Article 131 was that it contained no rules for decision-making by the parents awarded joint custody. It did provide that a plan for implementation of the custody order must allocate the legal authority, privileges, and responsibilities of the parents,\textsuperscript{57} and that, unless allocated, apportioned, or decreed in the implementation plan, the parents must confer with one another in the exercise of decision-making rights, responsibilities, and authority.\textsuperscript{58} Unless the implementation plan specified the decision-making

Before the court makes any order awarding custody to a person or persons other than a parent without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child.

For good discussions of this dual test, see Bolding v. Bolding, 532 So. 2d 1199 (La. App. 2d Cir. 1988); Boyett v. Boyett, 448 So. 2d 819 (La. App. 2d Cir. 1984).

\textsuperscript{52} La. Civ. Code art. 133 provides:
If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.

\textsuperscript{53} La. Civ. Code art. 133 cmt. (b). The primacy of a parent's right to custody was also recognized in prior legislation. See Bolding v. Bolding, 532 So. 2d 1199 (La. App. 2d Cir. 1988); Boyett v. Boyett, 448 So. 2d 819 (La. App. 2d Cir. 1984).

\textsuperscript{54} See Bolding v. Bolding, 532 So. 2d 1199 (La. App. 2d Cir. 1988); Boyett v. Boyett, 448 So. 2d 819 (La. App. 2d Cir. 1984).

\textsuperscript{55} La. Civ. Code art. 133 cmt. (a) states that the previous provisions are reproduced without substantial change, and cmt. (b) states that the "substantial harm" proof requirement represents a change in the terminology of the test for divestiture of parental custody. However, that comment acknowledges that the language of the revision may be interpreted as changing significantly the terms of the relevant test, making it more stringent.

\textsuperscript{56} La. Civ. Code art. 133 cmt. (b).


authority of each parent, the only statutory obligation imposed upon the parents was to confer with each other about these matters. If the parents disagreed after conferring, no mechanism was provided to resolve the dispute.

Some of the responsibility for the lack of cooperation between divorcing or divorced parents in a joint custody arrangement can be attributed to this deficiency in the prior joint custody statute. The prior act presupposed a willingness of the parents to cooperate with each other for the benefit of the child. In many cases, this is not a realistic expectation. Additionally, a parent could sabotage a joint custody award by refusing to cooperate and might be motivated to do so if he believed he would be awarded sole custody if the court determined joint custody would not work. The new act remedies this. It provides that the domiciliary parent has the authority to make all decisions affecting the child unless an implementation order otherwise provides. Thus, a non-domiciliary parent who does not desire the domiciliary parent to have full decision-making authority must have any restrictions on that authority incorporated into the implementation order. All major decisions made by the domiciliary parent concerning the child are subject to judicial review upon motion by the non-domiciliary parent. In this judicial review, it is presumed all major decisions made by the domiciliary parent are in the best interest of the child.


60. La. R.S. 9:335(B)(3) (Supp. 1994) provides: “The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise.” This grant of authority to make all decisions affecting the child unless an implementation order provides otherwise presents a dichotomy between La. Civ. Code art. 250 and La. R.S. 9:335(B)(3). Article 250 provides that, if the parents are awarded joint custody of a child, the cotutorship of the minor child shall belong to both parents with equal authority, privileges, and responsibilities, unless modified by order of the court or by an agreement of the parents, approved by the court awarding joint custody. Article 250 was not amended by 1993 La. Acts No. 261.

A custody award and tutorship create different legal relationships. A custody award does not include appointment of a tutor, nor does it institute a regime of tutorship. Griffith v. Roy, 263 La. 712, 269 So. 2d 217 (1972).

If one parent has been named the domiciliary parent without any limitations on his decision making authority, and it becomes necessary to institute tutorship proceedings in order to judicially assert a claim on behalf of the minor, or for other reasons, the parents would be appointed cotutors with equal authority, privileges, and responsibilities, unless modified by one of the specified methods, presumably either at the time of the awarding of joint custody or at the time of appointment of a tutor. Tutors have the custody of and care for the person of the minor. La. Code Civ. P. art. 4261. Therefore, a domiciliary parent with unrestricted decision making authority might seek restrictions on the other parent’s authority or seek to be appointed the sole tutor, if the occasion for tutorship arises.


The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.
decisions made by the domiciliary parent are in the best interest of the child.\textsuperscript{62} Therefore, the burden of proving they are in fact not in the best interest of the child is placed on the non-domiciliary parent who opposes the decision. Non-major decisions are not subject to judicial review. Thus, the act strengthens the position of the domiciliary parent and permits him to make all of the decisions concerning the child, unless limited by the implementation order, with only major decisions being subject to judicial review. Although the act does not define the nature of a major decision, such decisions normally include decisions concerning major surgery or medical treatment, elective surgery, and schools attended,\textsuperscript{63} but not the day-to-day decisions involved in rearing a child, e.g., bedtimes, curfews, household chores, and the like. The increase in the burden of proof, the shift in the focus of the inquiry, and the changes made in the decision-making rules combine to strengthen the joint custody preference. The changes in the decision-making rules make parental cooperation less critical to a successful joint custody award. Therefore, courts should be more reluctant to abandon joint custody as a preferred custodial arrangement because one or both parents are refusing to cooperate in the rearing of the child.

Former Article 131 directed the court to consider twelve factors in an action for sole custody in determining whether the presumption in favor of joint custody had been rebutted.\textsuperscript{64} In the revision, the twelve factors provide a guide to the court in determining the best interest of the child in all custody and visitation disputes, whether between parents or between parents and nonparents.\textsuperscript{65} Some

\textsuperscript{62} Id.

\textsuperscript{63} See Plemer v. Plemer, 436 So. 2d 1348, 1351 (La. App. 4th Cir. 1983), which granted to the domiciliary parent "ultimate authority for the minor's education and medical treatment," and Smith v. Smith, 459 So. 2d 646, 648 (La. App. 4th Cir. 1984), which granted the domiciliary parent "the final authority, in case of disagreement, on major medical treatment and education of the children."


\textsuperscript{65} La. Civ. Code art. 134 provides:

\begin{itemize}
  \item The court shall consider all relevant factors in determining the best interest of the child. Such factors may include:
  \item (1) The love, affection, and other emotional ties between each party and the child.
  \item (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.
  \item (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
  \item (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
  \item (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
  \item (6) The moral fitness of each party, insofar as it affects the welfare of the child.
  \item (7) The mental and physical health of each party.
  \item (8) The home, school, and community history of the child.
  \item (9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
\end{itemize}
changes have been made. The inclusion in prior Article 131(C)(2)(b) of consideration of raising the child in his religion or creed has been eliminated. The moral fitness of the parents is now a factor to be considered only insofar as it affects the welfare of the child.66 This reflects the jurisprudential rule that moral misconduct should be considered only if it has a detrimental effect on the child, not to regulate the moral behavior of the parents.67 A new factor is added: the responsibility for the caring and rearing of the child previously exercised by each party.68 Which parent or other person has been the primary caretaker of the child is an important factor in considering who should be the domiciliary parent or awarded sole custody. Comment (i) to Article 134 contains ten examples of caretaking duties.69

The twelve factors provided in Article 134 are illustrative. The prior act required consideration of evidence introduced with respect to all of the listed twelve factors.70 The new article directs the court to consider all relevant factors in determining the best interest of the child. All the specified factors may not be relevant in every case.

Prior Article 131 included the distance between the respective residences of the parties as a factor to be considered in determining whether the presumption that joint custody is in the best interest of a child had been rebutted.71 It also provided that when the award of joint custody had been made to parents domiciled in Louisiana and either parent changed his domicile to another state, the presumption that joint custody is in the best interest of the child ceased to exist.72 In the revision, the distance factor has been retained as one of the factors that may be considered in determining the child’s best interest in all custody disputes.73 The provision that removal of domicile from Louisiana terminates the joint custody presumption has not been retained. Distance between the residences of the parties should be a factor in determining the best

(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.
(11) The distance between the respective residences of the parties.
(12) The responsibility for the care and rearing of the child previously exercised by each party.

interest of a child. However, with the new decision-making rules and the ability of parents to communicate instantly when necessary by telephone or other means, the distance separating the parents assumes less importance in determining whether sole custody is a better custody arrangement than joint custody.74 Removal of a parent from Louisiana should not, of itself, constitute a sufficient reason to terminate the joint custody arrangement. The move and the resulting distance between the parents should be only one factor to consider in determining which custodial arrangement will be in the best interest of the child.75

One of the incongruities of the former joint custody act was that, in a custody dispute between parents, the parties were required to allege facts to support a parent's request for sole custody or to be designated as the child's domiciliary parent, not the ultimate conclusion that the child's best interest would be served by such an award. However, in a contest between the parents and a

74. For cases discussing the lessening importance of distance between the parents, see Jordan v. Jordan, 493 So. 2d 759 (La. App. 2d Cir. 1986), and Doyle v. Doyle, 465 So. 2d 167 (La. App. 3d Cir.), writ denied, 467 So. 2d 1136 (1985).

75. The adoption of the non-consensual joint custody statute in 1982 has had a profound effect on the right of a custodial parent to relocate to another state while retaining custodial rights. Previously, the jurisprudence permitted such a move if the custodian had good economic or personal reasons for living in another state and if the move was consistent with the welfare of the child. Wilmot v. Wilmot, 223 La. 221, 65 So. 2d 321 (1953); Griffin v. Griffin, 424 So. 2d 1228 (La. App. 1st Cir. 1982); Broomfield v. Broomfield, 283 So. 2d 839 (La. App. 2d Cir. 1973). Since the adoption of the joint custody statute, the judicial trend has been one of disapproval. See Key v. Key, 519 So. 2d 319 (La. App. 2d Cir. 1988), Sandifer v. Sandifer, 514 So. 2d 510 (La. App. 3d Cir. 1987), Risher v. Risher, 511 So. 2d 1220 (La. App. 2d Cir. 1987), Sambola v. Sambola, 493 So. 2d 206 (La. App. 5th Cir. 1986), Lachney v. Lachney, 446 So. 2d 923 (La. App. 3d Cir.), writ denied, 450 So. 2d 964 (1984), and Bezu v. Bezu, 436 So. 2d 592 (La. App. 4th Cir. 1983). In Bezu, the Louisiana Supreme Court granted writs and stayed execution of the trial court. Bezu v. Bezu, 437 So. 2d 285 (La. 1983).

This trend reflects a recognition of the policy inherent in joint custody that a child be assured of frequent and continuing contact with both parents. It also acknowledges the importance of the non-domiciliary parent's rights. The rights of a non-custodial parent were practically non-existent except for inheritance under the former sole custodial scheme of custody.

The removal of a child to another state is a major decision affecting the welfare of the child and is, therefore, subject to judicial review upon motion of the other parent under La. R.S. 9:335(B)(3) (Supp. 1994), provided the original implementation plan does not contain a provision regulating the right of a domiciliary parent to remove the child from the jurisdiction of the court. See supra note 61 for the text of La. R.S. 9:335(B)(3). As a result of the Revision, in addition to the factor of the distance between the respective residences of the parties resulting from an interstate move, factors numbered (4), (5), (8), (9), and (10) of La. Civ. Code art. 134 may be particularly appropriate factors to consider in determining whether the move is in the best interest of the child. See supra note 65 for the text of La. Civ. Code art. 134. In fact, the courts have addressed these considerations in the cases cited above, but not as statutory factors to consider in determining the best interest of the child in all custody and visitation disputes. These factors formerly were considered only in determining whether the presumption in favor of joint custody had been rebutted. See former La. Civ. Code art. 146(C)(2) (1870), quoted supra note 19. However, the courts in Sambola, Risher, Sandifer, and Key, supra, used these and similar considerations in determining that the move was not in the best interest of the child, but refused to change a joint custody award to sole custody, preferring to simply change the domiciliary parent while maintaining joint custody.
nonparent, factual pleadings were not required and were expressly prohibited. Only a statement of the ultimate fact that parental custody would be detrimental to the child was permitted.76 This provision has not been retained.

Louisiana Revised Statutes 9:335 retains the following requirements from former Louisiana Civil Code article 131: (1) the court must render a joint custody implementation order, except for good cause shown, when joint custody is decreed,77 (2) the implementation order shall allocate the time periods during which each parent shall have physical custody of the child so the child is assured frequent and continuing contact with both parents,78 and (3) the implementation order allocate the legal authority and responsibility of the parents.79

The concept of a domiciliary parent has been incorporated into the statute.80 The court must designate a domiciliary parent except where an implementation order provides otherwise or good cause is shown for not naming a domiciliary parent.81 The domiciliary parent is defined as the parent with whom the child primarily resides.82 The designation of a domiciliary parent must be made in the decree of joint custody, not in the implementation order.83 This is to ensure a domiciliary parent is designated, even in those instances in which a joint custody implementation order is not rendered. The naming of a domiciliary parent in the joint custody decree, without more, produces three legal results:

1. The child shall primarily reside with that parent;
2. The other parent has physical custody during time periods that assure that the child has frequent and continuing contact with both parents; and
3. The decision-making rules of Louisiana Revised Statutes 9:335(B)(3) apply.84

77. La. R.S. 9:335(A)(1) (Supp. 1994). Prior Article 131 obligated the court to require the parents to submit a plan of implementation of the custody order, unless waived by the court for good cause shown. The new article obligates the court to render a joint custody implementation order except for good cause shown.
80. La. R.S. 9:335(B)(1) (Supp. 1994) provides: "In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown."
81. *Id.*
82. La. R.S. 9:335(B)(2) (Supp. 1994).
83. La. R.S. 9:335(B)(1) (Supp. 1994) provides: "In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown."
84. See supra text accompanying notes 57-63 for a discussion of these new decision-making rules.
Former Article 131(A)(1)(a) provided that the plan for implementation of the joint custody order may include designation of the child’s legal domicile. To fill a hiatus in former Article 131, attorneys and the courts crafted the term domiciliary parent, the parent with whom the child primarily resided. That term and definition have been adopted in the new act. It is more important to define the relationship between the child and the parent with whom the child primarily resides than to designate the place of the child’s legal domicile. The domicile of a minor is defined in Louisiana Civil Code article 39 and the jurisprudence interpreting it, and it need not be addressed in an implementation plan for joint custody.

The purpose of Louisiana Revised Statutes 9:335 is to set forth the basic, mandatory minimum requirements of a decree of joint custody and a joint
custody implementation order, if one is rendered. Other provisions may be inserted, of course, either by the agreement of the parties or court order. However, if the implementation order does not allocate the legal authority and responsibilities of each parent, or no implementation order is rendered, decision-making rules and the rights and responsibilities conferred on the parents are imposed by law. This provision fills the troublesome hiatus in the former joint custody statute.

If neither the custody decree nor an implementation order designates a domiciliary parent, the rights and responsibilities of the parties are governed by the provisions of Louisiana Civil Code articles 215-245. The parties should carefully consider the consequences of the failure to designate a domiciliary parent.

Louisiana Revised Statutes 9:335(A)(2)(a), as enacted by Act 261, requires the implementation plan to allocate the time periods during which each parent shall have physical custody of the child so the child is assured frequent and continuing contact with both parents. Louisiana Revised Statutes 9:335(A)(2) appears as two sub-paragraphs:

(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.
(b) To the extent it is feasible, physical custody of the children shall be shared equally.

Prior Louisiana Civil Code article 131(D) provided, in part, that joint custody “shall mean the parents shall, to the extent feasible, share the physical custody of children of the marriage.” Article 131(D) was amended by Act 905 of 1993 to add: “To the extent it is feasible, physical custody of the children shall be shared equally.” The Law Institute proposal, Act 261, did not contain this provision. The courts have held that, although a frequent and continuing relationship with both parents is the primary aim of the joint custody provisions, joint custody does not necessarily require an equal sharing of physical custody. However, joint custody does not preclude such an arrangement in an

90. La. R.S. 9:335(C) (Supp. 1994).
91. For example, although the child would remain under the authority of his father and mother, in case of differences between the parents, the authority of the father prevails. La. Civ. Code art. 216. The father would be the administrator of the estate of the minor child until the divorce. La. Civ. Code art. 221.
92. La. R.S. 9:335(A)(2)(a) (Supp. 1994) provides: “The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.”
93. 1993 La. Acts No. 905 was not a Louisiana Law Institute proposal.
94. Montet v. Montet, 629 So. 2d 538 (La. App. 3d Cir. 1993); Stanley v. Stanley, 592 So. 2d 862 (La. App. 3d Cir. 1991); Flourney v. Flourney, 546 So. 2d 617 (La. App. 3d Cir. 1989); Brooks v. Brooks, 469 So. 2d 398 (La. App. 3d Cir. 1985); Doyle v. Doyle, 465 So. 2d 167 (La. App. 3d
appropriate situation. Equal sharing of physical custody is generally not feasible, especially with school age children. 95

The Louisiana State Law Institute, as the official law revision commission of the State of Louisiana, 96 is mandated to prepare, at the close of each legislative session, a printer’s copy containing the text of all the new legislation of a general and public nature, assigning to these laws an appropriate Title, Chapter, and Section number, and indicating the source of the legislative act from which they are taken. 97 In preparing the printer’s copy, the Louisiana State Law Institute may not alter the sense, meaning, or effect of any act of the Legislature. 98
When inconsistent amendments to the same statute have been adopted at the same legislative session, the statutes should be construed, if possible, in a manner so as to give effect to both amendments, consistent with legislative intent. The Louisiana State Law Institute is mandated to resolve, if possible, any conflict between two or more legislative acts affecting the same subject matter in the same provision of law for the purpose of incorporating the text into the Louisiana Revised Statutes. The staff of the Louisiana State Law Institute, in an attempt to reconcile the apparent conflict between Acts 261 and 905, inserted "To the extent it is feasible, physical custody of the children shall be shared equally," as an amendment to the newly enacted Louisiana Revised Statutes 9:335(A), defining the contents and effects of the joint custody decree and implementation order. It was inserted as paragraph A(2)(b) in Louisiana Revised Statutes 9:335. Act 905 amended Louisiana Civil Code article 131(D). Act 261 repealed and reenacted Louisiana Civil Code article 131 effective January 1, 1994. Act 261 also enacted Louisiana Revised Statutes 9:335 without any provision for equal physical custody of children.

There is a better and proper way to reconcile the provisions of Acts 261 and 905. Act 905 amended Louisiana Civil Code article 131(D). This amendment became effective on August 15, 1993. Louisiana Civil Code article 131(D) continued in effect, as amended, until January 1, 1994, the effective date of Act 261. On January 1, 1994, Louisiana Civil Code article 131, as amended and

(5) Substitute the proper section or chapter number for the terms "this act", "the preceding section" and the like;
(6) Strike out figures where they are merely a repetition of written words and vice-versa;
(7) Change capitalization for the purpose of uniformity;
(8) Correct manifest typographical and grammatical errors, and
(9) Make any other purely formal or clerical changes in keeping with the purpose of the revision.

The Institute shall omit all titles of acts, all enacting, resolving, and repealing clauses, all appropriation measures, all temporary statutes, all declarations of emergency, and all validity, declaration of policy, and construction clauses, except when the retention thereof is necessary to preserve the full meaning and intent of the law. Whenever any validity, declaration of policy, or construction clause is omitted, proper notation of the omission shall be made.

100. La. R.S. 24:252(B) (Supp. 1994).
102. La. Const. art. III, § 19: All laws enacted during a regular session of the legislature shall take effect on August fifteenth of the calendar year in which the regular session is held and all laws enacted during an extraordinary session of the legislature shall take effect on the sixtieth day after final adjournment of the extraordinary session in which they were enacted. All laws shall be published prior thereto in the official journal of the state as provided by law. However, any bill may specify an earlier or later effective date.
103. 1993 La. Acts No. 261, § 12 provides: "This Act shall become effective on January 1,
reenacted by Act 261, and Louisiana Revised Statutes 9:335, as enacted by Act 261, became effective. There is thus no statutory mandate for equal sharing of
physical custody effective January 1, 1994.

This was the method utilized in reconciling two statutes passed at the same
legislative session in City of New Orleans v. Board of Supervisors. Two
acts, Acts 234 and 351 of 1948, became law on the same day. Act 234 provided
for a mayor and 7 commissioners elected from the city's municipal districts for
the City of New Orleans. Act 351 provided for only 5 councilmen to be elected
at large. The court reconciled the two acts by holding that the purpose of the
later act, Act 351, was to "freeze" the commissioners in the offices they were
occupying and to maintain them in office until the expiration of their terms in
1950, and Act 234 was intended to make changes in the structure of the
municipal government to take effect only at the time the successors to the
commissioners who were frozen in office by Act 351 were elected and take
office, that is, in 1950.

The obligation of the parents to exchange information concerning the health,
education, and welfare of the child and to confer with each other in exercising
decision-making authority is continued. Although a parent is vested with
decision-making authority, this does not relieve that parent of the obligation to
discuss with the other parent the circumstances about which a decision needs to
be made.

The right of a parent, although not the child's custodial or domiciliary
parent, to obtain access to records and information pertaining to a minor child,
including medical, dental, and school records, has been preserved.

Act 261 also preserves the allocation of the dependency exemption granted
to a parent by the provisions of any revenue law and the protection afforded a
parent to whom the dependency allocation has been made if the allocation is not
maintained by the taxing authorities. Two changes are made in these

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1994. "Effective January 1, 1994, Louisiana Civil Code article 131, as amended and reenacted by
1993 La. Acts No. 261, § 1, provides: "In a proceeding for divorce or thereafter, the court shall
award custody of a child in accordance with the best interest of the child."

104. 216 La. 116, 43 So. 2d 237 (1949).

105. See also Rackley v. State, 146 So. 459 (Miss. 1933) (holding that, if two laws are in
necessary conflict, passed on the same day, but "go into effect on different days, the one taking effect
last will become the law from that day").

106. La. R.S. 9:336 (Supp. 1994) provides: "Joint custody obligates the parents to exchange
information concerning the health, education, and welfare of the child and to confer with one another
in exercising decision-making authority."

107. La. R.S. 9:351 (Supp. 1994) provides: "Notwithstanding any provision of law to the
contrary, access to records and information pertaining to a minor child, including but not limited to
medical, dental, and school records, shall not be denied to a parent solely because he is not the
child's custodial or domiciliary parent."

108. La. R.S. 9:337(B) (Supp. 1994) provides:

The decree or implementation order may also allocate to either parent any dependency
exemption granted to a parent by provisions of any revenue law; and if that allocation is
not maintained by the taxing authorities, then the parent who receives the benefit of the
provisions. Formerly, they were to be contained in the implementation order; now they may be in either the joint custody decree or the implementation order. Formerly, the allocation of the dependency exemption was mandatory; now it is discretionary.

The right of relatives by blood or affinity, who were not granted custody, to have reasonable visitation rights with the child has been revised. Like former Louisiana Civil Code article 132(B), present Louisiana Civil Code article 136(B) provides that, under "extraordinary circumstances," such a relative may be granted reasonable visitation rights with the child if the court finds it is in the best interest of the child. In addition to a finding of "extraordinary circumstances," the consideration of five factors is mandated in determining whether it is in the best interest of the child for the relative to be granted visitation privileges.

exemption for such tax year shall not be considered as having received payment of a thing not due.

No change was made in La. R.S. 9:315.13 (1991), a portion of the child support guidelines statute:

The amounts set forth in the schedule in R. S. 9:315.14 presume that the custodial or domiciliary party has the right to claim the federal and state tax dependency deductions and any earned income credit. However, the claiming of dependents for federal and state income tax purposes shall be as provided by the Internal Revenue Code.

Therefore, if the dependency deductions are allocated to the non-custodial or non-domiciliary parent pursuant to La. R.S. 9:337(B) (Supp. 1994), this may occasion a deviation from the guideline amount pursuant to La. R.S. 9:315.13 (1991).

109. La. Civ. Code art. 136(A) provides that "a parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child." If there is an award of joint custody, the non-domiciliary parent is not awarded visitation rights, but periods of physical custody of the child. La. R.S. 9:335(A)(2) and (B)(2) (Supp. 1994). If one parent is awarded custody pursuant to La. Civ. Code art. 132, the other parent may be awarded reasonable visitation rights under La. Civ. Code art. 136(A). If a third party is awarded custody pursuant to La. Civ. Code art. 133, both parents may be awarded visitation rights under La. Civ. Code art. 136(A).

This revision of the child custody provisions maintains the clear distinction between custody and visitation reflected in all the Louisiana Law Institute proposals discussed in the Introduction to this article. See La. Civ. Code arts. 105, 136; La. R.S. 9:331, 332, and 343-345 (Supp. 1994); La. Code Civ. P. art. 2592(8). La. Civ. Code art. 136 cmt. (b) states that the declaration in Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983), that visitation is a "species of custody" is no longer strictly true, since visitation has an independent basis under Article 136. This distinction between custody and visitation was urged by the author but rejected by the court in Clark v. Clark, 600 So. 2d 880 (La. App. 1st Cir. 1992), writ denied, 604 So. 2d 1305 (1992), a case involving an interpretation of La. Code Civ. P. art. 74.2. This case was a sequel to Clark v. Clark, 550 So. 2d 913 (La. App. 2d Cir. 1989). 110. Both former La. Civ. Code art. 132(B) and present La. Civ. Code art. 136(B) provide:

Under extraordinary circumstances, a relative by blood or affinity, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. In determining the best interest of the child, the court shall consider:

1. The length and quality of the prior relationship between the child and the relative.
2. Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
3. The preference of the child if he is determined to be of sufficient maturity to express a preference.
Former Article 132(C) provided that, in the event of a conflict between that Louisiana Civil Code article and Louisiana Revised Statutes 9:572, the Louisiana Revised Statutes provisions superseded those of the Louisiana Civil Code article. Louisiana Revised Statutes 9:572(A) provided four situations in which the parents of a party to a marriage without custody could be awarded reasonable visitation rights with their minor grandchild upon a finding that such visitation would be in the best interest of the child—i.e., when the party to a marriage without custody (1) was legally separated, (2) was divorced, (3) was now dead, or (4) was interdicted. Louisiana Revised Statutes 9:572(C) provided that if the parents of the child lived in open concubinage and one of the parents died, the parents of the deceased party could have reasonable visitation rights with the minor child if the court found both (1) that the grandparents had been unreasonably denied visitation rights and (2) that such visitation rights would be in the best interest of the child. Louisiana Revised Statutes 9:572(D) provided that, in three of the four situations outlined in paragraph (A), legal separation, divorce, or death of a parent of a child, the siblings of the minor child could have reasonable visitation rights with the minor child if the court made the dual finding (1) that the siblings had been unreasonably denied visitation rights and (2) that such visitation rights would be in the best interest of the child. If the parent of a minor child was interdicted, the siblings of

(4) The willingness of the relative to encourage a close relationship between the child and his parent or parents.

(5) The mental and physical health of the child and the relative.

Unlike the factors in La. Civ. Code art. 134, these factors do not appear to be illustrative.


112. Former La. R.S. 9:572(A) (repealed 1993) provided:

If one of the parties to a marriage dies or is interdicted, or the obligation to live together is terminated by an action of separation from bed and board, or the marriage is terminated by divorce, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, separated, or divorced party without custody of such minor child or children, may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

113. Former La. R.S. 9:572(C) (repealed 1993) provided:

When the parents of a minor child or children live in concubinage and one of the parents dies, the parents of the deceased party may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that the grandparents have been unreasonably denied visitation rights and such visitation rights would be in the best interest of the child or children.

114. Former La. R.S. 9:572(D) (repealed 1993) provided:
the minor child were not afforded visitation privileges. Several things are apparent in this scheme in former Louisiana Revised Statutes 9:572. Visitation rights were limited to grandparents and siblings. For these relations, no finding of "extraordinary circumstances" was required. In the four situations in paragraph (A), only the parents of a party to the marriage without custody could be granted visitation. The parents of a party to the marriage with custody could not. In the three situations in which siblings of the minor could be awarded visitation rights, the siblings additionally had to show they had been unreasonably denied visitation rights; grandparents did not. Both grandparents and siblings had to show their visitation rights would be in the best interest of the child. In the case of death of a parent living in concubinage, parents of the deceased party had to show an unreasonable denial of visitation and that the visitation right would be in the best interest of the child; siblings had no visitation rights. These provisions of Louisiana Revised Statutes 9:572 were special requirements governing visitation in the enumerated instances and superseded the general provisions of former Article 132, which granted reasonable visitation to any relative, by blood or affinity, not granted custody of the child, upon a showing that the circumstances were "extraordinary" and that visitation was in the best interest of the child.

All this was the result of piecemeal legislation. The issue of which persons, besides the parents of a child, if any, should be awarded visitation rights has been a controversial issue in the Legislature. The above-mentioned provisions have been retained in Louisiana Revised Statutes 9:344, with two changes. In paragraphs (A) and (C), legal separation or divorce of a parent as a circumstance in which the grandparents and siblings may be granted visitation has been eliminated. Therefore, the provisions of these paragraphs are inapplicable when

If one of the parties to a marriage dies, the obligation to live together is terminated by an action of separation from bed and board, or the marriage is terminated by divorce, the siblings of a minor child or children of the marriage may have reasonable visitation rights to such child or children during their minority if the court in its discretion finds that such visitation rights would be in the best interest of the child or children and that the siblings have been unreasonably denied visitation rights.

115. La. R.S. 9:344 (Supp. 1994) provides:

A. If one of the parties to a marriage dies or is interdicted and there is a minor child or children of such marriage, the parents of the deceased or interdicted party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

B. When the parents of a minor child or children live in concubinage and one of the parents dies, the parents of the deceased party may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

C. If one of the parties to a marriage dies, the siblings of a minor child or children of the marriage may have reasonable visitation rights to such child or children during their minority if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.
the party to a marriage (parent of the minor child) is divorced, in which case Article 136(B) applies. In these instances, in addition to demonstrating that visitation is in the best interest of the child, the grandparent or the sibling seeking visitation rights must prove that the circumstances justifying visitation are "extraordinary." This imposes a more onerous burden on grandparents and siblings seeking visitation in the event of divorce of the parent of a minor child than was previously the case.

Additionally, the requirement that the grandparents, in the case of the death of a parent living in concubinage, and the siblings, in the case of the death of a married parent, show that they have been unreasonably denied visitation rights has not been retained.

Also, the class of persons who may be awarded visitation rights under Louisiana Civil Code article 136(B) is not limited to grandparents and siblings, as in Louisiana Revised Statutes 9:344, but may include any relative of the child, by blood or affinity.

New Louisiana Civil Code article 245 provides that, in custody proceedings and change of custody proceedings involving an illegitimate child acknowledged by both parents, where custody is sought by both parents, custody should be awarded in accordance with the provisions on custody incident to divorce contained in Title V of Book I of the Louisiana Civil Code.116 Thus, the same rules governing the custody of a legitimate child expressly apply to an illegitimate child acknowledged by both parents in a custody dispute between the parents.117 These same rules, including the basic best interest of the child test, should also be applied in custody disputes between the parent or parents of an illegitimate child and a third party seeking custody, insofar as they are applicable to a parent-third party custodial dispute.118

Prior Louisiana Civil Code article 131119 provided that a custody hearing may be held in private chambers of the judge. This was too restrictive. The prior article did not authorize a court to conduct a custody trial in the courtroom by closing the hearing to the public without the consent of the parties, which was a common practice. Present Louisiana Civil Code article 135 grants the court flexibility in choosing the setting for a closed custody hearing and permits it to

116. Title V of Book I of the Louisiana Civil Code (Divorce) consists of Articles 102 through 159, including Articles 131-136, which regulate child custody.
117. La. Civ. Code art. 245 limits the application of the provisions on custody incident to divorce to a custody dispute between the parents of an illegitimate child acknowledged by both parents.
118. McKinley v. McKinley, 631 So. 2d 45 (La. App. 2d Cir. 1994), applied former Article 131(B) to a parent-third party custodial dispute involving an illegitimate child. There may be facts in a custody or visitation dispute involving an illegitimate child not acknowledged by both parents which will militate against the application of all those custody and visitation provisions. See La. Civ. Code art. 136 cmt. (c), and Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983).
utilize the courtroom facilities while maintaining the confidentiality of the proceedings.\textsuperscript{120}

Several provisions governing procedure, formerly contained in the Louisiana Civil Code, have been moved to Title 9 of the Louisiana Revised Statutes, the Louisiana Civil Code ancillaries. These include the evaluation of a party or the child,\textsuperscript{121} mediation of custody or visitation differences,\textsuperscript{122} the joint custody decree and implementation order,\textsuperscript{123} the obligation of joint custodians to confer,\textsuperscript{124} access to records of the child,\textsuperscript{125} the allocation of the dependency exemption for income tax purposes,\textsuperscript{126} and restrictions on visitation.\textsuperscript{127} Some changes have been made in these provisions.

Former Louisiana Civil Code article 131(H) provided that an evaluation may be ordered on the motion of either party. Louisiana Revised Statutes 9:331 provides that the court may order an evaluation for good cause shown. The new provision requires an affirmative showing of the necessity or desirability of an evaluation. An evaluation should be ordered only in those cases in which the mental health professional, because of his expertise, can assist the court in its custody determination; it should not simply constitute a substitute fact-finding procedure. Some reasonable basis for an evaluation by a mental health professional should be required before one is ordered. Louisiana Civil Code article 131(H) also implied that the evaluation must include all parties to the custody or visitation dispute and the child to be evaluated.\textsuperscript{128} This is not

\textsuperscript{120} La. Civ. Code art. 135 provides: "A custody hearing may be closed to the public." However, the court is bound by any other statutory limitations on the judicial proceedings that may be conducted other than in open court. See Empfinger v. Empfinger, 550 So. 2d 754 (La. App. 2d Cir. 1989) (holding that divorce proceedings were not properly conducted in private chambers even though custody issues were being resolved at the same time).


\textsuperscript{128} Former La. Civ. Code art. 146(H) (1870), redesignated as La. Civ. Code art. 131 by 1990 La. Acts No. 1008, § 8, and 1990 La. Acts No. 1009, § 10, provided in part, that "[t]he court . . . shall order both parties and the children to submit to and cooperate in the evaluation, testing, or
necessary in every case. There may be a condition or situation concerning one party or the child that alone should be the focus of the evaluation by the mental health professional. Therefore, the court is given the authority to order an evaluation of a party, specified parties, the child, or all parties, as the circumstances dictate. The discretion of the court to order an evaluation is retained.

The definition, in Louisiana Civil Code article 131(H), of a mental health professional as a psychiatrist or a person who possesses a master’s degree in counseling, social work, psychology, or marriage and family counseling has been suppressed. The provision was too restrictive. The court should be given discretion in choosing the person with the qualifications appropriate to the particular issue. Mental health counselors, physicians practicing psychiatry, psychologists, and board certified social workers are all defined and regulated by statute.

The mediation provisions, formerly in Louisiana Civil Code article 131 and in the Louisiana Revised Statutes, are now all in the Louisiana Revised Statutes. Previously, any communication between a mediator and a party or between parties in the presence of the mediator, except those reflected in the mediation agreement, was confidential, was considered a privileged communication, and was not admissible as evidence in any proceeding except with the consent of both parties. Present Louisiana Revised Statutes 9:332(C) makes any evidence of conduct in mediation as well as statements made in mediation inadmissible in any proceeding.

interview by the mental health professional.

129. La. R.S. 9:331 (Supp. 1994) provides, in part, that “[t]he court may order an evaluation of a party or the child” and “[t]he court may order a party or the child to submit to and cooperate in the evaluation, testing, or interview by the mental health professional.” The singular (party or child) includes the plural (parties or children). La. Civ. Code art. 3506.


Except as provided in R. S. 9:354, communications between a mediator and a party to a mediation are confidential. The secrecy of the communication shall be preserved inviolate as a privileged communication. The communication shall not be admitted into evidence in any proceeding except with the consent of both parties. The same protection shall be given to communications between the parties in the presence of the mediator.

The exception provided in La. R.S. 9:354 (1991) was the settlement incorporated into a mediation agreement.

135. La. R.S. 9:332(C) (Supp. 1994) provides:
The language broadens the protection to include the conduct of a party during mediation, as well as statements made in mediation. This might include a party's attitude, recalcitrance, and expressions of anger or remorse. The revision also extends the scope of confidentiality of communications. The former act protected communications between a mediator and a party to a mediation and communications between the parties in the presence of the mediator. The restriction of the protection of communications between the parties to those made in the presence of the mediator has been eliminated. The mediator may suggest that the parties discuss something in private, out of the presence of the mediator. Anything said by a party to the other during such a discussion should also be confidential. Any statement "made in mediation," i.e., made as a part of the mediation process, whether or not made in the presence of the mediator, is protected.

A party cannot prevent the introduction into evidence of his prior conduct by disclosing it during mediation, whether or not the other party is already aware of the conduct. If a party discloses prior conduct during mediation, this does not preclude the other party from independently obtaining evidence of that conduct and introducing that evidence in later judicial proceedings. However, the disclosure itself made in mediation is not admissible in any later proceeding.

Changes were made in the duties of the mediator with respect to the agreement reached. Previously, it was his duty to advise the parties to obtain legal review prior to reaching any agreement. The mediator must now advise each party to obtain review by an attorney of any agreement reached as a result of the mediation prior to signing the agreement. The removal of attorneys from the mediation process prior to the parties reaching an agreement and reducing the agreement to writing should facilitate the mediation process. Mediation is a non-adversarial process designed to assist the parties in clarifying issues, identifying alternatives, reducing acrimony, resolving controversy, and reaching their own agreement. The agreement should be submitted to the

Evidence of conduct or statements made in mediation is not admissible in any proceeding. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of mediation. Facts disclosed, other than conduct or statements made in mediation, are not inadmissible by virtue of first having been disclosed in mediation.

136. Id.
141. La. R.S. 9:333(B) (Supp. 1994): "The mediator shall advise each of the parties participating in the mediation to obtain review by an attorney of any agreement reached as a result of the mediation prior to signing such an agreement."
respective parties' attorneys, if they choose to retain attorneys, prior to signing, for review. The attorneys should consider the legality, enforceability, and legal consequences to their respective parties, but not approve or disapprove the content of the agreement itself. The latter would introduce an adversarial element into the mediation process, and would be inconsistent with it.

Previously, if an agreement was reached, the mediator would prepare and verify a written, signed, and dated agreement, which set out the settlement terms of the controversies. A consent judgment and/or plan of mediation incorporating the agreement was prepared by respective counsel for each of the parties and submitted to the court for its approval and signature. These provisions have been simplified to require that the mediator shall prepare the written, signed, and dated agreement, and that a consent judgment incorporating the agreement shall be submitted to the court for its approval.

Another change in the mediation proceeding is the authority granted the court to stay any further determination of custody or visitation for a period not to exceed thirty days from the date of issuance of an order for mediation. This provision was proposed in response to reports of custody and visitation proceedings being delayed for many months due to such matters being routinely referred to mediation and long delays in completing or terminating the mediation process. Thirty days was deemed sufficient time to either complete the mediation process or determine that it was not going to be successful.

The prohibition of visitation between a child and a parent who has subjected the child to or permitted physical or sexual abuse or exploitation has been continued. Previously, former Louisiana Revised Statutes 9:574 provided

143. Former La. R.S. 9:354(A) (repealed 1993) provided: "Upon the resolution of the controversies by the parties, the mediator shall prepare a written, signed and dated agreement, verified by the mediator, setting out the settlement terms of the controversies."

144. Former La. R.S. 9:354(B) and (C) (repealed 1993) provided:
   B. If an agreement is reached by the parties through mediation, a consent judgment and/or plan of mediation incorporating the agreement shall be prepared by respective counsel for each of the parties.
   C. The consent judgment and/or plan of mediation shall be submitted to the court for its approval and signature.

145. La. R.S. 9:332(B) (Supp. 1994): "If an agreement is reached by the parties, the mediator shall prepare a written, signed, and dated agreement. A consent judgment incorporating the agreement shall be submitted to the court for its approval."

146. La. R.S. 9:332(A) (Supp. 1994) provides:
   The court may order the parties to mediate their differences in a custody or visitation proceeding. The mediator may be agreed upon by the parties or, upon their failure to agree, selected by the court. The court may stay any further determination of custody or visitation for a period not to exceed thirty days from the date of issuance of such an order. The court may order the costs of mediation to be paid in advance by either party or both parties jointly. The court may apportion the costs of the mediation between the parties if agreement is reached on custody or visitation. If mediation concludes without agreement between the parties, the costs of mediation shall be taxed as costs of court. The costs of mediation shall be subject to approval by the court.

that the court may prohibit visitation in such circumstances, whereas former Louisiana Civil Code article 133 required the court to prohibit visitation. The latter rule has been retained.

The authorization of a court to require the posting of a bond or other security to insure compliance with a child visitation order has been retained, but expanded to include indemnifying the other party for the payment of any costs incurred.\textsuperscript{148}

The procedure for the return of a child kept in violation of a custody and visitation order\textsuperscript{149} and the provision for the appointment of an attorney to represent the child in any child custody or visitation proceeding\textsuperscript{150} are both retained.

The authorization previously granted to a court to direct that an investigation be made for the purpose of assisting the court in making a determination whether an award of joint custody is appropriate\textsuperscript{151} has not been retained. Neither has the

\textsuperscript{9:574} (1991), provides:

A. Whenever the court finds by a preponderance of the evidence that a parent has subjected his or her child to physical abuse, or sexual abuse or exploitation, or has permitted such abuse or exploitation of the child, the court shall prohibit visitation between the abusive parent and the abused child until such parent proves that visitation would not cause physical, emotional, or psychological damage to the child. Should visitation be allowed, the court shall order such restrictions, conditions, and safeguards necessary to minimize any risk of harm to the child. All costs incurred in compliance with the provisions of this Section shall be borne by the abusive parent.

B. When visitation has been prohibited by the court pursuant to Subsection A, and the court subsequently authorizes restricted visitation, the parent whose visitation has been restricted shall not remove the child from the jurisdiction of the court except for good cause shown and with the prior approval of the court.

\textsuperscript{148} La. R.S. 9:342 (Supp. 1994), previously in La. R.S. 9:312 (1991), provides:

For good cause shown, a court may, on its own motion or upon the motion of any party, require the posting of a bond or other security by a party to insure compliance with a child visitation order and to indemnify the other party for the payment of any costs incurred.

\textsuperscript{149} La. R.S. 9:343 (Supp. 1994) provides:

A. Upon presentation of a certified copy of a custody and visitation rights order rendered by a court of this state, together with the sworn affidavit of the custodial parent, the judge, who shall have jurisdiction for the limited purpose of effectuating the remedy provided by this Section by virtue of either the presence of the child or litigation pending before the court, may issue a civil warrant directed to law enforcement authorities to return the child to the custodial parent pending further order of the court having jurisdiction over the matter.

B. The sworn affidavit of the custodial parent shall include all of the following:

1. A statement that the custody and visitation rights order is true and correct.


3. The fact of the removal of or failure to return the child in violation of the custody and visitation rights order.

4. A declaration that the custodial parent desires the child returned.

\textsuperscript{150} La. R.S. 9:345 (Supp. 1994).

provision permitting a court, on its own motion, to terminate or modify a joint custody decree or implementation plan even if one or both parents opposed the modification or termination order. The express prohibition of consideration of a parent's sex and race as factors in custodial determinations is not retained. This prohibition is controlled by constitutional principles that need not be expressed in statutes. The disposition of a parent to continue raising the child in his religion or creed has likewise not been retained because of constitutional problems inherent in having this as a factor in child custody determinations.

The act contains transitional rules, both with respect to child custody and child support. The act became effective January 1, 1994. However, it does not apply to actions for separation from bed and board or divorce or actions for incidental relief commenced before that date, or to reconventional demands to these actions, whenever the reconventional demand is filed. These actions are governed by the law in effect prior to January 1, 1994.

III. CHILD SUPPORT

Prior to the enactment of Act 261, the statutory basis for an award of child support was Louisiana Civil Code article 227 which imposed a substantive

La. Acts No. 1008, § 8, and 1990 La. Acts No. 1009, § 10, provided: "For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted."


Any order for joint custody, or any plan of implementation effected pursuant to Paragraph A of this Article, may be modified or terminated upon the petition of one or both parents or on the court's own motion, if it is shown that the best interest of the child requires modification or termination of the order. The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.


154. U.S. Const. amend. XIV, § 1; La. Const. art. III.


156. La. R.S. 9:387 (Supp. 1994);

Acts 1993, No. 261 does not apply to actions for separation from bed and board or divorce or actions for incidental relief commenced before January 1, 1994, or to reconventional demands thereto, whenever filed. Such actions are to be governed by the law in effect prior to January 1, 1994.

157. Id.

158. La. Civ. Code art. 227 provides: "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children."
duty on mothers and fathers to support, maintain, and educate their children. This was an obligation which arose from the "very act of marrying." Louisiana Civil Code article 230 defines the scope of the obligation, Louisiana Civil Code article 231 quantifies the obligation, Louisiana Civil Code article 232 states the circumstances under which the obligation can be terminated or reduced, and Louisiana Civil Code articles 233 and 234 provide an alternate means of satisfying the obligation. The joint custody statute restated the factors in Louisiana Civil Code article 231 and provided that each parent shall be responsible for child support based on the needs of the child and the actual resources of each parent. In 1989, Louisiana Revised Statutes 9:315 was enacted, containing extensive guidelines and other statutory provisions mandating the use of detailed rules in proceedings to establish or modify child support. In the interim, the jurisprudence developed a set of principles to be used in quantifying the child support obligation. Act 261 essentially codifies these jurisprudential principles and makes some important procedural changes in child support proceedings.

The act grants explicit authority for a court to order child support in a proceeding for divorce or thereafter, an authority implied in the substantive

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159. La. Civ. Code art. 230 provides:
   A. By alimony we understand what is necessary for the nourishment, lodging, and support of the person who claims it.
   B. It includes the education, when the person to whom the alimony is due is a minor, or when the person to whom alimony is due is a major who is a full-time student in good standing in a secondary school, has not attained the age of nineteen, and is dependent upon either parent.

160. La. Civ. Code art. 231 provides: "Alimony shall be granted in proportion to the wants of the person requiring it, and the circumstances of those who are to pay it."

161. La. Civ. Code art. 232 provides:
   When the person who gives or receives alimony is replaced in such a situation that the one can no longer give, or that the other is no longer in need of it, in whole or in part, the discharge from or reduction of the alimony may be sued for and granted.

162. La. Civ. Code art. 233 provides: "If the person, whose duty it is to furnish alimony, shall prove that he is unable to pay the same, the judge may, after examining into the case, order that such person shall receive in his house, and there support and maintain the person to whom he owes alimony."


164. 1989 La. Acts No. 9 (2d Ex. Sess.).

165. These principles are reviewed in detail in La. Civ. Code art. 141 cmts. (b)-(f).

166. La. Civ. Code art. 141 provides:
   In a proceeding for divorce or thereafter, the court may order either or both of the 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.
child support provisions and one which was universally assumed.\textsuperscript{167} It provides that the obligation is based on the needs of the child and the ability of the parents to provide support.\textsuperscript{168} No change is made in the circumstances under which an award of child support may be modified or terminated.\textsuperscript{169} It also continues the statutory suspension or modification of the child support obligation if one custodial parent or his agent is intentionally secreting the child with the intent to preclude the other custodial parent from knowing the whereabouts of the child sufficiently to permit a custodial parent from exercising his rights or duties as joint custodial parent.\textsuperscript{170} For the suspension or modification of the obligation to occur, the obligor parent must obtain a court order suspending or modifying his obligation.\textsuperscript{171} If he does not, the obligation is not suspended or modified during the period a parent is secreting the child.\textsuperscript{172} The provision is not self-operative. Secreting the child does not operate to suspend or modify the obligation; only a court order entered because the parent is secreting the child suspends or modifies the support obligation. Therefore, secreting the child cannot be urged as a defense to a contempt action or action to enforce past due child support absent a prior order suspending or modifying the obligation. This act applies only in the case of a joint custody award;\textsuperscript{173} it is inapplicable to parental sole custody or third party custodial awards.

Present Louisiana Civil Code article 141\textsuperscript{174} contains two procedural changes. First, it authorizes the court to order either or both of the parents to provide child support. In addition to the traditional award to the domiciliary parent of a periodic monetary award of child support, the court may order either or both parents to pay specified expenses of the child, such as school tuition, group medical insurance premiums, certain travel expenses, and orthodontia

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\textsuperscript{167} La. Civ. Code art. 141 cmt. (a).
\textsuperscript{169} La. Civ. Code art. 142 provides: "An award of child support may be modified if the circumstances of the child or of either parent change and shall be terminated upon proof that it has become unnecessary."
\textsuperscript{170} La. R.S. 9:315.23 (Supp. 1994), previously La. R.S. 9:314 (1992), provides:
If one joint custodial parent or his agent is intentionally secreting a child with the intent to preclude the other joint custodial parent from knowing the whereabouts of the child sufficiently to allow him to exercise his rights or duties as joint custodial parent, the latter may obtain from the court an order suspending or modifying his obligation under an order or judgment of child support. However, such circumstances shall not constitute a defense to an action for failure to pay court-ordered child support or an action to enforce past due child support.
\textsuperscript{171} Id.
\textsuperscript{172} La. R.S. 9:315.23 (Supp. 1994).
\textsuperscript{173} Id.
\textsuperscript{174} See supra note 166 for the text of La. Civ. Code art. 141.
expenses. The court may also make a similar order in sole parental custody or third party custody awards. In the latter, both parents may be ordered to pay the third party custodian child support or to pay directly specified expenses of the child. The authority of the court to order certain third party payments by the obligor parent is contained in Louisiana Revised Statutes 9:315.8(D). The new article expands the types of payments to third parties that may be ordered.

Second, the article provides both for an interim allowance and for final support for a child. Frequently, a rule nisi for child support does not get heard on its return date due to a crowded court docket, the need for discovery, scheduling conflicts, or other reasons. This article gives the court authority to enter an interim order for child support pending the hearing on the final order for child support. This practice is already followed by some courts and is impliedly authorized by Louisiana Revised Statutes 9:315.1(C)(5). Louisiana Civil Code article 141 now provides express authorization for an interim allowance of child support. If this authority is utilized in making an interim award, compliance with Louisiana Revised Statutes 9:315.2(A) should be ordered, insofar as it is practicable for the parties to do so under the circumstances. This way, the record will reflect some objective basis for the interim allowance for appellate review purposes.

175. The article also provides authorization for a court to order the domiciliary parent to pay child support to the nondomiciliary parent in appropriate circumstances, such as an implementation plan that provides for equal physical custody of the child or extended periods of physical custody granted to the nondomiciliary parent. See Montet v. Montet, 629 So. 2d 538 (La. App. 3d Cir. 1993), and the cases discussed therein for the judicial resolution of this issue under prior law.

176. La. R.S. 9:315.8(D) (1991) provides:

The party without legal custody or nondomiciliary party shall owe his or her total child support obligation as a money judgment of child support to the custodial or domiciliary party, minus any court-ordered direct payments made 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.


178. La. R.S. 9:315.1(C) (1991) provides, in part:

In determining whether to deviate from the guidelines, the court’s considerations may include:

(5) The need for immediate and temporary support for a child when a full hearing on the issue of support is pending but cannot be timely held. In such cases, the court at the full hearing shall use the provisions of this part and may redetermine support without the necessity of a change of circumstances being shown.

179. La. R.S. 9:315.2(A) (1991) provides:

Each party shall provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings. Suitable documentation of current earnings shall include but not be limited to pay stubs, employer statements, or receipts and expenses if self-employed. The documentation shall include a copy of the party’s most recent federal tax return. A copy of the statement and documentation shall be provided to the other party.
The article permits an interim allowance only when a demand for final support is pending. This prevents a party from receiving a favorable interim award based upon incomplete data without the pendency of a proceeding in which all information and documentation may be obtained and final child support determined after a full hearing.

The rules concerning the retroactivity of interim and final child support judgments are carefully crafted to insure a good mesh between the two types of awards. Except for good cause shown, a judgment awarding, modifying, or revoking an interim child support allowance is retroactive to the date of judicial demand. A judgment that initially awards or denies final child support is effective as of the date the judgment is signed, and the judgment terminates an interim child support allowance as of that date. However, if an interim child support allowance is not in effect on the date of the judgment awarding final child support, the judgment of final child support is retroactive to date of judicial demand, except for good cause shown. In all cases, the obligor is given credit for child support of any kind paid to or on behalf of the child from the date of judicial demand to the date the support judgment is signed, except for child support paid pursuant to an interim child support judgment. This credit provision applies both to interim child support allowance awards and awards of final child support. If the court finds good cause for not making either award retroactive to date of judicial demand, the court may fix the date on which the award shall commence. Except for good cause shown, a judgment modifying or revoking a final child support award is retroactive to the date of judicial demand.

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181. La. R.S. 9:315.21 (Supp. 1994) provides:
   A. Except for good cause shown, a judgment awarding, modifying, or revoking an interim child support allowance shall be retroactive to the date of judicial demand.
   B. (1) 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 allowance as of that date.
      (2) If an interim child support allowance award is not in effect on the date of the judgment awarding final child support, the judgment shall be retroactive to the date of judicial demand, except for good cause shown.
   C. Except for good cause shown, a judgment modifying or revoking a final child support judgment shall be retroactive to the date of judicial demand.
   D. Child support of any kind, except that paid pursuant to an interim child support allowance award, provided by the judgment debtor from the date of judicial demand to the date the support judgment is signed, to or on behalf of the child for whom support is ordered, shall be credited to the judgment debtor against the amount of the judgment.
   E. In the event that the court finds good cause for not making the award retroactive to the date of judicial demand, the court may fix the date on which the award shall commence.

La. R.S. 9:310 (1991 & Supp. 1994), formerly regulating the retroactivity of child support and alimony orders, was amended to substitute “spousal support” for “child support and alimony” in the section heading and in subsection (A). Therefore, La. R.S. 9:310 applies only to spousal support orders and La. R.S. 9:315.21 applies only to child support orders.
Also continued is the provision for awarding, in joint custody decrees or implementation orders, a portion of the housing expenses of a parent as child support, even for a period when the child is not residing in the home of that parent, if that parent would otherwise be unable to maintain adequate housing for the child.\textsuperscript{182} Comment (c) to Louisiana Civil Code article 141 suggests that, under this provision, a court may, in or in conjunction with a joint implementation order, make a special monetary award to one spouse to enable that spouse to maintain adequate housing for a child. It is not clear how this provision interacts with the Louisiana Child Support Guidelines. Presumably, housing expense is included in the guideline amounts. But Louisiana Revised Statutes 9:315.8(E)\textsuperscript{183} provides, in calculating the child support obligation by the use of worksheets, that in the case of joint custody the court shall consider the period of time spent by the child with the nondomiciliary party as a basis for adjustment to the amount of child support to be paid during that period of time and shall consider the continuing expenses of the domiciliary parent during that period of time.

The provisions of former Louisiana Revised Statutes 9:309, regulating the termination of child support upon the child’s attaining the age of majority, have been retained; except that the same rules are made applicable to the emancipation of the child, thereby relieving the child of the disabilities attached to minority.\textsuperscript{184}

\begin{itemize}
  \item \textsuperscript{182} La. R.S. 9:337(A) (Supp. 1994) provides:
    A joint custody decree or implementation order may include in the sum awarded for child support a portion of the housing expenses of a parent even for a period when the child is not residing in the home of that parent, if that parent would otherwise be unable to maintain adequate housing for the child.
    This provision is in the section of Title 9 of the Revised Statutes regulating Child Custody, as a provision that may be contained in a joint custody decree or implementation order.

  \item \textsuperscript{183} La. R.S. 9:315.8(E) (1991):
    In cases of joint custody, the court shall consider the period of time spent by the child with the nondomiciliary party as a basis for adjustment to the amount of child support to be paid during that period of time. The court shall include in such consideration the continuing expenses of the domiciliary party.

  \item \textsuperscript{184} La. R.S. 9:315.22 (Supp. 1994) provides:
    A. When there is a child support award in a specific amount per child, the award for each child shall terminate automatically without any action by the obligor upon each child’s attaining the age of majority, or upon emancipation relieving the child of the disabilities attached to minority.

    B. When there is a child support award in globo for two or more children, the award shall terminate automatically and without any action by the obligor when the youngest child for whose benefit the award was made attains the age of majority or is emancipated relieving the child of the disabilities attached to minority.

    C. An award of child support continues with respect to any unmarried child who attains the age of majority, or to a child who is emancipated relieving the child of the disabilities attached to minority, as long as the child is a full-time student in good standing in a secondary school, has not attained the age of nineteen, and is dependent upon either parent. Either the primary domiciliary parent or the major or emancipated child is the proper party to enforce an award of child support pursuant to this Subsection.
\end{itemize}
As originally enacted by Act 311 of 1981, Louisiana Revised Statutes 9:309(C) provided:

An order or judgment of child support may continue with respect to any unmarried child who attains the age of majority as long as the child is a full-time student in a secondary school, has not attained the age of nineteen, and is dependent upon either parent. The major child shall be the proper party to enforce an order or judgment of child support which is continued beyond the age of majority pursuant to this Subsection.

Savage v. Savage interpreted these provisions as contemplating that a separate judicial action to continue child support beyond the child's attaining the age of majority should be brought on behalf of the unmarried minor child prior to the automatic termination of the child support at the child's majority in order to determine the child's eligibility for continued child support. If the child support was continued, the major child was the proper party to enforce the order or judgment continuing the child support. Absent such an action and judgment, the child support automatically terminated by operation of law upon the child attaining the age of majority.

Act 1014 of 1992 amended subsection (C) to provide that an order or judgment of child support “shall continue” in the specified circumstances and that “[e]ither the primary domiciliary parent or the major child” shall be the proper party to enforce such an order or judgment.

Thus, it was no longer necessary to institute a separate judicial proceeding to determine the child’s eligibility for continued child support, and either the primary domiciliary parent or the major child could enforce the original order or judgment of child support upon the child’s attaining the age of majority.

The latest revision provides that the order or judgment “continues.” It includes a child who is emancipated, relieving the child of the disabilities attached to minority, and it adds the emancipated child as a proper party to enforce an award of child support pursuant to this subsection.

The transitional provision of Act 261 makes the new child support provisions inapplicable to separation from bed and board and divorce actions and actions for incidental relief commenced before January 1, 1994 or to reconventional demands to these actions, whenever filed. These actions and reconventional demands are governed by the law in effect prior to January 1, 1994.

185. 589 So. 2d 95 (La. App. 2d Cir. 1991).
187. La. R.S. 9:387 (Supp. 1994) provides:
Acts 1993, No. 261 does not apply to actions for separation from bed and board or divorce or actions for incidental relief commenced before January 1, 1994, or to reconventional demands thereto, whenever filed. Such actions are to be governed by the law in effect prior to January 1, 1994.
IV. CONCLUSION

This revision of the child custody and child support provisions represents a much needed reform, especially in custody proceedings. The revision should simplify and expedite custody and child support determinations. If the spousal support proposal is adopted by the Legislature, it will complete the enormous task undertaken by the Persons Committee in eight facets of family law which affect nearly all Louisiana citizens.