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Persons

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PERSONS*

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CHILD CUSTODY

Legislation

Two acts of some significance were passed at the 1984 Session of the Louisiana Legislature amending Louisiana Civil Code article 146. One act does little more than respond affirmatively to the United States

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* Although this paper does not consider the topic, filiation continues to be an area of family law which generates the active interest of the legislature and the judiciary. Act 810 of 1984 amended Civil Code article 209(C) to provide procedures for proving filiation for certain purposes within one year of the death of the alleged parent; however, this peremptive period does not apply to efforts to establish beneficiary status under article 2315. Under the amendment, an illegitimate child over the age of 19 can institute an action to establish filiation to a parent, for the purpose of recovery of damages under article 2315, within one year of the parent's death. Some serious constitutional issues may be raised by the creation of a class of actions an illegitimate child may bring regardless of his age and others that he may not, such as support under article 229 and inheritance. However, such a distinction may be justified. In an action for damages under article 2315 the stability of land titles is not at issue, although protecting against "stale" proof is involved in both types of actions.

In Lamana v. LeBlanc, 449 So. 2d 31 (La. App. 1st Cir.), cert. denied, 450 So. 2d 959 (La. 1984), (three Justices dissenting) the court of appeal affirmed a judgment that sustained the defendant's peremptory exception of no cause and no right of action. The exceptions were filed in response to plaintiff's suit to be recognized as the father of defendant's son. According to the court, the natural father had no right or cause of action to establish his paternity because the child was born within 300 days of defendant's divorce from her husband; therefore, the child was conclusively presumed to be the child of the husband by virtue of his failure to disavow paternity. The authority for refusing to permit such a suit was Fontenot v. Thierry, 422 So. 2d 586 (La. App. 3d Cir. 1982), cert. denied, 427 So. 2d 868 (La. 1983).

Since the *Lamana* decision, there have been two other courts of appeal decisions considering the issue of establishing filiation to a father other than the husband of the mother. The first circuit court of appeal, sitting *en banc* in Griffin v. Succession of Branch, 452 So. 2d 344 (La. App. 1st Cir. 1984), concluded that the plaintiffs had no right to bring an action to establish filiation to a man other than the husband of their mother, who was conclusively presumed to be their father. The language of the court was: "LSA-C.C. art. 209, as amended by Act 720 of 1981, implies that a child who enjoys legitimate filiation, or is legitimated or formally acknowledged, cannot institute a proceeding to establish filiation." Id. at 346-47 (footnote omitted). An earlier symposium article written by this author was cited for a similar view. Developments in the Law, 1980-1981—Persons, 42 La. L. Rev. 403 (1982). In so deciding, the court expressly overruled its own decision in Succession of Levy, 428 So. 2d 904 (La. App. 1st Cir. 1983): "In carefully reading the statutory changes made in Act 720, we feel compelled to overrule

Supreme Court decision in *Palmore v. Sidoti*.[1] Article 146 now provides that no parent is to be preferred because of his race;[2] and as a specific

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our previous holding in *Succession of Levy* and find that the legislative intent is that a child entitled to legitimate filiation may not institute a proceeding to establish filiation to another man." *Griffin*, 452 So. 2d at 347. In *Succession of Levy*, the court had interpreted Article 209 ("a child not entitled to legitimate filiation") "to mean 'a child who is not entitled to legitimate filiation *to the parent to whom he is attempting to prove filiation*.' " Id.

Although the court expressed the opinion that "the Second and Third Circuits indicated that they agree with this inference of legislative intent. IMC Exploration Co. v. Henderson, *supra*; Fontenot v. Thierry, 422 So. 2d 586 (La. App. 3d Cir. 1982), writ denied, 427 So. 2d 868 (La. 1983)," id., the Third Circuit Court of Appeal reached a different result in *Durr v. Blue*, 454 So. 2d 315 (La. App. 3d Cir. 1984). In *Durr* the court permitted a natural father to assert his paternity as to children born to the mother while married to another man. According to the court: "The failure of the presumed legal father to timely bring a disavowal action should not operate to deny the biological father his parental rights. Such a result would be a violation of the due process provisions of the United States and Louisiana Constitutions." Id. at 318. For a contrary argument, which distinguishes filiation from the old effects of classification, see Spaht & Shaw, The Strongest Presumption Challenged: Speculations on *Warren v. Richard* and *Succession of Mitchell*, 37 La. L. Rev. 59 (1976). Judge Domengeaux, who had authored the opinion in *Fontenot v. Thierry*, cited in *Griffin v. Succession of Branch*, dissented.

The two decisions, however, need not be interpreted as inconsistent. There is an important legal distinction between the facts in the *Griffin* case and those in the *Durr* case. In the *Griffin* case, the children were registered as children of the husband of the mother on their birth certificates; but, in the *Durr* case the children were registered as that of the natural father. There is scholarly opinion to the effect that under Civil Code article 197, the presumption of Louisiana Civil Code article 184 does not apply if the children are not registered as children of the husband of the mother. R. Pascal & K. Spaht, Louisiana Family Law Course 366-67 (3d ed. 1982); Spaht & Shaw, supra.

In an unreported district court opinion, *Succession of Grice*, article 209 was declared unconstitutional because it discriminated against illegitimates in three ways:

> First, it requires them to prove their filiation in a suit brought for that purpose while legitimates are allowed to prove their filiation in the succession proceeding itself. Second, the burden of proof for illegitimates is more stringent, i.e., clear and convincing evidence as opposed to a preponderance of the evidence required of legitimates. Finally, the prescriptive period applied to illegitimates in order to participate in their parent's succession is shorter than the period which is applied to legitimates.

Succession of Grice, Probate No. 9034 (32d La. Jud. Dist. Ct. June 28, 1984). The decision was reversed by the Louisiana Supreme Court. Succession of Grice, No. 87-1761, slip op. (La. Sup. Ct. Jan. 14, 1985).

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1. 104 S. Ct. 1879 (1984).

2. La. Civ. Code art. 146(A)(2), as amended by La. Acts 1984, No. 133, § 1 ("A. If there are children of the marriage whose provisional custody is claimed by both husband and wife, the suit being yet pending and undecided, custody shall be awarded in the following order of preference, according to the best interest of the children: . . . (2) To either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex or race. The burden of proof that joint custody

response to the Supreme Court decision, the classification of persons according to race is "neither relevant nor permissible" in custody determinations.[3]

In *Palmore v. Sidoti*,[4] it was not the race of the parent at issue but the mother's marriage to a person of another race. When a change of custody was sought by the father because of the mother's cohabitation and subsequent marriage to a black man, the Florida trial court concluded that the best interest of the child would be served by awarding custody to the father. The Florida Court of Appeal affirmed the lower court's judgment; the United States Supreme Court granted certiorari and reversed. Importantly, the Florida trial court had found that there was "no issue as to either party's devotion to the child, adequacy of housing facilities, or respect(a)bility of the new spouse of either parent."[5] Thus, the court's conclusion as to the child's welfare was based solely on "what it regarded as the damaging impact on the child from remaining in a racially-mixed household."[6]

The United States Supreme Court held that the trial court's removal of custody from the mother, which constituted state action, was a denial of equal protection of the law. The question under the Fourteenth Amendment to the United States Constitution, as posed by the Court, was "whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother."[7] The Court concluded that they are not; private biases may not be given effect by law, particularly in view of the purpose of the Fourteenth Amendment to eradicate racial discrimination. Obviously, the amendments made to article 146 are consistent with the Supreme Court opinion in *Palmore*.

Two acts of potentially greater impact relating to the custody proceeding authorize the court to order an evaluation of the parties and children by a mental health professional[8] and to require the parties to submit to mediation.[9] Companion amendments to the Revised Statutes,

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would not be in a child's best interest shall be upon the parent requesting sole custody."). See La. Const. art. III, § 1.

3. Id. art. 146(C)(2)(1) ("C. There shall be a rebuttable presumption that joint custody is in the best interest of a minor child. . . . (2) 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: . . . (l) 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.").

4. 104 S. Ct. 1879 (1984).

5. Id. at 1881.

6. Id.

7. Id. at 1882.

8. La. Civ. Code art. 146(H), as amended by La. Acts 1984, No. 786, § 1.

9. Id. art. 146(I). Cf. Alaska Stat. § 25.20.060 (1982); Ariz. Rev. Stat. Ann. § 25-

regulations governing mediation in a custody or visitation proceeding, were enacted which specify the duties and qualifications of the mediator and the confidentiality of the mediation.[10]

The evaluation by a mental health professional, defined in the article,[11] may be requested by motion of either party. The judge has discretion in ordering the evaluation by the professional, who is to be chosen by the parties or by the court. The costs may be apportioned between the parties, and the evaluation is to be in writing furnished to the court and both parties.[12]

In contrast to the mental health evaluation, mediation may be ordered by the court on its own motion.[13] It is appropriate to order mediation when, from the face of the pleadings, custody or visitation is contested or when, during the proceedings, it appears that mediation is in the best interest of the children.[14] Obviously, the policy to be served by the statute on mediation is different from that of the mental health evaluation. In fact, the purpose is stated in the legislation: "The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the marriage is dissolved."[15] The statute, in relatively detailed fashion, prescribes the duties of the mediator,[16] the contents and review of the

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381.24 (1977); Cal. Civ. Code § 4607 (West 1981); Mich. Comp. Laws § 552.513 (1982); Mont. Code Ann. §§ 40-3-111, 40-3-127 (1983).

10. 1984 La. Acts, No. 788, § 1, adding La. R.S. 9:351-356.

11. La. Civ. Code art. 146(H), as amended by La. Acts 1984, No. 786, § 1 ("For the purposes of this Article, 'mental health professional' means a psychiatrist or a person who possesses a Master's degree in counseling, social work, psychology, or marriage and family counseling.").

12. La. Civ. Code art. 146(H) ("The mental health professional shall provide the court and both parties with a written report. The mental health professional shall serve as the witness of the court subject to cross-examination by either party.").

13. La. Civ. Code art. 146(I) ("In any custody or visitation proceeding, the court, on its own motion or the motion of either party, may require the parties to mediate their differences.").

14. 1984 La. Acts, No. 788, § 1, adding La. R.S. 9:351 ("When it appears on the face of the petition or motion for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, or when during such a proceeding it appears to the court to be in the best interest of the child or children, the parties may be required to mediate their differences upon the motion of the court or upon the motion of either party."). Cf. Cal. Civ. Code § 4607(a) (West 1981).

15. 1984 La. Acts, No. 788, § 1, adding La. R.S. 9:352. Cf. Cal. Civ. Code § 4607(a) (West 1981).

16. Id., adding La. R.S. 9:353 ("In performing the mediation contemplated herein, the mediator shall assist the parties in formulating a written, signed, and dated agreement to mediate which shall identify the controversies between the parties, affirm the parties' intent to resolve these controversies through mediation, and specify the circumstances under which the mediation may terminate. The mediator has a duty to advise each of

mediation agreement,[17] confidentiality of the mediation,[18] and the qualifications of a mediator.[19]

The statutory provisions, which authorize the court to order mediation and which regulate the alternative form of dispute resolution,

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the mediation participants to obtain legal review prior to reaching any agreement. The mediator has a duty to be impartial and has no power to impose a solution on the parties.").

17. Id., adding La. R.S. 9:354 ("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. 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. The consent judgment and/or plan of mediation shall be submitted to the court for its approval and signature."). Cf. Mich. Comp. Laws § 552.513(2) (1982).

18. Id., adding La. R.S. 9:355 ("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."). Cf. Cal. Civ. Code § 4607(c) (West 1981); Mich. Comp. Laws § 552.513(3) (1982).

19. Id., adding La. R.S. 9:356

> A. For purposes of this Article, a mediator shall be a person who:
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> (1) Shall be an attorney who is a member in good standing of the Louisiana State Bar Association; or
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> (2) Possesses a Master's degree in counseling, social work, psychology, or marriage and family counseling; and
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> (3) Is not a party or representative of a party, or engaged in any therapeutic relationship with the parties to the dispute.
>
> B. If the mediator is selected by the parties, he or she shall be so named in an agreement signed by the parties.

Compare the qualifications required of mediators in Michigan and conciliation counselors in California. Michigan law provides:

> (4) A domestic relations mediator who performs mediation under this act shall have all of the following minimum qualifications:
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> (a) One or more of the following:
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> (i) A license or a limited license to engage in the practice of psychology pursuant to parts 161 and 182 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.16311 and 333.18201 to 333.18237 of the Michigan Compiled Laws, or a master's degree in counseling, social work, or marriage and family counseling; and successful completion of the training program provided by the bureau under section 19(3)(b).
>
> (ii) Not less than 5 years of experience in family counseling, preferably in a setting related to the areas of responsibility of the friend of the court and preferably to reflect the ethnic population to be served, and successful completion of the training program provided by the bureau under section 19(3)(b).
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> (iii) A graduate degree in a behavioral science and successful completion of a domestic relations mediation training program certified by the bureau with not less than 40 hours of classroom instruction and 250 hours of practical experience working under the direction of a person who has successfully completed a program certified by the bureau.
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> (iv) Membership in the state bar of Michigan and successful completion of

are in part identical to California legislation.[20] California's experience with similar provisions and documented case histories[21] should prove of invaluable assistance in interpreting and applying our new statute. Ethical issues,[22] among others which are raised by the legislation, are deserving

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the training program provided by the bureau under section 19(3)(b).

(b) Knowledge of the court system of this state and the procedures used in domestic relations matters.

(c) Knowledge of other resources in the community to which the parties to a domestic relations matter can be referred for assistance.

(d) Knowledge of child development, clinical issues relating to children, the effects of divorce on children, and child custody research.

Mich. Comp. Laws § 552.513 (1982). California law provides:

(a) Any person employed as a supervising counselor of conciliation or as an associate counselor of conciliation shall have the following minimum qualifications:

(1) A masters degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships.

(2) At least two years' experience in counseling or psychotherapy, or both, preferably in a setting related to the areas of responsibility of the family conciliation court and with the ethnic population to be served.

(3) Knowledge of the court system of California and the procedures used in family law cases.

(4) Knowledge of other resources in the community to which clients can be referred for assistance.

(5) Knowledge of adult psychopathology and the psychology of families.

(6) Knowledge of child development, clinical issues relating to children, the effects of divorce on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.

(b) The family conciliation court may substitute additional experience for a portion of the education, or additional education for a portion of the experience, required under subdivision (a).

(c) The provisions of this section shall be met by all counselors of conciliation not later than January 1, 1984, provided that this section shall not apply to any supervising counselor of conciliation who is in office on the effective date of this section.

Cal. Civ. Proc. Code § 1745 (West 1982).

The House of Delegates of the American Bar Association at the 1984 Annual Convention in Chicago approved the "Standards of Practice for Lawyer Mediators in Family Disputes." One of the reasons for adopting the standards was that the use of mediators in family practice was increasing rapidly, largely without ethical guidelines. 53 U.S.L.W. 2083 (Aug. 14, 1984). See also 10 Fam. L. Rep. 1552 (Aug. 14, 1984).

20. Cal. Civ. Code § 4607 (West 1981).

21. For examples of case histories, see F. Bienefeld, Child Custody Mediation (1983). See also King, Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law, 2 Cal. Law. 40 (1982).

22. See, e.g., Silberman, Professional Responsibility Problems of Divorce Mediation, 16 Fam. L.Q. 107 (1982); Crouch, Divorce Mediation and Legal Ethics, 16 Fam. L.Q. 219 (1982).

of more comprehensive and incisive commentary[23] than that permitted by this symposium. However, it is significant that Louisiana, following the lead of California, continues to be a pioneer in child custody legislation.

Jurisprudence

Since last year's symposium[24] and the Fourth Circuit Court of Appeal decision in *Plemer v. Plemer*,[25] there has been a spate of appellate court

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23. Hopefully, this legislation will be the subject of a student comment to be published in the future.

Some suggested readings on the subject of mediation as a form of alternative dispute resolution for divorce include: O. Coogler, Structured Mediation in Divorce Settlements (1978); volume 17, no. 4 of the *Family Law Quarterly* has an entire section devoted to articles on the subject with an excellent bibliography at pages 539-40; Rigby, Alternate Dispute Resolution, 44 La. L. Rev. 1725 (1984) and authorities cited therein.

Judge Robert L. Gottsfield wrote an article which summarized a panel discussion on mediation and under what circumstances it might not work in volume 18, no. 2 of the *Arizona Bar Journal*. The listed circumstances could assist in evaluating whether mediation is appropriate.

Two cases considered the provisions of article 146(B), as first amended in 1982, which expressly authorized an award of custody to a non-parent if "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." La. Civ. Code art. 146(B) as amended by 1982 La. Acts, No. 307, § 1. In re Matter of Parker, 434 So. 2d 1256, 1257 n.2 (La. App. 1st Cir. 1983), described the legislation as a codification of past jurisprudence. However, in Boyett v. Boyett, 448 So. 2d 819 (La. App. 2d Cir. 1984), the court correctly interpreted the statutory language as a departure from the prior jurisprudential standard:

> The use of the word "detrimental" in the new act embraces a wider range of situations, including those previously recognized in the jurisprudence as cause for awarding custody to a nonparent . . . . It is reasonable to assume that had the Legislature intended merely to codify the existing law in this area they would have incorporated into the statute the familiar and oft-cited phraseology of the jurisprudence concerning parental rights. Instead, they chose to utilize language which broadens somewhat the range of situations in which a nonparent custody award is permissible. The amendment allows more freedom to pursue what has always been considered the primary consideration in custody cases, the best interest of the child or children involved.

448 So. 2d at 822. Despite such an observation, the court then seized upon the language in article 146 that provides that the award of custody to the nonparent must be "required" to serve the child's best interest:

> Art. 146 B. provides that the nonparent [custody] award must be "required" to serve the child's best interest. The use of the word "required" connotes necessity. In other words, the nature or extent of the detriment faced by the child under an award of custody to the parent must be such that it outweighs the parent's otherwise superior right and makes it necessary or essential, in pursuit of the child's best interest, that custody be awarded to the nonparent.

Id.

24. Spaht, Developments in the Law, 1982-1983—Persons, 44 La. L. Rev. 463 (1983).

25. 436 So. 2d 1348 (La. App. 4th Cir. 1983).

opinions interpreting the joint custody legislation. From these decisions, it is now possible to make some general observations concerning interpretation of the joint custody legislation and accompanying plans of implementation.

The presumption that joint custody is in the best interest of the child[26] applies when both parents establish their fitness.[27] At least two appellate court opinions[28] recognize that a parent is unfit if he is guilty of sexual misconduct,[29] or the parent's spouse is guilty of sexual misconduct with the child.[30] Yet, interestingly enough, parental sexual misconduct is being redefined in some of the more recent opinions.[31]

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26. La. Civ. Code art. 146, as amended by 1983 La. Acts, No. 695, § 1 ("C. There shall be a rebuttable presumption that joint custody is in the best interest of a minor child."). See Schwartz, Toward a Presumption of Joint Custody, 18 Fam. L.Q. 225 (1984).

27. Lake v. Robertson, 452 So. 2d 376 (La. App. 3d Cir. 1984); Duhe v. Duhe, 451 So. 2d 1198 (La. App. 5th Cir. 1984). See also Note, Louisiana's New Joint Custody Law, 43 La. L. Rev. 759 (1983), cited as persuasive authority by the court in Lake v. Robertson, 452 So. 2d at 379.

In commenting upon the effect of the 1983 amendments, the third circuit court of appeal observed:

> As can be seen, one of the major changes in Art. 146 as a result of the most recent amendment is that it no longer provides that the presumption that joint custody is in the best interest of the child does not apply if the court, in fact, finds that joint custody would not be in the best interest of the child. As a result, the presumption that joint custody is in the best interest of the child always exists—it is no longer within the court's discretion to decide that the presumption is not applicable.

Chaudoir v. Chaudoir, 454 So. 2d 895, 898 (La. App. 3d Cir. 1984).

28. Stevens v. Stevens, 449 So. 2d 629 (La. App. 1st Cir. 1984); Galeano v. Galeano, 444 So. 2d 658 (La. App. 1st Cir. 1983).

29. In the *Galeano* case, there were serious allegations of improper sexual conduct by the father toward an older female sibling which sufficiently rebutted the presumption that joint custody was in the best interest of the younger daughter.

30. In the *Stevens* case, an examination conducted by a physician established that the six-year-old daughter had been sexually abused by the stepfather, married to the mother. The court found that the presumption that joint custody was in the best interest of the child had been overcome and that sole custody in the father was in her best interest. The court explained that she needed the stability and love of her father to overcome the psychological damage inflicted by her stepfather. Furthermore, the mother lived with her younger child, issue of her marriage to the stepfather, who presumably would be granted visitation rights and be present in the home of her mother. The mother expressed a desire to move with the children to New York. Therefore, the court awarded sole custody of the six-year-old daughter to the father.

31. Wickboldt v. Wickboldt, 448 So. 2d 254 (La. App. 1st Cir. 1984), involved a custody contest in which the father was seeking a change of custody from the mother or in the alternative joint custody. He was seeking a change primarily because of the mother's moral unfitness, evidenced by the fact that she abused drugs and alcohol and had lived with two different men without the benefit of marriage. The court, in maintaining sole custody in the mother with certain restrictions, observed:

> The evidence shows that at the time of the hearing, Mrs. Wickboldt was living

In *Peters v. Peters*,[32] the mother began living with the child in a mobile home owned and occupied by a man who was at the time legally separated from his wife. The father filed suit seeking a change of custody, and in August, 1983 a judgment was rendered decreeing joint custody. While the judgment was being appealed, the mother married the man with whom she had been living. In dismissing the father's argument concerning the mother's moral unfitness, the court observed: "In this case there was no evidence of any aspect of moral unfitness on the part of the mother other than her attitude toward and her actions in living with the man she planned to marry."[33] The mother's attitude in living with her boyfriend was only one aspect of moral fitness; other aspects, according to the court, may be "more significant in their effect on a child, such as the parent's attitude toward criminal activity, drug abuse, sexual promiscuity in the home, and other activities deemed immoral in our society."[34]

Such language could be interpreted as a departure from past jurisprudence concerning moral fitness but, according to the court, consistent with the 1983 amendment to Article 146, which lists the moral fitness of the parties as only one of eleven factors to be considered in determining the best interests of the child.[35] The implication of the court's language is that the legislature intended that moral fitness be

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> with her parents in Baton Rouge; she was working, was not taking drugs at that time and was not living with a "boyfriend." She still had a problem with alcohol, but promised to continue attending AA meetings. We find that this evidence suggests a reasonably stable home environment and an attempt to "reform" by Mrs. Wickboldt.

Id. at 257. But see Pleasant v. Pleasant, 448 So. 2d 824 (La. App. 2d Cir. 1984), where the court of appeal applying the standard of appellate review applicable in child custody cases, could find no clear abuse of discretion and thus affirmed the trial court's award of custody to the father:

> After trial in August 1983, the district court found that the boyfriend frequently stayed overnight with the mother in the presence of the children. Noting that the question of her moral fitness had been at issue in the first custody trial and was closely resolved in her favor at that time, the court concluded that the mother's behavior appeared to be of a continuing nature and it was not in the best interest of the children for her to retain custody. . . . Accepting these factual findings, and agreeing that the mother's conduct may have a detrimental effect on the children even though they are now very young, it remains an extremely close decision on whether the proven indiscretions establish that a change in custody would be in the best interest of the small children.

Id. at 825.

32. 449 So. 2d 1372 (La. App. 2d Cir. 1984).

33. Id. at 1374.

34. Id.

35. La. Civ. Code art. 146(c)(2), as amended by 1983 La. Acts, No. 695, § 1, "(C. (2) 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: . . . (f) The moral fitness of the parties involved.").

considered, but only as one of many factors in a child custody case, thus deemphasizing its importance.

Despite such implications, closer examination of the facts indicate that *Peters* does not represent such a significant departure from past decisions. The mother's marriage to her paramour, alleged in counsel's brief and not disputed by the father, in addition to the lack of "any manifestation that the child was being detrimentally affected by his present situation"[36] influenced the court in reaching its decision. In summation, the court of appeal commented: "While stating that it did not condone the mother's behavior, the trial court noted that the mother's relationship with the man appeared stable and it produced no apparent detrimental effect on the child's well-being."[37]

Subsequently, in a Third Circuit Court of Appeal decision, the *Peters* case was cited as authority for the proposition that a mother's attitude toward living with a man to whom she was not married is but one aspect of moral fitness, which is only one of eleven factors to consider in deciding what custody arrangement is in the best interests of the child.[38] In *Lake v. Robertson*,[39] the father sought a change in custody or, in the alternative, joint custody on the basis of the mother's moral unfitness. The mother had been married and divorced a total of four times and at the time of the trial was engaged in a sexual relationship with another man. Testimony of private investigators hired by a prior husband of the mother, other than the father, established that the mother took the child with her on nightly visits to the home of her boyfriend.

Without specifically so holding, the court of appeal presumably found the mother to be morally fit since it vacated the trial court's judgment maintaining sole custody in the mother and remanded the case for a consideration of joint custody. The father was denied sole custody. According to the court of appeal, the mother had not rebutted the presumption that joint custody was in the child's best interest. In commenting upon the testimony concerning the mother's moral unfitness, the court quoted from a law review article[40] in which the author stated:

> Although parental fitness is surely still relevant to the best interest of the child, its importance may decrease for several reasons. The presumption in favor of joint custody eliminates the need for each parent to prove that he or she is more fit than the other parent. When joint custody is awarded, it does not matter which parent is 'more fit,' so long as both are fit.[41]

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36. *Peters*, 449 So. 2d at 1375.
37. Id.
38. Lake v. Robertson, 452 So. 2d 376 (La. App. 3d Cir. 1984).
39. Id. at 379.
40. Note, supra note 27.
41. Id. at 767-68.

Although the court cited *Peters* in its opinion, implying similarity, the facts are distinguishable in two very important respects. First, no evidence whatsoever indicated that the mother in *Lake* intended to marry or had married her co-respondent. In fact, she argued "that a majority of the states in this country recognize common-law marriages."[42] Such an argument suggests that she did not intend to marry her co-respondent. Secondly, although a clinical psychologist testified that the child was intelligent and had not been abused or neglected during the month she was in the actual custody of her father,[43] there was no evidence suggesting that the child had *not* been adversely affected by her mother's immoral behavior.

If both parents are fit, the presumption that joint custody is in the best interest of the child applies, and the burden is on the parent seeking sole custody to rebut the presumption. General categories of evidence deemed sufficient to overcome the presumption in some cases include: (1) severe disagreement over basic issues, such as education, which has had a detrimental effect on the child;[44] (2) the joint custody arrangement, based on the distance between the parents[45] in one case,[46] or child care arrangements that can be made by the parent,[47] are deemed to be not

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42. *Lake*, 452 So. 2d at 379.

43. Id. at 378 ("Daniel Lonowski, a clinical psychologist, with considerable experience in the area of child neglect and abuse, testified that he had evaluated the child and found her to be intelligent and found no evidence of abuse or neglect after the child had been in the custody of the father for a period of a month. He further testified that the child had expressed a desire to live with her father, in preference to the mother although she was unsure whether she wanted to live in Alabama forever. The psychologist attached significance to the child's preference.").

44. Kincaid v. Kincaid, 444 So. 2d 651, 652 (La. App. 1st Cir. 1983) ("Here, the trial court found, as do we, that because of irreconcilable differences between the parents concerning the child's attending a private religious school and other matters, joint custody would not be in the best interest of the child. . . . In the present case, in view of the obvious inability of the parents to agree upon any matter of any importance with respect to the child; the fact that the differences of the parents had had a traumatic effect upon the child, and the clear showing that joint custody would reopen old wounds and not be in the child's best interest, the trial court properly waived the requirement that a plan of joint custody be drawn or adopted.").

45. Lachney v. Lachney, 446 So. 2d 923 (La. App. 3d Cir. 1984). One parent lived in Louisiana and the other in South Carolina thus making a joint custody plan unfeasible, according to the third circuit court of appeal.

46. But see two later decisions in which joint custody was awarded and one parent lived in California and the other in Louisiana, Krotoski v. Krotoski, 454 So. 2d 374 (La. App. 4th Cir. 1984); and one parent lived in Alexandria, Louisiana and the other parent, who had had sole custody of the child for nine and one-half years, in Baton Rouge, Louisiana, Chaudoir v. Chaudoir, 454 So. 2d 895 (La. App. 3d Cir. 1984).

47. In Robicheaux v. Robicheaux, 446 So. 2d 979 (La. App. 3d Cir. 1984), the father traveled frequently, and when he did, his mother with whom he lived might not have been able to adequately care for the two-year-old child. At age seventy she suffered from bursitis which prevented her from lifting the child. Although the father's sister also lived

in the best interest of the child; (3) one parent lacked the ability to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent;[48] and (4) stability of environment which is necessary to the welfare of the child demands continuance of sole custody.[49] The latter factor tends to be the weakest evidence in rebutting the presumption; it is almost always found in combination with other factors militating against joint custody.[50]

The Second Circuit Court of Appeal will scrutinize carefully a judgment labelled "joint custody" to verify that it is not sole custody with reasonable visitation.[51] Such scrutiny is a delicate process since the Second Circuit recognizes, as do all courts of appeal, that joint custody does

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in the home with her mother, she was unable to provide child care arrangements since she was employed.

48. Price v. Price, 451 So. 2d 1187 (La. App. 1st Cir. 1984). "The deterioration and/or destruction of the relationship between Kelvin and his father is detrimental to Kelvin." Id. at 1191. See La. Civ. Code art. 146(C)(2)(j).

49. See, e.g., Alloway v. Rodrigue, 451 So. 2d 1348 (La. App. 1st Cir. 1984); Wickboldt v. Wickboldt, 448 So. 2d 254 (La. App. 1st Cir. 1984); Lachney v. Lachney, 446 So. 2d 923 (La. App. 3d Cir. 1984); Kincaid v. Kincaid, 444 So. 2d 651 (La. App. 1st Cir. 1983). In the *Wickboldt* case, the court reproduced the trial judge's reasons for judgment where the judge stated:

> "Stability is still a very important factor. This child has been with her mother since November, 1977, at the very least by the pleadings because that's when the parties separated according to the pleadings. This situation does seem stable now. She is apparently doing well in school, seems to be very happy, and very adjusted, and is very happy about her father and his situation, and her new brother. She has the love and affection of a family, a natural parent, and two natural grandparents, and an aunt in a stable home at this time. Mr. Wickboldt is starting a new family with all the problems in starting a new family."

Wickholdt, 448 So. 2d at 256.

At least one recent case has resulted in a joint custody award after the mother had had sole custody for nine and one-half years. See Chaudoir v. Chaudoir, 454 So. 2d 895 (La. App. 3d Cir. 1984). In his dissenting opinion, Judge Domengeaux stated:

> In this case I feel that the trial judge has erred in ordering joint custody. Without going into detail . . . I believe, that under the amended statute La. C.C. Art. 146(C)(2), joint custody is not in the best interest of 12 year old Elizabeth, who has been in her mother's sole custody since she was approximately two years old under favorable and commendable conditions.

Id. at 902.

50. Id.

51. Carroway v. Carroway, 441 So. 2d 494 (La. App. 2d Cir. 1983); Adams v. Adams, 441 So. 2d 490 (La. App. 2d Cir. 1983). In the *Adams* case, the court made the following observations:

> The judgment in this case awarding joint custody but naming one parent as "domiciliary parent" with the other parent having reasonable visitation rights is not truly joint custody. The judgment is in effect no different than the award of sole custody to one parent under the law as it formerly existed, except for the co-tutorship and exchange of information provisions of the article which by implication would be part of the judgment. The judgment ignores, without explanation or reasons, the express mandate of the article that the parents "share

not require an equal sharing of physical custody.[52] Furthermore, a case will be remanded if there is no accompanying plan of implementation, either agreed upon or submitted by the parties or court imposed. To do otherwise, observed the First Circuit Court of Appeal, would result in two appeals: the first from the initial award of joint custody and the second from the provisions of the plan of implementation.[53]

Concerning the plan of implementation of a joint custody decree, there appears to be a general hesitancy to find that a particular plan approved or imposed by the trial court constitutes an abuse of discretion.[54] Yet, *Plemer v. Plemer*[55] was an example of the willingness of the court

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the physical custody" of the child and that "physical care and custody shall be shared by the parents."

Adams, 441 So. 2d at 493. In accord, Hatchett v. Hatchett, 449 So. 2d 626 (La. App. 1st Cir. 1984).

But see Clynes v. Clynes, 450 So. 2d 372, 375 (La. App. 4th Cir. 1983) (Redmann, C.J., dissenting in part). See also Gaudet v. Gaudet, No. 84-0032, slip op. (La. App. 1st Cir. June 26, 1984), cert. denied, 458 So. 2d 122 (La. 1984) and the dissenting opinion by Judge Savoie.

52. Such an interpretation was first announced in Plemer v. Plemer, 436 So. 2d 1348 (La. App. 4th Cir. 1983) and subsequently reiterated by courts of appeal which cite *Plemer* as authority. See, e.g., Peters v. Peters, 449 So. 2d 1372 (La. App. 2d Cir. 1984); Turner v. Turner, 445 So. 2d 35 (La. App. 4th Cir. 1984); Adams v. Adams, 441 So. 2d 490 (La. App. 2d Cir. 1983).

53. Little v. Little, 447 So. 2d 1247 (La. App. 1st Cir. 1984); Creary v. Creary, 447 So. 2d 60 (La. App. 1st Cir. 1984).

54. Gaudet v. Gaudet, No. 84-0032, slip op. (La. App. 1st Cir. June 26, 1984); Peters v. Peters, 449 So. 2d 1372 (La. App. 2d Cir. 1984); Hatchett v. Hatchett, 449 So. 2d 626 (La. App. 1st Cir. 1984); Turner v. Turner, 445 So. 2d 35 (La. App. 4th Cir. 1984), cert. granted, 449 So. 2d 1342 (La. 1984).

In *Peters* the court stated:

> Joint custody opens the door for plans that assure a continued close relationship between the child and both parents, the primary objective of joint custody, and such plans should be tailored by the trial courts in accordance with the circumstances of individual cases. The plan of monthly alternating living arrangements adopted in this case is not, as a matter of law, either required or prohibited. Whether it will work to the best interest of this particular child under the particular circumstances of this case remains to be seen, but the carefully considered plan devised by the trial court in accordance with the code article should be given a chance to succeed. Undoubtedly, many different plans of shared custody will be adopted by trial courts in the course of administering the new joint custody law. Experience with this new-to-Louisiana concept will, perhaps, develop some guidelines for determining what sort of plans and arrangements seem to most benefit the children involved. Appellate courts should be very reluctant to interfere with plans ordered by trial courts in the exercise of their discretion after careful consideration, and should do so only where a clear abuse of discretion is demonstrated.

Id. at 1376.

55. 436 So. 2d 1348 (La. App. 4th Cir. 1983), commented on in Spaht, Developments in the Law, 1982-1983—Persons, 44 La. L. Rev. 463 (1983). See also Duhe v. Duhe, 451 So. 2d 1198 (La. App. 5th Cir. 1984).

of appeal to modify in certain important respects a very detailed plan of implementation.[56] In *Plemer*, the areas selected for such modification have been identified as basic issues in child-rearing: education,[57] residence during holidays,[58] and major medical expenses.[59] Although there is a general reluctance to interfere with a plan of implementation on appeal, it appears that the more detailed the plan concerning basic issues, the greater the opportunity to scrutinize and modify.

Many joint custody plans of implementation respecting physical custody provide for residence with one parent during nine months of the year (corresponding to the school year) and with the other parent during three months (corresponding to summer vacation).[60] Such plans permit and facilitate joint custody awards even where the parents live in different cities or different states.[61] During physical residence with one parent, the ordinary plan of implementation provides for visitation by the other parent either on alternating weekends or three weekends a month.[62] Holidays are ordinarily alternated, but important ones, such as Christmas, usually are divided between the parents.[63] More recent cases, how-

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56. *Plemer*, 436 So. 2d at 1349-51.

57. The trial court had imposed a plan giving the mother primary authority to make educational decisions while the child was in elementary school and then shifted this authority to the father while the child attended high school. The court of appeal concluded that this shift in authority was illogical since the mother would have guided this aspect of the child's rearing for so long and continuity in this critical area was in the child's best interest.

58.

> In order to clarify any possible ambiguity as to holidays and special days, we interpret the plan to mean that the parents will have custody on alternating holidays each year. However, allocation of the entire Christmas vacation to one parent is unrealistic because it totally deprives one parent of visitation during the two-week Christmas time. Even though we feel the parents would have worked out their own arrangement to share Christmas, out of caution we amend the judgment to provide that the non-custodial parent shall have visitation on December 25 from 2:00 p.m. to 10:00 p.m., subject to any mutually agreeable modifications.

Plemer, 436 So. 2d at 1350.

59.

> However, it is impractical and unworkable, as provided by the lower court judgment, for "each parent . . . to provide whatever medical treatment is necessary while the child is in his (her) physical custody." It is certainly more reasonable to have both parents pay equally all major medical expenses (not covered by insurance) regardless of who has custody if treatment becomes necessary.

Id. at 1351.

60. See, e.g., Hatchett v. Hatchett, 449 So. 2d 626 (La. App. 1st Cir. 1984); Johnson v. Johnson, 444 So. 2d 283 (La. App. 1st Cir. 1983); Plemer v. Plemer, 436 So. 2d 1348 (La. App. 4th Cir. 1983).

61. Chaudoir v. Chaudoir, 454 So. 2d 895 (La. App. 3d Cir. 1984).

62. *Plemer*, 436 So. 2d at 1350.

63. See, e.g., id. at 1348.

ever, reflect more radical[64] arrangements for physical custody: for example, alternating physical custody between the parents yearly,[65] monthly,[66] or weekly.[67]

In *Turner v. Turner*,[68] the mother sought a change in custody from sole custody in the father to joint custody. The parents had agreed to sole custody due to the mother's illness. Ultimately, the court ordered joint custody under a plan which alternated physical custody of the twin boys yearly. The father on appeal argued, among other things, that the trial court had abused its discretion in awarding alternating annual custody. On the trial court's plan of implementation, the court of appeal commented: "However, while a joint custody award does not require equal physical custody, there is nothing in Article 146 which indicates that the judge acted contrary to the law, or in abuse of his discretion in making an award of equal physical custody in this case."[69]

After granting certiorari,[70] the Louisiana Supreme Court vacated the trial court's judgment ordering joint custody and remanded the case with specific instructions "not to render a joint custody decree or extensive visitation privileges to the non-custodial parent, absent a clear showing by both of the parties that they are willing and capable of serving the children to the children's best interest."[71] Specifically, the trial court was directed to determine which of the two parents—"without regard for the 'needs' of the parents—can serve better the best interest of the children."[72]

Considering all of the evidence presented, the history of child care arrangements previously established by the court, and the extensive litigation,[73] the supreme court concluded that the presumption that joint custody was in the children's best interest had been overcome. What the court observed concerning the proper application of the presumption is instructive. Recognizing that the presumption has created confusion, the court stated:

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64. In Lambert v. Lambert, 452 So. 2d 244 (La. App. 1st Cir. 1984), the court awarded joint custody, with physical custody given to the father for four weeks, and the mother for one week, on a rotating basis. Three major factors influencing the court's decision were: "1) Mrs. Lambert's drinking problem; 2) her suicide attempt; and 3) the quality of the environment offered by the parties parents." Id. at 247.

65. Turner v. Turner, 445 So. 2d 35 (La. App. 4th Cir.), cert. granted, 449 So. 2d 1342 (La. 1984).

66. Peters v. Peters, 449 So. 2d 1372 (La. App. 2d Cir. 1984).

67. Duhe v. Duhe, 451 So. 2d 1198 (La. App. 5th Cir. 1984).

68. 445 So. 2d 35 (La. App. 4th Cir. 1983).

69. Id. at 38.

70. 449 So. 2d 1342 (La. 1984).

71. 455 So. 2d 1374, 1381 (La. 1984).

72. Id.

73. Id. at 1380.

> The article 146 presumption only compels the judge to award joint custody in those cases where other things are equal; or where there is insufficient evidence to rebut the presumption; or whenever neither parent alone would be able to manage a sole custody arrangement, and where it cannot be shown that it would be detrimental to the child to remain in parental custody.[74]

The court commented that the presumption simply afforded the judge with a "first choice," or preference[75] "which choice must be rejected in the face of evidence which tends to disprove the conclusion."[76] The trial judge "cannot rest on the legislative presumption to solve its case, but must become an active participant in the case."[77] The child's well-being and health being the responsibility of the trial judge, he "sits as a sort of fiduciary on behalf of the child, and must pursue actively that course of conduct which will be of the greatest benefit to the child."[78]

Consistently with earlier court of appeal decisions, the supreme court found that the presumption was rebutted because of the serious conflicts between the mother and father, many of which involved basic issues of child rearing, such as education and discipline.[79] Furthermore, the court added that the seven-year-old twin boys are "in their *formative years* right now, and it is essential that they have a *single authority* upon which they can base their behavior and development."[80] Such a pronouncement by the supreme court is significant, especially in combination with its *emphasis* of the proposition that the paramount concern remains the best interest of the child.[81]

The decision is commendable and recognizes some of the serious concerns raised by the author in last year's symposium.[82] The carefully considered opinion by the supreme court in the *Turner* case will assist

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74. Id. at 1379.

75. La. Civ. Code art. 146 ("A. If there are children of the marriage whose provisional custody is claimed by both husband and wife, the suit being yet pending and undecided, custody shall be awarded in the following order of *preference, according to the best interest of the children*: (1) To both parents jointly . . . .") (emphasis added).

76. 455 So. 2d 1374, 1379 (La. 1984).

77. Id. at 1380.

78. Id. at 1379.

79. Id. at 1380.

80. Id. (emphasis added).

81. La. Civ. Code art. 146 ("A. If there are children of the marriage whose provisional custody is claimed by both husband and wife, the suit being yet pending and undecided, custody shall be awarded in the following order of *preference, according to the best interest of the children*: (1) To both parents jointly . . . .") (emphasis added).

82. Spaht, Developments in the Law, 1982-1983—Persons, 44 La. L. Rev. 463 (1983).

the courts in implementing controversial legislation[83] which has enormous human impact for the citizens of the state of Louisiana.

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83. In *Gaudet v. Gaudet*, Judge Savoie, dissenting, commented: "It appears that the legislative mandate giving preference to the concept of joint custody is unpalatable to the trial court and the majority of this panel. It may not be to my liking either. Yet, joint custody remains a solemn expression of legislative will which we are bound to uphold." *Gaudet*, No. 84-0032, slip op. at 4 (La. App. 1st Cir. Jun. 26, 1984) (Savoie, J., dissenting). See also discussion of trial judge's disposition of custody case under joint custody statute in Wickboldt v. Wickboldt, 448 So. 2d 254 (La. App. 1st Cir. 1984) (dissent); Pleasant v. Pleasant, 448 So. 2d 824 (La. App. 2d Cir. 1984); Carroway v. Carroway, 441 So. 2d 494 (La. App. 2d Cir. 1983); and Adams v. Adams, 441 So. 2d 490 (La. App. 2d Cir. 1983).