Joint Custody in Louisiana

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COMMENTS

JOINT CUSTODY IN LOUISIANA

With the 1981 adoption of an act authorizing joint custody of children after separation or divorce, the Louisiana legislature has created myriad complex problems which will challenge Louisiana lawyers and judges. 1 This comment will examine the historical development of child custody in Louisiana and other states, discuss the advantages and disadvantages of joint custody, review the statutory and jurisprudential enactment of joint custody in other states, analyze the Louisiana statute, and suggest some possible applications for the Louisiana attorney whose client may be a candidate for a joint custody arrangement.

Historical Development

The problem which has perplexed lawmakers and courts at least since the reign of King Solomon 2 is how to settle a dispute between two persons, both of whom seek custody of a child. More particularly, the current issue is which of two parents is entitled to custody of a child or children of the marriage when that marriage has terminated by separation or divorce. Although the question has remained the same, the answer has undergone several distinct evolutions, each of which has reflected shifts in social and economic patterns.

The Roman patria potestas concept gave the father absolute dominion over the persons and properties of his children. 3 English feudal law incorporated much of this tradition, primarily to protect and en-

1. 1981 La. Acts, No. 283. Its purpose is defined as:
   To amend and reenact Article 146, Paragraph A of Article 157, and Article 250 of the Louisiana Civil Code and to amend and reenact Articles 4031 and 4262 of the Louisiana Code of Civil Procedure, relative to custody and tutorship of children pending litigation and after separation or divorce, to provide for joint custody, to provide for natural co-tutorship, and otherwise to provide with respect thereto.


3. "The ancient Roman laws gave the father a power of life and death over his children ... all (a son's) acquisitions belonged to the father ... for his life." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *451 (G. Shanswood ed. 1860). "The oldest male ancestor not only has complete control over the persons of his descendants, even to the extent of inflicting the death penalty on them in the exercise of his domestic jurisdiction, but he alone has any rights in private law." H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 118 (1932).
sure the orderly passage of property from one generation to the next.⁴
Control over the children was incidental to the father's control over
property and to the merging of the legal identity of the wife into
the person of the husband.⁵ By the early 19th century, the mother
had gained some visitation rights and the right to custody of young
children.⁶ American courts initially adopted a similar paternal
preference but moved more rapidly than did British courts in develop-
ing the "tender years" doctrine, which presumes that very young
children require their mother's nurturing.⁷

In France, the Roman influence was also evident. The father was

⁴. W. Blackstone, supra note 3, at 451; Brosky & Alford, Sharpening Solomon's
⁵. "[T]he very being or legal existence of the woman is suspended during the mar-
rriage." W. Blackstone, supra note 3, at 441. Examples of the rigidity of the "paternal
preference rule" include The King v. de Manneville, 5 East 331, 7 Rev. Rep. 693 (K.B.
1804), in which the alien French father was given custody of an 8 month old nursing
infant whom he had taken by force from its mother after his cruelty drove her from
his home, and Ex parte Skinner, 9 Moore 278, 27 Rev. Rep. 710 (K.B. 1824), in which
the custodial father was in jail and was visited there by his mistress and 6 year old
son daily. The Court of Common Pleas obviously sympathized with the mother who
sought a change in custody, but it had no authority to remove the child from the
father or his mistress on a writ of habeas corpus and recommended she apply to
Chancery for relief. In contrast, the mother of an illegitimate child was always entitl-
ed to possession of it, according to King v. Hopkins, 7 East 579, 8 Rev. Rep. 866 (K.B.
1806). See generally Note, Joint Custody Awards: Toward the Development of Judicial
⁶. British Infants Custody Act, 1839, 2 & 3 Vict., ch. 54. This act contained the
first expression of the "tender years" policy: it allowed mothers to have custody of
the children until they reached the age of seven. This was extended in 1873 to allow
the mother to keep the child until it reached the age of sixteen. British Infants Custody
⁷. See, e.g., Magee v. Holland, 27 N.J.L. 86 (1858) (This case is interesting because
it involves a "child-napping" by the mother and the return of the children to the father.);
Latham v. Latham, 71 Va. (30 Gratt) 397 (1878) (The father has the right to custody;
the mother has no right to visitation when her intransigence has caused the separa-
tion.); Carr v. Carr, 63 Va. (22 Gratt) 168, 174 (1872) (The paramount right of the father
is recognized once the "tender nursing period has passed by."). An often-quoted case
extolling the merits of the "maternal preference rule" is Helms v. Franciscus, 2 Bl.
Ch. 544 (Md. 1830), in which the judge rhapsodized as follows:

[Even a court of common law will not go so far as to hold nature in contempt,
and snatch helpless, pulling infancy from the bosom of an affectionate mother
and place it in the coarse hands of the father. The mother is the softest and
safest nurse of infancy, and with her it will be left in opposition to this general
right of the father.

In all of these cases, the courts gave recognition to the "tender years" doctrine,
but declined to apply it to children beyond nursing age. It appears from the language
used in these cases that the judges hoped, by denying the mother's application for
custody, to force her back to the matrimonial domicile and thus encourage reconciliation.
the primary holder of la puissance paternelle; only if he could not or would not exercise it did the mother have this right. The French commentators report that by the end of the 19th century, the mother was occasionally given preference when the custody dispute involved very young children or girls. However, the maternal preference was not so pronounced in France, because the spouse who was not at fault and obtained the divorce was always awarded custody unless unusual circumstances existed.

Elements of both Anglo-American tradition and French tradition were absorbed into Louisiana law. The Anglo-American influence is evidenced by Louisiana's approach to provisional child custody pending the separation or divorce hearing; the progressive amendments to Civil Code article 146, dealing with pendente lite custody, indicate a gradual shift from the father to the mother. From 1800 to 1888 provisional custody pending litigation was granted to the husband in all cases unless it could be proved that there were "strong reasons to deprive him of it." The 1888 amendment completely reversed this by specifying provisional custody was to be given to the wife in all cases. In accord with French tradition, however, permanent custody was theoretically unaffected by paternal or maternal preferences; Civil Code article 157, which controlled permanent custody, granted custody to the spouse who had obtained the separation or divorce.

8. 1 M. Planiol, Traite elementaire de droit civil, n° 1250 & 1257 (12th ed. 1939).
9. M. Planiol, supra note 8, at n° 1637-42 & 1645-47.
12. "If there are children of the marriage whose provisional administration is claimed by both husband and wife it shall be granted to the husband whether he be plain-tiff or defendant." PROJET DU GOUVERNMENT, bk. I, tit. VI, art. 32 (1800); "whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband . . . ." LA. CIV. CODE art. 146 (as it appeared prior to 1888 La. Acts, No. 124). This language survived the 1825 and 1870 amendments. (For the above quotes, see LA. CIV. CODE ANN. art. 146, "History and Text of Former Codes" (West 1952)).
13. LA. CIV. CODE art. 146 (as it appeared in 1870).
14. LA. CIV. CODE art. 146 (as amended by 1888 La. Acts, No. 124) ("[It] shall be granted to the wife . . . . ").
16. J.F.C. v. M.E., 6 Rob. 135 (La. 1843). "In all cases of separation, the children shall be placed under the care of the party who shall have obtained the separation. . . ." LA. CIV. CODE art. 157 (as it appeared in 1888). This article retained basically the same wording from 1808 to 1970. The effect of this was to award permanent custody only to the marital partner who was not at fault in the dissolution of the marriage.
Despite this specific statutory command, however, judicial decisions granting permanent custody roughly paralleled the pattern established in cases granting provisional custody. Over an extended period of time, the father’s rights gradually yielded to those of the mother. 17 This sometimes occurred upon the recommendation of a family meeting called to decide which alternative would be most advantageous to the children. 18 Later decisions were based on the discretion given to the judge in the 1921 amendment to article 157. 19

The gradual shift away from the father’s dominance in custody of children can be partially explained by the move away from an agrarian, feudal society in which a person’s attachment to land was the basis of societal and economic rights. With an increasingly industrialized society, land ownership and its orderly transmission became less important; the father’s dominance of persons and patrimony decreased accordingly. 20 “As men began leaving their homes in order to sustain them, women became—by default—progressively more important within their confines . . . . [T]he supremacy of the

17. This is apparent in the decisions of the following cases: Gahn v. Darby, 36 La. Ann. 70 (1884) (wife’s allegations of cruelty were insufficient justification for her refusal to follow husband to new domicile; therefore father was entitled to judgment and custody of the child); Bursha v. Lane, 105 La. 112, 29 So. 712 (1901) (though father obtained separation, wife was awarded custody of child because it was only 5 years old; right of father to seek modification when child got older was expressly reserved); Copping v. Termini, 135 La. 224, 65 So. 132 (1914) (wife’s poor health required her to live with her mother, so no separation was granted to husband, and custody of child remained with mother); Laplace v. Briere, 152 La. 235, 92 So. 881 (1922) (father had been given temporary custody, but permanent custody after divorce was granted to mother who had obtained the divorce and was not shown to be unfit, nor were there greater advantages to child in entrusting it to the father).

18. Crochet v. Dugas, 126 La. 285, 52 So. 495 (1910); Bursha v. Lane, 105 La. 112, 29 So. 712 (1901). The Louisiana Civil Code used to require a family meeting to give the judge advice and counsel in many situations involving the rights of minors. This requirement was gradually dropped as the appropriate Code articles were amended. See, e.g., LA. CIV. CODE arts. 281-291 (as they appeared prior to their repeal by 1960 La. Acts, No. 30, § 2) and LA. R.S. 9:651 (1950) (“In all matters . . . the family meeting shall be abolished.”).

19. See Brewton v. Brewton, 159 La. 251, 105 So. 307 (1925) (judge used his discretionary power to give custody of child of tender years to mother). “[U]nless the judge shall for the greater advantage of the children, order that some or all of them shall be entrusted to the care of the other party.” LA. CIV. CODE art. 157 (as amended by 1921 La. Acts, Ex. Sess., No. 38). This amendment eliminated the requirement that a family meeting be called to advise the judge and authorized this action.

father was gradually eroded."21 As the mother became the primary care-giver to children, custody decisions increasingly reflected the assumption that her influence on them was paramount to their well-being.22 The "maternal preference rule," combined with the "tender years doctrine,"23 became a strong presumption in Louisiana24 and other states,25 requiring the father to prove the mother unfit if he wished to have custody. In Louisiana, when the doctrine of maternal preference was balanced against the statutory preference favoring the spouse who obtained the divorce, most courts found that the


23. British Infants Custody Act, 1839, 2 & 3 Vict., ch. 54. Basically the tender years doctrine presumes that the nursing infant requires its mother's care for sustenance and that the very young child requires a quality of love, attention and affection which only its mother has the patience and ability to give. See, e.g., Harmon v. Harmon, 264 Ky. 315, 94 S.W.2d 670 (1936); Heims v. Franciscus, 2 Bl. Ch. 544 (Md. 1830); Esposito v. Esposito, 41 N.J. 143, 195 A.2d 295 (1963); Jenkins v. Jenkins, 173 Wis. 592, 181 N.W. 826 (1921). Louisiana cases expressing the "tender years" doctrine include: Black v. Black, 205 La. 861, 18 So. 2d 321, 323 (1944) ("They are both girls of tender years and need a mother's constant care and attention."); Carlson v. Carlson, 140 So. 2d 801, 803 (La. App. 4th Cir. 1962) ("The law . . . is well-settled in the rules that it is to the best interest of young children, particularly girls, that custody be awarded to the mother."); and McManus v. McManus, 250 So. 2d 496, 501 (La. App. 1st Cir. 1971) ("Especially is the paramount right of the mother recognized where the custody of children of tender years is involved.").

24. LA. CIV. CODE art. 146 (as it appeared prior to 1979 La. Acts, No. 718, § 1) ("[I]t shall be granted to the wife . . . "). The reversal of the preference in the provisional custody article is the most obvious example, but the jurisprudence also demonstrates the almost irresistible nature of the presumption. See, e.g., Sampognaro v. Sampognaro, 215 La. 631, 41 So. 2d 456 (1949); Cannon v. Cannon, 225 La. 874, 74 So. 2d 147, (1954); White v. Broussard, 206 La. 25, 18 So. 2d 641 (1944); Jones v. Jones, 344 So. 2d 414 (La. App. 1st Cir. 1977); Williams v. Mabry, 246 So. 2d 69 (La. App. 3d Cir. 1971); Nugent v. Nugent, 232 So. 2d 521 (La. App. 3d Cir. 1970); Douglas v. Douglas, 146 So. 2d 227 (La. App. 3d Cir. 1962).

best interests of the child dictated that custody be awarded to the mother. This was true even in some cases in which the father had obtained the divorce on grounds of the mother's adultery. There were a few situations in which the mother might be denied custody: (1) when the mother was mentally unfit to care for children, (2) when the mother failed to provide a healthy and wholesome home atmosphere for the children, (3) when the mother indicated by open and flagrant adultery that she was morally unfit, or (4) when the mother abandoned the home and made no attempt to seek custody of the children.

The exceptions to the maternal preference rule gradually became more frequent, courts began to take tentative steps away from reliance on maternal preference as a "bright line" rule, while moving in the direction of analysis of multiple factors to help determine the actual "best interest of the child." Many states codified the best in-


32. Note that most of the cases cited in notes 26-29, supra, were decided within the last decade, indicating a gradual movement away from the strict application of the maternal preference rule.

33. The "best interest of the child" has been the stated standard for custody decisions at least since the early 19th century. "[T]he courts will exercise a sound discretion for the benefit of the children . . ." W. Blackstone, supra note 3, at 451 n.10; " . . . a moins que le tribunal, sur la demande de la famille ou du ministere public n'ordonne pour le plus grand advantage des enfants, que tous ou quelgues-un d'eux seront confies aux soins soit de l'autre epoux . . ." Nouveau Code Civ., supra note 11, art. 302 (emphasis added). See Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813) & Chapsky v. Wood, 26 Kan. 650 (1881) for early expressions of this standard in American courts.
terest standard in their statutes, and some listed various inquiries to be made by the court in applying this test. In Louisiana, this standard, though not yet codified, was used to mitigate the otherwise rigid application of article 157, which required the grant of custody to the spouse who obtained the divorce. The strength of the maternal preference rule was so great, however, that even when a number of factors were evaluated, the scales usually tipped in favor of the mother. For many judges, the “best interest” standard was inextricably bound up with the maternal preference rule, such that inevitably it was considered in the best interest of a child to be with the mother.

Recent increased attention to equal rights has fostered a reevaluation of the statutory scheme controlling divorce and custody. The feminist movement and the civil rights movement forced courts to discard some of the presumptions which had resulted in unequal or discriminatory treatment. In response, most states amended their custody statutes and judges were forced to justify their custody deci-

34. See, e.g., CAL. CIV. CODE § 4600(b) (West Supp. 1982) (“according to the best interest of the child”); CONN. GEN. STAT. ANN., § 46b-56(b) (West Supp. 1982) (“the court shall be guided by the best interest of the child”); HAWAII REV. STAT. § 571-46(1) (Supp. 1981) (“according to the best interests of the child”); KANS. STAT. ANN. § 60-1610(b) (1976) (“the court shall consider the best interest of such children to be paramount”); MASS. ANN. LAWS ch. 208 § 31 (Michie/Law. Co-op Supp. 1982) (“the happiness and welfare of the children shall determine their custody or possession”).

35. See, e.g., KY. REV. STAT. ANN. § 403.270 (Baldwin Supp. 1979); MICH. COMP. LAWS ANN. § 722.23 (Supp. 1982); MINN. STAT. ANN. § 518.17(1) (West 1982).

36. See text at note 24, supra.

37. See, e.g., Partin v. Partin, 339 So. 2d 450 (La. App. 1st Cir.), writ denied 341 So. 2d 419 (La. 1976); Note, A Case For Joint Custody After the Parents’ Divorce, 17 J. FAM. LAW 741, 748 (1978-79).

38. “Probably most judges sincerely believe that children . . . properly and naturally belong with their mothers, and that it would be contrary to their best interests to award . . . custody to the father unless the mother is shown to be unfit.” Foster & Freed, supra note 22, at 27.


41. See, e.g., KAN. STAT. ANN. § 60-1610(b) (1976) (“either parent shall be considered
sions in the light of these new provisions. The Louisiana Legislature reacted to this trend by amending article 157 in 1977 to specifically permit permanent custody awards to either the husband or wife. This rejected by implication the prior “fault-based” criteria and made it appear that the “best interest of the child” standard was to be the sole criterion for custody awards. In Act 718 of the 1979 regular session, the legislature strengthened the “equal right to custody” provision in article 157 by adding the words “without any preference being given on the basis of the sex of the parent.” This act also amended the provisional custody article to eliminate the maternal preference it had expressed. Subsequent Louisiana decisions interpreted these changes as clear signals of the legislative intent to overturn the maternal preference rule.

Perhaps in response to the new freedom from rigid maternal

to have a vested interest in the custody of any such child as against the other parent”); KY. REV. STAT. ANN. § 403.270(1) (Baldwin Supp. 1979) (“and equal consideration shall be given to each parent”); MASS. ANN. LAWS ch. 208 § 31 (Michie/Law. Co-op Supp. 1982) (“the rights of the parents shall, in the absence of misconduct, be held to be equal”); 1981 MINN. SESS. LAW SERV. § 518.17 subd. 3 (West) (“and shall not prefer one parent over the other solely on the basis of the sex of the parent”).


43. 1977 La. Acts, No. 448, § 1: “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.”

44. See note 16, supra.

45. Comment, Selected Legislation of the 1979 Regular Session—A Student Commentary, 40 LA. L. REV. 473 (1980). In spite of the clear implication of the amendment, the Louisiana circuit courts were split as to whether the 1977 amendment abrogated or codified the maternal preference rule. Id. at 475. Later amendments eliminated any possible confusion.


47. 1979 La. Acts, No. 718, § 1: “If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, . . . it shall be granted to the husband or the wife, in accordance with the best interest of the children.”

Act 718 also added to article 146 the requirement that, “[i]n 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.” See text at notes 12-14, supra.

48. “It could hardly be more clear that the legislative intent is to do away with any legal preference or presumption in favor of the mother in custody disputes. The father and mother stand on equal footing at the outset . . . .” Thornton v. Thornton, 377 So. 2d 417, 420 (La. App. 2d Cir. 1979); “Louisiana Civil Code article 146 . . . and article 157 . . . were amended in 1979 to eliminate any legal preference in favor of the mother in custody disputes.” Burch v. Burch, 398 So. 2d 84, 86 (La. App. 3d Cir. 1981).
preference or perhaps as a reaction to the changing demographics of family life in the United States, courts in many states began to allow divorcing couples to experiment with alternatives to sole custody. These alternatives have been variously described as co-parenting, split custody, divided custody, alternate custody, and joint custody. Regardless of the label affixed to them, these agreements usually include two distinct elements: each parent retains his or her legal rights and responsibilities with respect to the children, and each parent retains sufficient access or physical contact with the children so that his or her parent-child relationship can be sustained. Increasingly, parents are asserting and courts are agreeing that joint custody, rather than sole custody, is in the best interest of the child.

Controversy Over Joint Custody

No consensus of opinion has arisen concerning alternative custody arrangements. Some strong arguments against joint custody,
however, have been made. Probably the most common such argument is what might be called the "yo-yo" argument—it is not good for the child to be shuttled back and forth between two homes. The argument postulates that such movement of the child involves not only a physical dislocation for him, but also a mental disorientation because of the parents' conflicting sets of behavior expectations. Proponents of alternative custody arrangements have generally agreed that if the parents cannot work out a reasonable logistical setup, joint custody may not be workable. For instance, most recommend that school-age children not be switched from one school to another; as a consequence, divided custody has often been on a nine months/three months basis or has required both parents to be within commuting distance of the child's school.

Another major argument against joint custody is that it is illogical to expect two people who could not get along during marriage to sud-

is never good for the child was strongly expressed in BEYOND THE BEST INTERESTS OF THE CHILD, whose authors contend that a child cannot relate in a healthy way to two conflicting adults. They recommended that, in all custody dispositions, one parent should maintain exclusively his parental rights and the other parent should be essentially excluded from the child's life. J. Goldstein, A. Freud & A. Solnit, BEYOND THE BEST INTERESTS OF THE CHILD, 37-38 (1973). The split in opinion occurs also among other professionals working with families, as evidenced by Parley, Joint Custody: A Lawyer's Perspective, 53 Conn. B.J. 310 (1979) which is highly favorable to joint custody, and on the other side, Levy & Chambers, The Folly of Joint Custody, 69 Ill. B.J. 412 (1981), which refers to joint custody as a "placebo."

54. "It is argued that joint custody between parents usually requires that 'shutting back and forth' of the children which must inevitably lead to the lack of stability in home environment which children require." This was only one of many factors considered by the court in an extremely well-written and carefully reasoned decision. Dodd v. Dodd, 93 Misc. 2d 641, 645-46, 403 N.Y.S.2d 401, 404 (1978). "Children need a home base." Braiman v. Braiman, 407 N.Y.S.2d 449, 451 (1978); "Nothing can be more demoralizing . . . than to have children . . . going from one home to another each month." Towles v. Towles, 176 Ky. 225, 228, 195 S.W. 437, 438 (Ky. Ct. App. 1917).

55. In rejecting any divided custody awards, Louisiana courts consistently reiterated the idea that children should not be subjected to a division of authority over them. Woods v. Woods, 253 So. 2d 230 (La. App. 2d Cir. 1971); Ogden v. Ogden, 220 So. 2d 241 (La. App. 1st Cir. 1969); Bowlin v. Bowlin, 222 So. 2d 637 (La. App. 2d Cir. 1969). Other courts have also referred to the detrimental results of conflicting authority figures. Phillips v. Phillips, 153 Fla. 133, 13 So. 2d 922 (1943); Dunn v. Dunn, 217 S.W.2d 124 (Tex.1949); M. Morgenbesser & N. Nehls, supra note 52, at 70-71.

56. M. Roman & W. Haddad, supra note 21, at 118; Foster & Freed, supra note 22, at 27 & 31.


58. See Mansfield v. Mansfield, 230 Minn. 574, 42 N.W.2d 315 (1950); Larson v. Larson, 176 Minn. 490, 223 N.W. 789 (1929).
denly become cooperative in joint decision-making for their children.\textsuperscript{59} On the other hand, proponents suggest that the adversary nature of custody disputes aggravates the already tense situation which faces a divorcing couple, and joint custody will alleviate this strife.\textsuperscript{60} When a couple has agreed to joint custody, there is no winner or loser. Each parent maintains legal parental rights without being forced to prove that the other is unfit.\textsuperscript{61} However, even the strongest advocates of joint custody agree that its feasibility is enhanced if the parents can separate the shattered husband-wife relationship from the intact parent-child relationship.\textsuperscript{62}


\textsuperscript{60} J. Noble & W. Noble, The Custody Trap 160 (1975) ("If custodial care were to be considered a joint responsibility in divorce, as it is in marriage, there would be less opportunity for enmity to replace cooperation.") (quoted in Folberg & Graham, supra note 20, at 550). A similar viewpoint is expressed by Morgenbesser and Nehls: "Joint custody may actually enhance the relationship between divorcing parents. A custody fight is avoided and child-rearing remains a mutual task which necessitates cooperation, communication and respect." J. Morgenbesser & N. Nehls, supra note 52, at 66.

\textsuperscript{61} Realistically, however, if both parents have an equal statutory right to custody, the courts must examine and compare the fitness of both parents in order to reach a decision. The Michigan custody statute, for instance, lists a number of factors which must be used by the judge in deciding what constitutes the best interest of the child. Among them are:

(a) the love, affection and other emotional ties existing between the parties involved and the child.

(b) the capacity and disposition of the parties involved to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

(f) the moral fitness of the parties involved.

\textsuperscript{62} Grief, Joint Custody: A Sociological Study, 15 Trial 32, 33 (1979). The author described a study of joint custody conducted in metropolitan New York in 1976-77. One of the conclusions was that even parents whose relationship with each other was hostile and recriminatory could learn to separate "their marital issues from the parental issues." This was possible if each loved the child enough to put up with the inconvenience of contact with the other and if each recognized that the child was safe and well cared for with the other parent. California has established conciliation courts which are available to parents who find that they are unable to agree upon a major
A third potential problem with joint custody arrangements involves the remarriage or relocation of one or both parents. The parent seeking to remarry or relocate may find himself in a serious predicament, forced to choose between his child and his new job or new relationship. Some courts have found remarriage or relocation a "material change in circumstances" which would justify a modification of the custody award. Other courts have used the relocation of one spouse to justify an award of divided custody, such that each parent is full custodian for a portion of the year, reasoning that great distance between the parents would make visitation impractical. Some states have dealt with these potential problems by statutory conflict-resolution methods.

In spite of the problem areas, there are many reasons why joint custody is a preferred alternative to sole custody with visitation. The most important argument in favor of joint custody is that it allows the child to have a continuing, regular relationship with both parents. Sociologists and psychologists have emphasized that the child's proper gender identification is enhanced by regular contact with his mother and father, who serve as appropriate role models.

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63. In re Osborn, 604 P.2d 954 (Wash. Ct. App. 1979) (court denied mother's request to move from Seattle to Iowa to accept a new job, reasoning that joint custody implied a continuing relationship with the father). However, this choice may face the custodial parent in a sole custody situation also. In Thompson v. Thompson, 338 So. 2d 1186 (La. App. 2d Cir. 1976), the father unsuccessfully sought a change in custody because the mother was away from the children several nights each week spending time with her boyfriend. And in Lloyd v. Lloyd, 313 So. 2d 854 (La. App. 2d Cir. 1975), the husband sought to impose a geographical restriction on the custody agreement when the wife indicated her intent to move to Florida to remarry.

64. Ramsden v. Ramsden, 32 Wash. 2d 603, 202 P.2d 920 (1949) (remarriage of mother constitutes a material change in circumstances for court to consider); cf. Broomfield v. Broomfield, 283 So. 2d 839 (La. App. 2d Cir. 1973) (court can allow custodian to move to another state if custodian had good reason to relocate and it is in best interest of the child).

65. Maxwell v. Maxwell, 351 S.W.2d 192 (Ky. 1961); Patrick v. Patrick, 17 Wis. 2d 434, 117 N.W. 2d 256 (1962).

66. The California statute refers such questions to conciliation courts. CAL. CIV. CODE 4600.5(f) (West Supp. 1982). Lacking this alternative, the parties may agree to submit controversies to arbitration. Trombetta, supra note 20, at 228.

67. "[E]very such child is entitled to the love, nurture, advice, and training of both father and mother. . . ." Brock v. Brock, 123 Wash. 450, 452, 212 P. 550, 551 (1923); "Since the child is entitled to the love, advice and training of both father and mother, divided custody is not wrong in principle if the best interests of the child are thereby subserved." Sneed v. Sneed, 248 Ala. 88, 26 So. 2d 561, 562 (1946).

68. See Trombetta, supra note 20 at 219; "The research on children of divorce clearly indicates that those children do best who have open and continuous access
extensive visitation rights theoretically accomplish this effect, studies have indicated that the non-custodial parent gradually becomes less involved with the child. This inevitably leads to a "loss" of one parent for the child, inducing trauma similar to that suffered at the death of a loved one. This feeling is intensified if the child feels guilt from being forced to make an emotional or physical choice of one parent over the other. Joint custody can avoid this anguish for the child, because he is allowed to "keep" both parents and does not have to choose one and lose the other.

Another favorable aspect of joint custody is that divorcing parents are not as tempted to use the child as a "pawn" in their negotiations. If one parent does not "win" the child, neither does the other parent "lose" the child; thus, both parents are allowed to retain dignity in the separation and divorce process. Also, a major source of leverage available to the sole custodial parent is removed; one parent no longer has power over the visitation privileges of the other. In the past, the non-custodial parent had few legal rights with respect to the child and had to resort to the courts to enforce those rights he did have.

69. As a practical matter, if a court does not allow a father to have the custody of a child part of the time it is probable that his interest in the child will gradually fade, and the mother may have difficulty in collecting alimony and child support. Annot. 92 A.L.R.2d 559, 705; "Fathers regularly ignore their court-ordered responsibility for child support payments. Apparently, they feel they have not only divorced their wives, but also their children." Bratt, supra note 49, at 275; Grief, supra note 62 at 32.

70. "The children often feel abandoned and rejected. It shakes their basic sense of security to see someone they have loved and trusted gone from their lives." Bratt, supra note 49, at 297; "Many of their (children's) problems are related to the perceived loss of one parent typically resulting from sole custody arrangements." M. MORGENBESSER & N. NEHLS, supra note 52, at 60.

71. "Joint custody removes the feeling that a child needs to make such a choice." M. MORGENBESSER & N. NEHLS, supra note 52, at 64. The child "sees that he can love one parent without being disloyal to the other." Note, supra note 59, at 333-34. See also Trombetta, supra note 29, at 231.

72. Note, supra note 59, at 333-34. The article cites a study of 165 Michigan children in grades three through six from both divorced and intact families. A majority of the children indicated a preference for joint custody with physical custody alternating twice weekly. Id. at 334 n.66.

73. M. MORGENBESSER & N. NEHLS, supra note 52, at 66.

74. "If anything, sole custody exacerbates parental conflict and the children are often used by the mother as a club." M. ROMAN & W. HADDAD, supra note 21, at 117.

75. As the court stated in Johnson v. Johnson, 214 La. 912, 922, 39 So. 2d 340, 343 (1949), it is always preferable for the parents to mutually agree on the question of the father's right to visitation, "without the necessity of forcing one or the other to apply to the court for modification . . . ."
With joint custody, if one parent proves uncooperative in carrying out the agreement, the court may decide to grant sole custody to the other parent. This would reward good-faith efforts to make joint custody work and discourage a "tug-of-war" situation with the child in the middle.

Aside from its impact on the child, joint custody may also work to the advantage of both parents. In sole custody, the custodial parent bears alone the burden of decision-making, emotional support, and physical care of the child. Also, the sole custodian usually has to work to support the children adequately. The imposition on the custodial parent's time and energy often leaves little opportunity to develop new relationships with other adults. Joint custody offers some relief from this problem. Both parents are available to share the difficult decisions; both contribute some of their emotional and physical energies to the child; both are involved in the daily discipline, education, and development of the child. Also, because each parent has some "time-out" while the other is caring for the child, both should find it easier to pursue their own interests and establish or maintain friendships.

Joint custody relieves the trauma which is usually experienced by the non-custodial parent. Because neither parent "loses" his child, there is not this additional source of distress during and after the

76. A preliminary draft of the California statute included the statement that when modification of joint custody is sought, "The court may consider, among other factors, evidence of any substantial or repeated failure of a parent to adhere to the plans . . . ." CAL. S.B. 477 (1979-80), quoted in Lemon, supra note 20 at 493-94 n.48. Although this factor was not included in the final draft of the California statute, one director of the Conciliation Court of Los Angeles County has expressed the opinion that if joint custody breaks down because of the intransigence of one party, sole custody will be awarded to the party who did not cause the failure. Folberg & Graham, supra note 20, at 551.

77. See M. ROMAN & W. HADDAD, supra note 21, at 73-79. The authors list numerous problems faced by the sole custodian. These include for mothers: the economic problem caused by being forced to take a job which is usually at low-pay; and for fathers or mothers: the need for child care services during working hours, sole decision-making responsibility, possible deterioration of the parent-child relationship as one parent tries to fill all roles, discipline problems, lack of a social life with adults, lack of intimacy, presence of stress, and feelings of being in an emotional vacuum due to incomplete relationships.

78. Id.

79. Id.

80. See Folberg & Graham, supra note 20, at 553-56; Bratt, supra note 49, at 301.

81. Id.

82. The reaction to this trauma has been a surge in "father's rights" advocates. See Solomon, supra note 40, at 33.
divorce. Neither parent is relegated to the status of a mere "visitor" in his child's life. Joint custody can alleviate the bitterness and resentment commonly felt by non-custodial parents whose parental rights have been curtailed by a sole custody decree.

Joint custody is a relatively new phenomenon in the sense that it has only recently attracted public attention and approbation. Consequently, it remains to be seen whether joint custody really is a viable, practicable alternative for most divorcing couples or whether it will remain an unusual choice which only the rare couple is able to actuate and maintain. Both its proponents and opponents await further experimentation by divorcing parents to determine the viability and practicality of joint custody.

Experience of Other States

Statutory custody provisions of the states fall into four main categories: (1) statutes which establish a presumption that joint custody is in the best interest of the child in certain circumstances, (2) statutes which mandate that joint custody be considered before sole custody, (3) statutes which merely allow joint custody as a possible alternative, and (4) visitation provisions which indicate that the non-custodial parent has extremely limited access to the child. See, e.g., Litton v. Litton, 299 So. 2d 458 (La. App. 2d Cir. 1974) (visitation was limited to one weekend per month, Christmas every other year, and two weeks during summer). And in Ogden v. Odgen, 220 So. 2d 241 (La. App. 1st Cir. 1969), the court held that visitation rights of father for the first and third weekends of each month was excessive and amounted to prohibited divided custody.

Though a few courts have experimented with divided custody in one form or another, most of the statutory provisions have been enacted since 1979, and most of the articles and books also have been written since then. See, e.g., Conn. Stat. Ann. § 46b-56 (Supp. 1982); Hawaii Rev. Stat. § 571.46 (Supp. 1982).

"Presumptive" joint custody is established in: Cal. Civ. Code art. 4600.5 (West 1982) ("where the parents have agreed"); Conn. Gen. Stat. Ann. 46b-56 (as amended by Pub. Act 81-402) ("where the parents have agreed... or so agree in open court"); Mich. Comp. Laws Ann. § 722.26a (1982) (this statute is almost a mandate: (1) "In custody disputes, the parents shall be advised of joint custody," (2) "If the parents agree on joint custody, the court shall award joint custody.").

"First" joint custody is found in: Cal. Civ. Code art. 4600(b) (West Supp. 1982) ("in the following order of preference... (1) to both parents jointly... or to either parent") & N.M. Stat. Ann. § 40-4-9.1 (Supp. 1982) ("the court should first consider an award of joint custody").

and (4) statutes which contain no specific statement concerning joint custody. 88

Prior to 1980, very few states had statutory statements concerning joint custody; those states with such statements merely allowed joint custody as an alternative to sole custody. 89 However, in several other states the courts occasionally allowed joint custody despite the lack of specific authorization in their custody provisions. 90 In others, the courts looked upon any form of divided custody with disfavor and interpreted their custody statutes as prohibiting it 91 unless exceptional circumstances were shown. Their reasoning usually took the form that whatever was not expressly allowed was impliedly negated. It is difficult to draw any conclusions about joint custody's relative effectiveness from the reported cases, even after canvassing decisions from those states whose statutes or jurisprudence allow joint custody, because only those cases in which a dispute arises return to court for resolution. Consequently, the courts see and report only the small percentage of cases in which custody arrangements have broken down. 92 Prior to the 1981 amendment, Louisiana courts categorically

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90. For an extensive list of the cases in which some form of divided custody has been allowed by the courts, see Annot. 92 A.L.R.2d 696-745 (1963).


92. Bratt, supra, note 49, at 284: "Because of their very nature, shared custodial arrangements where proposed by the parents and approved by the courts are not appealed . . . . In such circumstances, where one party has appealed the trial court's decision, the appellate court has reason to question the appropriateness of a shared custody arrangement."
rejected any form of custody which even resembled divided custody. As a result, there are no recorded cases in Louisiana which can provide some idea of the success or failure of this type of arrangement.

*Louisiana Statutes’ Major Provisions*

Under the new provisions of articles 146 and 157, joint custody means that the parents “may share” the physical custody of the

93. See, e.g., Bowlin v. Bowlin, 222 So. 2d 637 (La. App. 2d Cir. 1969); Ogden v. Ogden, 220 So. 2d 241 (La. App. 1st Cir. 1969). Although Louisiana courts could not formally order joint custody, some Louisiana parents apparently achieved “de facto” joint custody by agreement. Legal custody had to be awarded to one or the other parent, but the court might allow parents to establish details of a visitation arrangement approximating joint custody. Hansen, Joint Custody Done Informally in Louisiana, State-Times, April 4, 1980, at 3-B.

94. *La. Civ. Code* art. 146:

A. 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, or if 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. In all cases, the court shall inquire into the fitness of both the mother and father and shall award custody to such parent or to both parents, if they agree to joint custody, as 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.

B. An award of joint custody shall be made only when both 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. For purposes of this article “joint custody” shall mean the husband and wife may share the physical custody of children of the marriage and shall enjoy the natural co-tutorship of such children in accordance with Article 250.


A. In all cases of separation or divorce, and change of custody after an original award, permanent custody of the child or children shall be granted to the husband or the wife, or to both jointly by agreement of both the husband and wife, in accordance with the best interest of the child or children; however, an award of joint custody may be granted only when the husband and wife are both domiciled in the state of Louisiana. If either parent changes his or her domicile to another state the other may petition for sole custody. No preference shall be given on the basis of the sex of the parent in cases where custody is awarded to only one parent. Such custody hearing may be held in private chambers of the judge.

B. In all cases in which the custody of the child or children is awarded to one parent, the parent with legal custody shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died. In all cases in which the custody of the child or children is awarded jointly to both parents, they may share the physical custody of the child or children and shall be entitled to become the natural cotutors of such child or children in accordance with Article 250.
children and "shall" enjoy or be entitled to natural co-tutorship. Several requirements must be met before the court can award joint custody, either provisionally or permanently. These requirements are: (1) both parents must agree to joint custody; (2) the best interest of the child must be met by such an award; and (3) both parents must be domiciled in Louisiana. Apparently, the court will not have discretion to award joint custody when only one parent requests it or to impose it when neither parent requests it, even if it appears that the best interest of the child would be served thereby. All three of these requirements must be met to satisfy the statutory standards.

According to article 250, the co-tutorship of the child will belong to both parents upon an award of joint custody. The statutory definition of co-tutorship is that both parents shall have "equal authority, privileges and responsibilities" with regard to the minor child. This

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96. LA. CIV. CODE art. 146.
97. LA. CIV. CODE art. 157.
98. LA. CIV. CODE art. 146 ("if both husband and wife agree to joint custody"); LA. CIV. CODE art. 157 ("or to both jointly by agreement of both the husband and wife").
99. LA. CIV. CODE art. 146 ("and the court deems it in the best interest of the children"); LA. CIV. CODE art. 157 ("in accordance with the best interest of the child or children").
100. LA. CIV. CODE art. 146 ("shall be made only when both husband and wife are domiciled in the state of Louisiana"); LA. CIV. CODE, art. 157 ("may be granted only when the husband and wife are both domiciled in the state of Louisiana").
101. Court imposed joint custody is strongly recommended in Danzig, Presumptive Joint Custody, 105 N.J.L.J. 289 (April 3, 1980). Danzig reasons that the imposition of joint custody when only one parent or neither parent requests it cannot be any worse than the imposition of sole custody to one parent when both have requested it. He concludes that such an award will force both parents to overlook their personal animosities in order to achieve the stated goal of all custody decisions, namely the innocent child's welfare.
102. One court went so far as to impose joint custody because the parents were so hostile that sole custody with visitation was not workable. Therefore, each parent was given partial or divided custody. Scott v. Scott, 240 Pa. Super. 65, 368 A.2d 288 (1978).
103. LA. CIV. CODE art. 250.

Upon the death of either parent, the tutorship of minor children belongs of right to the other. Upon divorce or judicial separation from bed and board of parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted; however, if the parents are awarded joint custody of a minor child, then the cotutorship of the minor child shall belong to both parents, with equal authority, privileges, and responsibilities, unless modified by agreement of the parents and approved by the court awarding joint custody.

All those cases are called tutorship by nature.
104. LA. CIV. CODE art. 250.
is similar to the definition of “joint legal custody” found in other states’ statutes.105

Potential Problems with Louisiana Joint Custody

Louisiana’s new joint custody provisions pose several major potential problems. Lawyers and judges must be aware of gaps in this legislation in order to minimize problems through carefully structured joint custody arrangements. The statutes are broadly worded; therefore, substantial jurisprudential interpretation and clarification will be required. The areas addressed in the following discussion are: (1) the lack of clear standards for joint custody, (2) the domicile restriction, (3) natural co-tutorship, and (4) the joint custody agreement.

The Lack of Clear Standards for Joint Custody

The first problem facing lawyers and judges concerns the standards by which the custody decision will be made. The “best interest of the child” is still the controlling standard for all custody awards, including joint custody.106 However, this is a vague and undefined standard which historically has been interpreted to accord with various social theories and presumptions.107 Several other states have provided guidelines to aid the court in deciding just what the “best interest of a child” may be.108 Lacking these, Louisiana judges will have to establish some valid criteria upon which to base custody decisions. A look at some of the specific factors listed in the statutes of other states may provide direction for the Louisiana courts. The Kentucky statute describes these factors as:

(a) the wishes of the child’s parent or parents as to his custody;
(b) the wishes of the child as to his custodian;
(c) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
(d) the child’s adjustment to his home, school, and community; and
(e) the mental and physical health of all individuals included.109

105. MINN. STAT. ANN. § 518.003, Subd. 3(b) (West Supp. 1982) (“‘Joint legal custody’ means that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child’s upbringing, including education, health care and religious training.”).
106. LA. CIV. CODE arts. 146 & 157.
107. See text at notes 32-38, supra.
108. See also MICH. COMP. LAWS AN. § 722.23 (Supp. 1981); MINN. STAT. ANN. § 518.17, subd. 1 (West Supp. 1982).
Though not required or enumerated in the Louisiana joint custody legislation, consideration of all of the above factors would aid the courts in determining in each case what actually is the “best interest of the child.” By providing such factors for consideration, the reliance on a single presumption can be avoided.

One inquiry which is required by the Louisiana statute in all provisional custody cases is an examination of the fitness of both the mother and the father. Unfortunately, the statute does not define “fitness,” nor does it suggest how these findings are to be applied by the judge, other than to suggest that parental fitness is in some way tied into the best interest of the child. The jurisprudence variously has interpreted this statutory fitness as physical, economic, mental, or moral fitness, with emphasis on the latter. But none of these factors, taken singly, is an adequate description of fitness to act in the best interest of the child. It may be appropriate to examine all of these qualities when making this evaluation. A perplexing problem which has arisen in other states concerns granting joint custody when both parents are unfit. Some courts have granted joint custody in such situations, perhaps in the hope that by lessening the burden on each parent, each will be better able to fulfill his or her duties as a “part-time parent,” although neither is qualified to be sole custodian. However, it seems more reasonable to avoid joint custody under these circumstances, because joint custody exacerbates the child’s difficulties by forcing him to endure a double dose of poor parental influence. Most proponents of joint custody

110. LA. CIV. CODE art. 146.
112. Creed v. Moriarty, 244 So. 2d 286 (La. App. 3d Cir.), writ refused 258 La. 351, 246 So. 2d 199 (1971).
117. One Louisiana case indicated that when both parents were unfit, the mother would get custody. Porter v. Porter, 295 So. 2d 860 (La. App. 2d Cir. 1974). Another awarded temporary custody in this circumstance to the grandparents, which was later modified to give it to the “rehabilitated” mother. DeCelle v. DeCelle, 313 So. 2d 634 (La. App. 2d Cir. 1975).
118. See Foster & Freed, supra note 22, at 28; Parley, supra note 53, at 319.
envision it as a feasible option only when both parents are fit, and the Louisiana statute can only be logically applied if the assumption is made that both parents are required to be fit parents in order to qualify for joint custody.

Finally, even if both parents are fit and the other statutory requirements are met, there is no indication of how the court is to determine that joint custody, rather than sole custody, is in the best interest of the child. Several states have established an evidentiary presumption that joint custody is in the best interest of the child when both parents request it. Some states have also provided that an investigation or conciliation attempt can be ordered to assist the parents and the judge in making this decision. Others have listed a number of "best interest" factors and have specified additional inquiries to be made in order to compare the relative advantages of sole and joint custody. The Minnesota statute, for example, lists these additional factors as:

(a) the ability of parents to cooperate in the rearing of their children;
(b) methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods; and
(c) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing.

An additional factor to be considered by the Louisiana judge involves how carefully the parents have delineated the logistical arrangements and division of responsibilities, since future conflicts in these areas can be avoided. The Louisiana courts do not have the benefit of clear statutory guidelines in comparing joint and sole custody, but selective "borrowing" of such factors from other jurisdictions can fill this gap.

Domicile Restriction

The statutes' requirement that both parents be domiciled in Louisiana presents a second major problem. At first glance, this re-

120. HAWAII REV. STAT. § 571-46.1 (Supp. 1981) (investigation); CAL. CIV. CODE § 4600.5(b) (investigation) and (f) (conciliation) (West Supp. 1981).
121. MICH. COMP. LAWS ANN. § 722.26a, sec. 6a(1)(a)& (b) (Supp. 1982).
122. MINN. STAT. ANN. § 518.17, subd. 2 (West Supp. 1982) (factors when joint custody is sought) (added by amendment in ch. 349, 1981 Session, 72d Legislature).
123. LA. CIV. CODE arts. 146 & 157.
requirement appears justifiable as a simple, common-sense way to make shared physical custody easier for the child and parents. For instance, if a particular custody agreement contemplates weekly transfers from one home to the other, the parents must live within the same community or geographical area in order to minimize the transportation problem and keep the child in one school.124 But if practical necessity is the primary reason for the domicile requirement, the rationale is undermined by the statutory definition of joint custody, which makes shared physical custody discretionary, not mandatory.125 As a practical matter, "same" domicile would seem to be unnecessary if the joint custody agreement contemplates only a sharing of legal rights and responsibilities with little or no sharing of physical custody. But as a legal matter, this requirement has stronger justification. The most probable reason for the Louisiana domicile requirement is the state's interest in safeguarding the welfare of minor children domiciled in the state. Continued supervision over the custodians and child is facilitated if all remain Louisiana domiciliaries; domicile ensures that Louisiana courts will be able to exercise jurisdiction over all the parties.

Regardless of how it is justified, however, the limitation on domicile appears to raise more questions than it solves. Both the provisional and permanent custody statutes contain the stipulation that "[i]f either parent changes his or her domicile to another state, the other may petition for sole custody."126 The jurisprudential rule has always been that either spouse may request a change in custody upon a showing of materially altered circumstances,127 but the implication of the new provision is that only the "staying" parent will have the right to seek this modification of the custody arrangement. Narrowly interpreted, this statutory language would give undue leverage to the "staying" parent and would unnecessarily restrict the right of the "moving" parent to petition for sole custody, even when altered circumstances require the change of domicile in the best interest of the

124. See Kilgore v. Kilgore, 54 Ala. App. 336, 308 So. 2d 249 (1975) (the court noted that shifting back and forth would usually be detrimental but due to the proximity of the parents' homes in this case, the joint custody order was upheld).
125. LA. CIV. CODE arts. 146 & 157 (parents "may share" physical custody of the child).
126. LA. CIV. CODE arts. 146 & 157.
127. For a while, this change in circumstances was called the "double burden rule" since it required a showing that conditions under which the child was presently living were detrimental to him and that the applicant could provide a better environment. Lagrone v. Lagrone, 311 So. 2d 290 (La. App. 2d Cir.), writ denied 313 So. 2d 839 (La. 1975). However, a later decision indicated that this burden was no longer applicable. Bordelon v. Bordelon, 381 So. 2d 871 (La. App. 3d Cir.), aff'd 390 So. 2d 1325 (La. 1980).
child. The statutory language is overly broad if given this construction by the courts.

In another sense, the statute is *under-inclusive*. The permissive “may petition” language of the statute leaves the door open for the “staying” parent to consent to continuing joint custody in spite of the other parent’s move. By choosing not to petition for sole custody, the “staying” parent can give tacit consent to the other’s move. Thus, as a practical matter, the provision does little more than indicate legislative disapproval of long-distance joint custody. Perhaps the provision should not be accorded any more weight than as such an expression of disapproval.

To remain consistent with the jurisprudence, each spouse should retain the right to petition the court for sole custody. Such consistency could be achieved by interpreting the “domicile” phrase as merely permissive for the “staying” spouse, but not necessarily as denying or limiting the right of the “moving” parent to so petition. By emphasizing the right of the “staying” spouse, the phrase may also imply that the “moving” parent has breached an implied obligation of the joint custody agreement to remain in Louisiana. This may give the “staying” spouse a legal advantage in seeking sole custody by providing a strong factor to be weighed by the court in reaching its decision.

Another problem with the statute is its lack of standards or criteria for evaluating the “staying” parent’s petition for sole custody. “Material change in circumstances” has been the normal jurisprudential justification for modifying custody, but the statute seems to suggest that one parent’s change of domicile to another state may be, in itself, sufficient evidence of changed circumstances. But if one parent’s move becomes the “per se” criterion for changing joint custody to sole custody, the best interest of the child may be thwarted.

128. LA. CIV. CODE arts. 146 & 157.
129. See text at notes 154-56, infra, for a discussion of express consent.
130. One case suggested several factors for consideration by the court, such as the comparative age and sex of the child and each parent, physical and emotional characteristics of the child and each parent, comparison of present and proposed environment, and length of time the child had been in his present environment. Languirand v. Languirand, 350 So. 2d 973 (La. App. 2d Cir.), writ denied 352 So. 2d 236 (La. 1977). More often, however, the courts have merely stated the general requirement of material change in circumstances. King v. King, 245 So. 2d 560 (La. App. 3d Cir. 1971).
131. Some consideration should also be given in such cases to the “best interest of the parents.” It may be that the joint custody terms regarding legal and physical custody can be interpreted to accommodate the needs of the “moving” parent without infringing on the custodial rights of the “staying” parent.
In addition, the statute is unclear regarding the proper outcome of the "staying" parent's petition for sole custody. Its language suggests that the "staying" parent should be the one to whom sole custody is automatically granted. However, this has punitive overtones which are out of place in a decision-making process which is ostensibly concerned only with the child's welfare. On the other hand, lacking a clear statutory indication concerning the preferred outcome of the "staying" parent's petition, a judge may, in the exercise of his discretion, award sole custody to the "moving" parent. Assuming this result is possible, there seems little justification for interpreting the language as limiting the right to petition to only the "staying" parent.

Natural Co-Tutorship

Natural co-tutorship is another major problem area in the new joint custody provisions. The provisional custody article states that "the husband and wife shall enjoy the natural co-tutorship of such children," while the permanent custody article states that "they... shall be entitled to become the natural co-tutors of such child or children." The difference in language most likely reflects the fact that until the marriage is terminated by separation or divorce, the parental authority, which is in many ways similar to natural tutorship, exists of right. Until the separation or divorce, therefore, the parents can act on behalf of their children because they are parents and need not qualify as tutors. However, once the marriage is terminated, although entitled to become natural co-tutors, they cannot act on behalf of the minor as tutors until qualified as such.

Presumably, joint custodians will have to follow the same qualification procedures for natural co-tutorship that always have been required for individual natural tutors. In some cases, this may result in over-protection of the minor. Should both parents have substantial im-

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132. This would seem to be implied by the language granting only the "staying" parent the right to so petition. See discussion in text following note 127, supra.

133. LA. CIV. CODE art. 146.

134. LA. CIV. CODE art. 157 (emphasis added).

135. LA. CIV. CODE arts. 216 & 221; LA. CODE CIV. P. arts. 4501-02. During the marriage, this authority is primarily vested in the father, but the mother can exercise the right when the father is unable, refuses, or neglects to do so. Murphy v. McHughes, 66 So. 2d 525 (La. App. 2d Cir. 1953).

136. See LA. CIV. CODE arts. 216 & 221; art. 4501. LA. CODE CIV. P. See also Higginsbotham v. Inland Empire Ins. Co., 88 So. 2d 711 (La. App. 1st Cir. 1956).

137. See LA. CODE CIV. P. art. 4501; Griffith v. Roy, 263 La. 712, 269 So. 2d 217 (1972).

138. See Mitchell v. Cooley, 12 Rob. 636 (1846); Griffith v. Roy, 263 La. 712, 269 So. 2d 217 (1972); LA. CODE CIV. P. art. 4061 (natural tutor must take oath, inventory property, furnish security or legal mortgage in favor of minor).
movable property to which the legal mortgage will attach\textsuperscript{139} or if both parents choose to furnish alternative forms of security,\textsuperscript{140} the value of the minor's property will be protected by double security. Logically, the essential protective function of the security requirements would be met if the value of the minor's property is adequately covered by the \textit{total} security furnished by the co-tutors. However, although the court has the authority to require the natural tutor to furnish \textit{more} than the legal mortgage,\textsuperscript{141} it does not have statutory authority to reduce or eliminate the security requirements for one of two co-tutors.

This situation could be further complicated if one of the parents is assigned sole responsibility for administration of the minor's property.\textsuperscript{142} This parent should then be the only one required to give any kind of security for losses due to mismanagement of the property.\textsuperscript{143} On the other hand, since both are still liable \textit{in solido} for other liabilities of the child,\textsuperscript{144} the appointment of one as property administrator may be irrelevant to the security question.

One potential problem which the statute does solve concerns the proper venue for filing the qualification petition. The parents are to file a joint petition for appointment as co-tutors "in the district court of the parish in which the proceedings for divorce or judicial separation were instituted."\textsuperscript{145} Thus the same court will hear and decide the separation or divorce, the custody question, and the co-tutorship application. Therefore, any modifications of the co-tutorship authority will be approved or disapproved by a court which is familiar with the details of the joint custody agreement.

Other co-tutorship problems have not been addressed by the new provisions. The tutor is the proper party to bring\textsuperscript{146} or defend\textsuperscript{147} an action on behalf of the minor. This simple procedural rule becomes complicated when there are two tutors with equal authority, privileges, and responsibilities. Can one of the parents act alone to bring or defend an action? Must the other co-tutor be joined as a necessary, or

\textsuperscript{139} See LA. CODE CIV. P. arts. 4061 & 4134.
\textsuperscript{140} See LA. CODE CIV. P. arts. 4061 & 4135.
\textsuperscript{141} LA. CODE CIV. P. art. 4135.
\textsuperscript{142} See text at notes 163-64, infra.
\textsuperscript{143} LA. CODE CIV. P. arts. 4069 & 4262 et seq.
\textsuperscript{144} See text at notes 165-67, infra.
\textsuperscript{145} LA. CODE CIV. P. art. 4031.
\textsuperscript{146} LA. CODE CIV. P. art. 683.
\textsuperscript{147} LA. CODE CIV. P. art. 732.
even indispensable, party? And as sole administrator of the minor’s property, may that parent act alone on a property-related claim? These questions may have to be addressed by legislation. 148

Fortunately, most of these co-tutorship problems will remain hypothetical, because, typically, there is no need for tutorship. Most minors do not have significant property which requires protection and management, nor do most children get involved in tort actions as plaintiffs. 149 Therefore, most joint custodial parents will never need to apply or qualify for natural co-tutorship.

The Joint Custody Agreement

The fourth major area in which problems may arise concerns the joint custody agreement itself. The statutes merely require that “both husband and wife agree to joint custody”; 1 it shall be granted “to both jointly by agreement of both husband and wife.” The method of indicating agreement is not set out; therefore, it presumably could

148. Perhaps this legislation could track the provisions of Code of Civil Procedure article 686.

Either spouse is the proper plaintiff, during the existence of the marital community, to sue to enforce a community right; however, if one spouse is the managing spouse with respect to the community right sought to be enforced, then that spouse is the proper plaintiff to bring an action to enforce the right. . . . When only one spouse sues to enforce a community right, the other spouse is a necessary party. . . .

Analogous treatment would make the co-tutors necessary parties to any action for or against the minor, but would allow the property administrator acting alone to bring or defend actions related to the minor’s property. However, unlike the matrimonial regime in which each spouse’s own interests could be affected by such an action, only the child’s interests would be determined in an action brought by one or both co-tutors. Therefore either one of them should be able to act alone to enforce the minor’s rights, without joinder of the other co-tutor whose interests would be unaffected.

Code of Civil Procedure article 3992(2) also suggests an analogy. It provides that “If a tutor of his [the minor’s] property and a tutor of his person have been appointed, the consent of both is necessary [for emancipation of the minor].” Written consent from the parent not involved in property administration could be deemed sufficient authorization for the other to act alone on a property-related claim.

Further support for this can be found in Official Revision Comment (c) to Code of Civil Procedure article 4069, which states, “All articles in this Title [Title 6, Tutorship] dealing with the care of the minor’s person apply to the custodian of the person; whereas those dealing with the administration of property apply to the tutor of the property.” This suggests that, once the legal responsibility has been divided with court approval, no consent or joinder of the “physical custodian” is required when property administration is necessary.

149. The minor as defendant can be represented by an appointed attorney. LA. CODE Civ. P. art. 5091(1) & (2).
150. LA. CIV. CODE art. 146.
151. LA. CIV. CODE art. 157.
be written or verbal, express or tacit. Of course, an express, written agreement is always preferable in order to avoid future conflicts concerning the exact terms of the agreement.

Drafting a precise, yet flexible, agreement is never easy and the task is made more difficult when the statute is unclear concerning which terms may be permissible objects of stipulations between the parties. The general rule is that anything not specifically denied by statute nor contrary to public order may be stipulated by the parties to a contract. Unfortunately, the statute does not, in express terms, specifically deny anything; yet it impliedly rejects certain stipulations. For example, it is not clear whether the “staying” spouse can waive the right to petition for sole custody in the event the other parent moves out of state. Clearly, the legislature intended to discourage the joint custodial parents from such moves. But since the “staying” spouse’s option of filing or not filing such a petition is permissive according to the statute, the parties may wish to incorporate an express waiver of this option—an express consent, in advance, to either spouse’s moving out of state while maintaining joint custody.

The statute is more precise in its treatment of shared physical custody of the child. Since such sharing is clearly permissive, the parents should be able to structure the agreement to best suit their needs and those of the children. They may seek an equal division of time by days, weeks, or months; or they may divide physical custody unequally, by the week and weekends or school-months and vacation-months. The wording of the statute thus does not require that the child be “shuttled back and forth” between two homes, and the disadvantage of the “yo-yo” effect can be avoided. On the other hand, if physical sharing is not made a part of the arrangement, the strongest

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152. It is unclear whether this agreement must be prearranged and submitted by the parties at the custody hearing, or whether a simple verbal affirmation of the parties in court will suffice for a joint custody award. Several states’ statutes allow either method to indicate agreement. See, e.g., CAL. CIV. CODE § 4600.5(a) (West Supp. 1982); CONN. GEN. STAT. ANN. § 46b-56, sec. 2(b) (1981). See text at notes 128-29, supra, for discussion of a tacit agreement.

153. See LA. CIV. CODE arts. 11, 1764 & 1967.

154. Not every legislative statement amounts to a “rule of public order”; these usually reflect strong societal and moral standards. Given the imprecision and ambiguity in this optional provision allowing the “staying” spouse to petition for sole custody, it would be exaggerating the import of the phrase to accord it such status. See discussion at notes 126-29, supra.

155. See text at 128-29, supra, for a discussion of tacit consent.

156. LA. CIV. CODE arts. 146 & 157.

157. See text at notes 53-58, supra.
advantages to children and parents are also eliminated. As a result of this permissive wording and Louisiana's historic antipathy to divided custody, it may be possible to fashion ostensibly “joint” arrangements which, as a practical matter, will be nothing more than sole custody with a new label. The only difference will be the continued sharing, to some extent, of legal parental rights and responsibilities.

The leeway to be given parents in dividing legal custody is less clear. The only reference to legal relationships is in the statutory mandate that both parents “shall” have natural co-tutorship of the children. Article 250 describes this as a relationship of equals, but then reneges with the words, “unless modified by agreement of the parents and approved by the court awarding joint custody.” Evidently, the parents are free to modify the co-tutorship to provide unequal legal rights and responsibilities, but this is subject to review by the judge. Amended article 4262 of the Code of Civil Procedure provides a clue as to one permissible type of inequality which could be stipulated. It suggests that the agreement may give the right to administer the minor’s property to one parent individually; that parent will also bear attendant responsibilities individually. Other divisions of legal rights and responsibilities are not prohibited, so these should also be available to the parents. Examples of such divisions are an allocation to one parent of responsibility for major decisions affecting the child’s health, education, and religion, and an allocation of con-

158. See text at notes 67-72, supra.
159. See LeBouef v. LeBouef, 325 So. 2d 290 (La. App. 4th Cir. 1975); Wilmot v. Wilmot, 223 La. 221, 65 So. 2d 321 (1953).
160. LA. CIV. CODE art. 250:
Upon the death of either parent, the tutorship of minor children belongs of right to the other. Upon divorce or judicial separation from bed and board of parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted; however, if the parents are awarded joint custody of a minor child, then the cotutorship of the minor child shall belong to both parents, with equal authority, privileges, and responsibilities, unless modified by agreement of the parents and approved by the court awarding joint custody.
All those cases are called tutorship by nature.

See text at notes 133-37, supra.
161. LA. CIV. CODE art. 250.
162. LA. CODE CIV. P. art. 4262: “Natural cotutors shall be bound in solido except as to damages arising from the administration of all or a part of the minor’s property by one of the cotutors individually pursuant to an agreement between the cotutors approved by the court.”
163. Id. However, since this provision is a part of the tutorship article, it may refer to a separate, distinct co-tutorship agreement and not be intended to apply to the simple custody agreement in any way.
tribution rights between the parents. The procedural article does direct that "natural cotutors shall be bound in solido except as to damages arising from the administration of all or a part of the minor's property by one of the cotutors individually." By excepting only the agreed-upon, court-approved property administration, the article suggests that each parent will be bound for the whole of any other claim against the minor. This would seem to include tort damages and claims against the minor's property when no agreement has been approved as to its individual administration. Unless some derogation of the public order can be demonstrated, the parents should be able to specify contribution rights between the two of them.

The co-tutorship articles indicate that court approval will be required for any modification of the parents' equal co-tutorship rights and responsibilities and for designation of one parent as administrator of the minor's property. However, there is no such approval required for any other term of the joint custody agreement, which, in the majority of cases, will probably not even attempt to establish or modify tutorship. Nor are there any standards established upon which the court can base its approval. Will the court inquire into the "fitness" of the property administrator? Is the judge required to consider the best interest of the child? Can he look also to the

164. LA. CIV. CODE art. 2317: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable . . . with the following modifications."

LA. CIV. CODE art. 2318: "The father, or (and) after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons."

The same responsibility attaches to the tutors of minors."

In the joint custody situation, the child will always be "residing with" one parent, who thus is liable for his damages according to article 2318. But the other parent will also be liable at the same time for the same damages because, although he has "placed the minor into the care of another," he is still primarily liable with rights of recourse. By definition in Civil Code article 2091 and by implication in Code of Civil Procedure article 4262, this "concurrent" liability for the whole damage caused by the minor is in solido liability. Contribution between co-debtors in solido is allowed by Civil Code articles 2103 and 2104 and by the reservation of recourse in article 2318. The enforcement of the contribution right could be waived by one of the parents, according to Civil Code article 11. This would effectively shift the burden of tort liability between the parties to one or the other of the parents, by shifting the contribution right.

165. LA. CODE CIV. P. art. 4262.
166. LA. CIV. CODE art. 11. See note 164, supra.
167. LA. CIV. CODE art. 250. See note 164, supra.
168. LA. CODE CIV. P. art. 4262.
169. No court approval is required for the logistical arrangements for physical sharing of the child, for instance.
best interests of the parents? These questions are unanswered by the statute and will be left once again to the discretion of the courts.

Different standards will have to be developed for evaluating a simple joint custody agreement which makes no mention of the intent of the parents to petition for co-tutorship and the more complex agreement which contemplates actual co-tutorship and possibly modification of legal duties and rights. The simple petition can probably be evaluated with a general "best interest of the child" standard, perhaps utilizing a list of factors similar to those used in several other states.\textsuperscript{170} If a workable physical arrangement appears to have been devised by the parties, shared physical custody on a regular, alternating basis should be encouraged. If no co-tutorship is contemplated, the parents should also be able to shift legal responsibilities between themselves as they wish,\textsuperscript{171} unless there are indications of overreaching or potential financial hardship to one party. At some point, the best interests of the parents need to be considered also, if only because the child's well-being is always affected by the emotional and physical stability of the parents.\textsuperscript{172}

When actual co-tutorship is contemplated and described in the agreement, the more stringent standards of ordinary tutorship proceedings must be applied.\textsuperscript{173} These guidelines are quite detailed and specific; they should adequately protect the minor's interests when joint custody includes co-tutorship.

The court unfortunately may have little effective enforcement power over the agreement. Generally, courts will not grant specific performance of an obligation to do.\textsuperscript{174} Therefore, should one of the parents fail to uphold the agreement, the only apparent recourse for the other parent would be to petition for sole custody. This would be rather drastic if that party truly desired joint custody and sought only a way to make it workable. Alternatively, one parent could attempt to enforce the joint custody agreement by seeking damages for breach of contract from the other.\textsuperscript{175} This remedy shares the weakness of the petition for sole custody in that it is not actually a method

\textsuperscript{170} See text at notes 109 & 122, supra.
\textsuperscript{171} See text at notes 160-66, supra.
\textsuperscript{172} See text at notes 77-83, supra.
\textsuperscript{173} LA. CODE CIV. P. arts. 4031-4463. See text at notes 138-44, supra.
\textsuperscript{174} See LA. CIV. CODE arts. 1905, 1926 & 1927; Goudeau v. Daigle, 124 F.2d 656 (5th Cir. 1942), cert. denied 316 U.S. 695 (1942); Pratt v. McCoy, 128 La. 617, 54 So. 1012 (1911); Branch v. Acme Homestead Ass'n, 169 So. 129 (La. App. Orl. Cir. 1936).
\textsuperscript{175} A weakness of this remedy is that the measure and entitlement to such damages may be difficult to establish, given the uncertainty in interpreting Civil Code article 1934(3).
which will effectuate the joint custody agreement; it is, rather, a recognition of the breakdown of the contract. Courts have used the contempt power to enforce visitation provisions in sole custody situations;\textsuperscript{176} perhaps this will also be a viable enforcement tool when applied to joint custody. On the other hand, since a joint custody arrangement requires a high degree of cooperation between the parents, if use of the contempt power is necessary it could be regarded as conclusive evidence of failure of the arrangement.

\textbf{Suggested Applications of Joint Custody in Louisiana}

The "no-fault" divorce\textsuperscript{177} theoretically would seem to present the most ideal situation for a joint custody agreement. Because an accusatory, adversarial proceeding is unnecessary, the parents should be able to avoid recriminations and cooperate in the custody arrangements. Even when the divorce or separation involves allegations of fault on one side or both,\textsuperscript{178} an attempt should be made by the parties' attorneys to at least acquaint them with the possibility of a joint custody award. If both parents sincerely want custody, they may be persuaded to put aside hostilities in order to achieve benefits for both themselves and their children.

In all joint custody awards, it will be advisable to prepare an express, detailed, written agreement.\textsuperscript{179} The three essential requirements for joint custody in Louisiana should at least be alleged,\textsuperscript{180} and preferably supported with some evidence as to the Louisiana domicile of both parents and as to how joint custody serves the best interest of the child. It should contain definite time limits and methods for achieving shared physical custody;\textsuperscript{181} the agreement should also delineate carefully the allocation of rights, responsibilities, and authority of legal custody.\textsuperscript{182} Flexibility should be built into the agreement so the parents can adjust the terms to fit reality. If co-tutorship appears necessary, any modification of its equal authority provisions must be

\textsuperscript{176} See Fouchi v. Fouchi, 391 So. 2d 1352 (La. App. 4th Cir. 1980); Lemoine v. Lemoine, 303 So. 2d 520 (La. App. 1st Cir. 1974). One case specifically stated that courts generally try to avoid restrictions and court supervision of custody orders unless unusual circumstances exist. LeBouef v. Fontenot 390 So. 2d 266 (La. App. 3d Cir. 1980).


\textsuperscript{178} \textit{LA. Civ. Code} arts. 138(1-8), 139(1)(2) \& 141.

\textsuperscript{179} See text at notes 150-66, \textit{supra}.

\textsuperscript{180} See text at notes 98-100, \textit{supra}.

\textsuperscript{181} See text at notes 156-59, \textit{supra}. One commentator has suggested that the practicality and workability of any allocation of physical custody should be measured by a "reasonableness" test. This would allow a variety of physical arrangements to fit the requirements of all family members. Note, \textit{supra} note 5, at 124-25.

\textsuperscript{182} See text at notes 160-66, \textit{supra}.
An important stipulation which should not be ignored is some method for submitting major disagreements to arbitration in order to avoid the necessity of returning to court for resolution of disputes. Since the statutory provisions contain so few guidelines for judicial decision, a carefully drawn joint custody agreement will be an invaluable aid to the Louisiana judge who seeks to make a joint custody award. It will indicate to him that both parents have a sincere interest in the child, that both can cooperate at least to the extent required to draw up the agreement, and that both are willing to submit future disagreements to a forum other than the courtroom. Obviously, joint custody is not a panacea. Its implementation will be difficult under the best of circumstances. However, for those parents for whom the potential advantages outweigh the disadvantages, Louisiana now does offer joint custody as an alternative. Unanswered questions and details have been left to the parents, the lawyers, and the judges; all should strive to minimize joint custody's pitfalls and maximize its advantages.

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183. See text at notes 133-49 & 167-68, supra.
184. However, arbitration contracts have the same weakness as the overall custody agreement, in that usually they are not specifically enforced. See Saint v. Martel, 127 La. 73, 53 So. 432 (1910).
185. Subsequent to the writing of this comment, the Louisiana Legislature passed Act 307 of 1982, which substantially modifies Louisiana's child custody provisions. The new law attempts to eliminate many of the vagueries and inconsistencies discussed in this article. Its provisions are progressive and innovative and thrust Louisiana into the vanguard among the states which have joint custody statutes. The full text of the law's major joint custody provisions is produced below:

Article 146.
Custody of children pending the litigation.
A. If there are children of the marriage whose provisional keeping 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 interests of the children:
1. To both parents jointly. The court, shall, unless waived by the court for good cause shown, require the parents to submit a plan for implementation of the custody order or the parents acting individually or in concert may submit a custody implementation plan to the court prior to issuance of a custody decree.
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. The burden of proof that joint custody
would not be in a child's best interest shall be upon the parent requesting sole custody.

C. There shall be a rebuttable presumption that joint custody is in the best interest of a minor child unless:
   1. The parents have agreed to an award of custody to one parent or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage; or
   2. The court finds that joint custody would not be in the best interest of the child.

   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.

D. For purposes of this Article 'joint custody' shall mean the parents shall share the physical custody of children of the marriage, subject to any plan of implementation effected pursuant to paragraph A of this Article, and shall enjoy the natural cotutorship of such children in accordance with Article 250. Physical care and custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents. An award of joint custody obligates the parties to exchange information concerning the health, education, and welfare of the minor child; and, unless allocated, apportioned, or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities, and authority.

E. 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.

F. Any order for the custody of a minor child of a marriage entered by a court in this state or in any other state, subject to jurisdictional requirements, may be modified at any time to an order of joint custody in accordance with the provisions of this Article.

G. A custody hearing may be held in private chambers of the judge.

H. In jurisdictions having a private or publicly-supported conciliation service, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation service for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

I. Notwithstanding any other provision of law, 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 because the parent is not the child's custodial parent.

Article 157:
A. In all cases of separation and divorce, and change of custody after an original award, permanent custody of the child or children shall be granted to . . . the parents in accordance with Article 146.

(Emphasis added).