A PRIMER ON CHILD CUSTODY IN LOUISIANA

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This Article is the fifth in a series of primers on Louisiana Family Law. The Louisiana Civil Code of 1870, as amended to date, operates as the primary source of law, with other ancillary statutes and codes on particular subject matters. The law of child custody appears in Section 3 of Chapter 2 in Title V on Divorce. Chapter 2 covers Provisional and Incidental Proceedings and the section on child custody is preceded by spousal support and education claims. While the section on child custody only comprises eight articles, the jurisprudence interpreting issues of custody and visitation, and the revised statutes addressing restrictions on custody and visitation, provide a wealth of law in this area. The best interest of the child remains the hallmark of every decision, and courts are given wide discretion due to its fact-intensive nature.

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I. EARLY HISTORY OF CUSTODY LAW IN LOUSIANA

Louisiana derived its early laws on custody from the patriarchal traditions of Europe. In early Roman law, the father had absolute control over his children and their property.1 English feudal law also vested control of the children with the father, in large part to ensure that property was kept in the family and passed down through generations.2 In France, although the father was the primary property holder, custody was awarded to the spouse who was not at fault in the divorce, absent any unusual circumstances.3

Drawing from these traditions, Louisiana adopted a paternal preference for provisional custody but awarded permanent custody to the innocent spouse, regardless of gender.4 In the Code of 1870, provisional custody was granted to the father unless there was “strong reason[] to deprive him of it.”5 For permanent custody determinations, however, the law required the children to be placed under the care of the parent who obtained the separation or divorce, unless the “greater advantage of the children” required otherwise.6 Ultimately, courts awarded custody to the spouse who...

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1. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 451 (George Sharswood ed., 1860).
4. See LA. CIV. CODE art. 146 (1870).
5. Id. The full text of Civil Code article 146 provided:
   If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband, whether plaintiff or defendant, unless there should be strong reasons to deprive him of it, either in whole or in part, the decision whereof is left to the discretion of the judge.
Id. Article 146 was derived from the Projet du Gouvernement, which contained no limitations at all: “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 plaintiff or defendant.” Projet du Gouvernement, bk. I, tit. VI, art. 32 (1800); see also supra note 2, at 87 n.12.
6. LA. CIV. CODE art. 157 (1870). Civil Code article 157 provided:
   In all cases of separation, the children shall be placed under the care of the party who shall have obtained the separation, unless the judge shall, for the greater advantage of the children, and with the advice of the family meeting, order that some or all of them shall be intrusted [sic] to the care of the other party.
   In all cases of divorce the minor children shall be placed under the tutorship of
was not at fault in the dissolution of the marriage.\(^7\)

**A. THE REVISION OF 1888 AND THE SHIFT TO MATERNAL PREFERENCE**

In 1888, the Louisiana State Legislature changed course for provisional custody and replaced the paternal preference with a maternal preference.\(^8\) This revision paralleled the shift in feudal culture, where a person’s status was less dependent on property ownership.\(^9\) Additionally, women were being recognized as the primary caregivers of the home and the children, while the men were away earning income.\(^10\) The “tender years doctrine,” which recognized the need for a nursing mother to sustain the child and the unique ability of a mother to provide love, attention, and affection to a young child, further advanced the maternal preference rule.\(^11\)

The laws governing permanent custody, however, were not amended. Permanent custody was unaffected by a paternal or maternal preference rule. Rather, courts were directed to award permanent custody to the parent that obtained the separation or divorce.\(^12\) Despite the Code’s mandate, courts awarded permanent custody in line with provisional custody, which favored the mother, particularly if the children were of tender years.\(^13\) Courts began focusing on the child’s best interest and found that custody with the mother generally met that interest.\(^14\) In 1921, the legislature

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7. Hawkins, *supra* note 2, at 87. For more information on the development of Louisiana Civil Code article 156, see *id.* at 87 n.16.

8. Act No. 124, 1888 La. Acts 185. Article 146 was amended to replace “husband” with the word “wife,” and the rest of the article remained the same. *Id.*


10. *Id.* at 88–89.

11. *See, e.g.*, Black v. Black, 18 So. 2d 321, 323 (1944) (“They are both girls of tender years and need a mother’s constant care and attention.”); *see also* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Fam. L. 423, 425 (1976).

12. LA. CIV. CODE art. 157 (1888).

13. *See, e.g.*, Bursha v. Lane, 29 So. 712, 715 (La. 1901) (father obtained separation, but wife was awarded custody of the five-year-old child); Laplace v. Briere, 92 So. 881, 883 (La. 1922) (father had been given temporary custody, but wife was awarded permanent custody of minor child after the court found that there was “no reason for saying that it would be for the greater advantage of the child to intrust [sic] it to the [father]”).

14. *See, e.g.*, Abreo v. Abreo, 281 So. 2d 693, 697 (La. 1973) (“In keeping with the law’s aim to promote the child’s welfare, the decisions have recognized that the child’s best interest is served when custody is awarded to the mother, especially when the
amended article 157 on permanent custody to give the judge discretion to award permanent custody of a child to the parent who did not obtain the separation or divorce, but only “for the greater advantage of the children.”\(^{15}\)

Although the “best interest of the child” standard was not yet codified in Louisiana, it was used by the courts to mitigate a rigid application of the provisional and permanent custody rules.\(^{16}\) Even though courts evaluated several factors to determine the best custody award for a child, a preference for the mother persisted. Very few situations defeated the preference for the mother.\(^{17}\) The best interest standard was inextricably linked to the maternal preference rule because society considered it to be in the best interest of a child to be nurtured by his mother.

**B. The Revision of 1979 and Equal Rights to Parents**

By the early 1970s, the feminist and civil rights movements influenced courts to discard presumptions based on gender that resulted in unequal treatment.\(^{18}\) Although Louisiana courts continued to uphold the constitutionality of the maternal preference rule,\(^{19}\) the legislature saw fit to amend the provisions

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16. Brewton v. Brewton, 105 So. 307, 309 (La. 1925) (court used discretionary power to award custody of the child to the mother, due in part to the child's tender years).
17. A mother was denied custody when she was mentally or morally unfit to care for the children. See Richard v. Richard, 359 So. 2d 696, 697 (La. Ct. App. 1 Cir. 1978); Poole v. Poole, 189 So. 2d 75, 83–84 (La. Ct. App. 1 Cir. 1968). A mother was also denied custody when she failed to provide a wholesome atmosphere for the children, or when she abandoned the home and failed to seek custody of the children. Nethken v. Nethken, 292 So. 2d 923, 926 (La. Ct. App. 1 Cir. 1974) (reasoning that the mother would “routinely [leave] the house in the morning and return[] late at night to minimize the contact with her husband and children” and “was unable to discipline the older children . . . and could control the younger children only with rather harsh restraints”); Ard v. Ard, 28 So. 2d 461, 462 (La. 1946) (holding that “[f]or a mother to deliberately abandon her children of very tender ages, to make no effort to secure their legal custody . . . and to be generally disinterested in them . . . are factors that combine to strongly indicate that she is . . . unsuited for their custody”).
18. See, e.g., Orr v. Orr, 440 U.S. 268, 283 (1979) (finding that statute allowing alimony to be paid only to women violated the Equal Protection Clause); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (finding that classifications based on gender are inherently suspect); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (finding that statute preferring men over women as administrators was unconstitutional).
on permanent custody to permit awards to either the mother or the father, in line with the best interest of the child.\textsuperscript{20} Confusion continued, however, because courts were unclear as to whether the amendments eliminated or codified the maternal preference rule.\textsuperscript{21}

Therefore, in 1979, the legislature again amended the Code to make clear that the best interest of the child was the sole consideration in awarding custody and that parents had equal rights to custody.\textsuperscript{22} The legislature also abrogated the maternal preference rule in provisional custody cases, granting custody to either parent, all in the best interest of the child.\textsuperscript{23} Courts recognized that these amendments eliminated any legal preference in favor of the mother.\textsuperscript{24}

\textbf{C. THE REVISION OF 1981 AND THE INSTITUTION OF JOINT CUSTODY}

With the best interest of the child as the governing consideration in child custody cases, courts across the country began to consider alternatives to custody in one parent alone. “Joint custody,” “divided custody,” “split custody,” and “co-parenting” were all labels used to describe parents’ legal rights to the child as well as their physical time with the child.\textsuperscript{25} These

\begin{itemize}
\item \textsuperscript{20} Act No. 448, 1977 La. Acts 1196 (“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.”).
\item \textsuperscript{21} See, e.g., Abreo v. Abreo, 281 So. 2d 695, 697 (La. 1973) (granting custody to the mother even though both parents were fit because the mother’s right to custody is paramount); Welch v. Welch, 307 So. 2d 737, 738 (La. Ct. App. 2 Cir. 1975) (applying maternal preference as a rebuttable presumption); Brackman v. Brackman, 322 So. 2d 314, 317 (La. Ct. App. 2 Cir. 1975) (applying the maternal preference rule in determining what is in the best interest of the child and finding the preference to be less important “when the children remain[] away from the mother for a substantial period of time”).
\item \textsuperscript{22} Act No. 718, 1979 La. Acts 1962, 1963–64 (“In all cases of separation and divorce, and changes of custody after an original award, permanent custody of the child or children shall be granted to the husband or wife, in accordance with the best interest of the child or children, without any preference being given on the basis of the sex of the parent.”) (emphasis added); see also Hawkins, supra note 2, at 87 n.12.
\item \textsuperscript{23} Act No. 718, 1979 La. Acts 1962, 1963 (“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.”).
\item \textsuperscript{24} Burch v. Burch, 398 So. 2d 84, 86 (La. Ct. App. 3 Cir. 1981); Thornton v. Thornton, 377 So. 2d 417, 420 (La. Ct. App. 2 Cir. 1979).
\item \textsuperscript{25} Hawkins, supra note 2, at 93; see also MEL MORGENBESSER & NADINE NEHLS, JOINT CUSTODY: AN ALTERNATIVE FOR DIVORCING FAMILIES 30 (1981). “No consensus of opinion has arisen concerning alternative custody arrangements.” Hawkins, supra note 2, at 93.
\end{itemize}
arrangements were urged by parents and accepted by many courts to meet the best interest of the child. Louisiana likewise recognized the need to provide alternatives to sole custody, and in 1981, amended the provisional and permanent custody articles to provide for joint custody.26

Joint custody, as it was first enacted into the Code, could only be awarded if both parents agreed, it was in the best interest of the child, and both parents were domiciled in Louisiana.27 Joint custody was not permitted if the parents failed to agree, even if the best interest of the child indicated otherwise.28 Additionally, if either parent changed domicile, the other parent could seek sole custody.29 As persists today, joint custody ultimately resulted in some form of shared physical custody and co-tutorship of the child,

26. Act No. 283, 1981 La. Acts 600–02. Article 146, the new provisional custody article, provided:

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 cotutorship of such children in accordance with Article 250.

Id. at 600. Article 157, the new permanent custody article, provided:

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 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.

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 the 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.

Id. at 600–01.

27. Id. at 600.

28. Id.

although the concept of a “domiciliary parent” had yet to be developed.

The 1981 amendments brought about substantial and important changes in Louisiana custody law but lacked details necessary to guide the parties and the court. The best interest of the child standard was vague and undefined, and previously had been conflated with the now-repealed maternal preference. The method by which parents could agree to joint custody was not specified in the new articles, leading to confusion about whether joint custody agreements could be verbal, express, or tacit.

Because joint custody was a new concept in Louisiana, its advantages and disadvantages were greatly disputed. On one hand, joint custody was preferred to sole custody because it allowed the child to have a continuing, regular relationship with both parents and prevented the courts from having to name a “winner” and a “loser” in the custody dispute. Because joint custody allowed parents to share the burdens of decision-making, emotional support, and physical care of the child, the parents could also pursue their individual goals and develop new relationships.  

On the other hand, with the adoption of joint custody, doubts arose as to how it would function and its potential disadvantages to the child and the parents. One common argument against joint custody focused on the unsettling effects of being shuttled between two homes and answering to divided authority. Before joint custody was written into the Civil Code, Louisiana courts historically rejected divided custody arrangements based on the idea that children should not be subjected to a division of authority. Concern arose that parents, who had dissolved their marriage due to conflict, would be unlikely to cooperate in child-rearing.

Notwithstanding the ongoing discussion surrounding the propriety of joint custody, the legislature quickly remedied the shortcomings of articles 146 and 157 by defining joint custody

31. See Hawkins, supra note 2, at 94. This argument was referred to as the “yo-yo” argument. See id.
through an implementation plan, much of which still exists today. Act 307 of 1982 rewrote articles 146 and 157, adopting the same rules for provisional or permanent custody.34

34. Act No. 307, 1982 La. Acts 804–07. Amended article 146 provided:

A. If there are children of the marriage whose provisional custody is claimed by both husband and wife, the suit being yet pending and undecided, custody shall be awarded in the following order of preference, according to the best interest of the children:

(1) To both parents jointly. 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. Such plan may include such considerations as the following:

(a) Domiciliary arrangements for the child or children.
(b) Rights of access and communication between the respective parents and the child or children.
(c) Child support, if appropriate to the economic circumstances of the parents.
(d) Any other matter deemed in the best interest of the child or children.

(2) To either parent. In making an order of 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.

(3) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(4) To any other person or persons deemed by the court to be suitably able to provide an adequate and stable environment.

B. Before the court makes any order awarding custody to a person or persons other than a parent without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings.

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
Most notably, the amendments provided a rebuttable presumption that joint custody was in the best interest of the child. The presumption could be overcome in one of two ways: (1) if the parents agreed to sole custody; or (2) if joint custody was not in the best interest of the child. Absent a parental agreement for sole custody, the presumption that joint custody was in the best interest of the child could be rebutted by evidence that it was, in fact, not in the best interest of the child—a circular proposition at best. At this point, no factors were articulated to help determine the best interest of the child, but the court was permitted to “direct . . . an investigation.”

The amended articles also required that parents with joint custody submit a custody implementation plan, which could include the living arrangements of the child, access and communication rights of the parents, support for the child, and any other matter deemed to be in the child’s best interest. An award of joint custody obligated the parents to exchange information regarding the child and to confer with one another when making decisions. If disputes arose following the decree, the parties had to return to court to enforce their version of the plan or to petition for sole custody. In the revision, the legislature clearly

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. 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.

Act No. 307, 1982 La. Acts 804–06. Amended article 157 provided:

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.

B. If subsequent to the granting of a divorce or separation one of the parties to the marriage dies and is survived by a minor child or children of the marriage, the parents of such deceased party may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interests of the child or children.

Id. For a complete discussion of the revision, see generally Richard C. Guerriero, Jr., Louisiana’s New Joint Custody Law, 43 La. L. Rev. 759 (1983).

36. Id. at 805.
37. Id.
38. Id.
39. Id. at 804.
41. Id. at 804.
recognized the need for frequent, continuing contact with both parents and provided guidance to litigants on how to achieve that result.\textsuperscript{42}

Finally, the revision provided for an award of custody to a nonparent for the first time in Louisiana's history.\textsuperscript{43} Nonparent custody had been recognized in the jurisprudence when both parents were unfit, unwilling, or unable to accept custody.\textsuperscript{44} The amended articles set a clear standard for nonparent custody: the court must find that parental custody would be detrimental to the child.\textsuperscript{45}

As the best interest of the child was paramount in the award of joint custody, the legislature in 1983 amended article 146 again to provide the following list of factors to assist the court in making its determination:

(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 education and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

\textsuperscript{43} Id. at 805.
\textsuperscript{44} See, e.g., Jones v. Jones, 415 So. 2d 300, 302 (La. Ct. App. 2 Cir. 1982); Deville v. LaGrange, 388 So. 2d 696, 698 (La. 1980); see also Wood v. Beard, 290 So. 2d 675, 676–77 (La. 1974).
(j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) The distance between the respective residences of the parties.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. However, the classification of persons according to race is neither relevant nor permissible.\textsuperscript{46}

The parent seeking sole custody had the burden to rebut the presumption that joint custody was in the best interest of the child.\textsuperscript{47} Shortly after the revision, courts began considering the illustrative list of factors, and over time, a certain set of facts emerged that would generally rebut the presumption of joint custody. Those included severe disagreement over basic issues related to the child,\textsuperscript{48} the distance between the parents,\textsuperscript{49} child care arrangements made by the parent,\textsuperscript{50} or the parent’s inability to encourage a relationship between the child and the other parent.\textsuperscript{51}

\textbf{D. THE REVISION OF 1993}

The next significant revision to the custody articles took place in 1993. Shortly before, in 1990, the legislature redesignated articles 146 and 157 as articles 131 and 134, respectively.\textsuperscript{52} No

\begin{itemize}
\item \textsuperscript{46} LA. CIV. CODE art. 146 (rev. 1984). The second sentence of factor (l) was added in response to the United States Supreme Court decision in \textit{Palmore v. Sidoti}, 466 U.S. 429 (1984), which found that private biases based on race violated the Fourteenth Amendment of the United States Constitution. \textit{See also} Katherine Shaw Spaht, \textit{Persons}, 45 LA. L. REV. 467, 477 (1984).
\item \textsuperscript{47} LA. CIV. CODE art. 146 (rev. 1984); \textit{see also} Owen v. Galien, 477 So. 2d 1240, 1245 (La. Ct. App. 3 Cir. 1985); Lake v. Robertson, 452 So. 2d 376, 380 (La. Ct. App. 3 Cir. 1984).
\item \textsuperscript{48} Kincaide v. Kincaide, 444 So. 2d 651, 652 (La. Ct. App. 1 Cir. 1983) (holding that “because of irreconcilable differences between the parents concerning the child’s attending a private religious school and other matters, joint custody would not be in the best interest of the child”).
\item \textsuperscript{49} See Lachney v. Lachney, 446 So. 2d 923, 926 (La. Ct. App. 3 Cir. 1984) (stating that parents living in separate states made a joint custody plan unfeasible).
\item \textsuperscript{50} Robicheaux v. Robicheaux, 446 So. 2d 979, 980 (La. Ct. App. 3 Cir. 1984) (the father traveled frequently and left the child in the care of his elderly mother, who was not able to adequately care for the child).
\item \textsuperscript{51} See Price v. Price, 451 So. 2d 1187, 1191 (La. Ct. App. 1 Cir. 1984) (placing the child in the father’s custody because living with his mother and her new husband created a rift between the child and his father). For a discussion of these and other cases post-revision, see Spaht, \textit{supra} note 46, at 477–78.
\end{itemize}
substantive changes to the articles were made.

In Act 261 of 1993, effective January 1, 1994, the substance of articles 131 and 134 was redistributed among articles 131 through 135.\(^{53}\) The classification of custody as provisional and permanent was abolished, and the rules governing a temporary award of custody were moved into the Code of Civil Procedure.\(^{54}\) The overarching factor, “the best interest of the child,” appeared first in article 131, making it clear that in all custody cases—initial awards or modification—the court’s paramount concern is the child’s best interest.\(^{55}\) The two articles that followed set forth the descending order of custody, with parental custody first and nonparent custody second.

The rebuttable presumption in favor of joint custody was suppressed. Instead, first preference was given to parental agreement, unless the best interest of the child required otherwise.\(^{56}\) When the parents could not agree or if their agreement was not in the child’s best interest, the court was mandated to award joint custody.\(^{57}\) The shift away from a rebuttable presumption of joint custody was not an attempt to weaken the arrangement where parents share child-rearing; rather, it respected the agreement of the parents, absent any harmful effects on the child, to make custody decisions without interference by the state.\(^{58}\) If the parents were unable to agree, joint custody would be mandated, rather than just presumed.\(^{59}\)

Act 261 of 1993 also placed a higher burden of proof on the


\(^{54}\) See LA. CODE CIV. PROC. ANN. art. 3945 (2019); see also Act No. 1204, 1995 La. Acts 3486.

\(^{55}\) Act No. 261, 1993 La. Acts 610, 611. Louisiana Civil Code article 131 provided, in part, “In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child.” Id.

\(^{56}\) Id. at 613. The first paragraph of then-Louisiana Civil Code article 132 provided: “If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.” Id.

\(^{57}\) Id. The second paragraph of then-Louisiana Civil Code article 132 provided: In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent. Act No. 261, 1993 La. Acts 610, 613.


\(^{59}\) LA. CIV. CODE ANN. art. 132 (2019).
parent seeking sole custody. Under prior law, the parent seeking sole custody had to rebut the presumption that joint custody was in the best interest of the child by a preponderance of the evidence. Under the revision, the parent seeking sole custody had to prove by clear and convincing evidence that an award of sole custody was in the child’s best interest. Focus shifted from the joint custody arrangement—considering the parents’ relationship with one another—to whether sole custody in one parent was best for the welfare of the child.

The second article that set forth the order of custody permitted an award of custody to nonparents only in the face of “substantial harm” to the child. The substantial harm standard replaced the two-pronged test under prior law, which required that parental custody be “detrimental” to the child and that nonparent custody serve the best interest of the child. The revision raised the evidentiary bar from “detrimental” to “substantial harm” for the nonparent who sought to remove the parent’s paramount right to custody. As reflected in article 131, any award of custody had to consider the best interest of the child.

After the revision, article 134 contained the factors to determine the child’s best interest. The illustrative list of factors provided a guide to use in all custody and visitation cases, rather than their former, limited use to rebut the presumption of joint custody. The factors looked substantially similar to former article 146, with three notable exceptions. First, the capacity of a parent to raise his child “in his religion or creed, if any” was replaced with the capacity to give “spiritual guidance.” Second, the “moral fitness” of the parents could be considered only “insofar

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60. See supra note 47 and accompanying text.
62. Rigby, supra note 58, at 110.
63. Act No. 261, 1993 La. Acts 610, 613. Then-Louisiana Civil Code article 133 provided:
   If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.
   Id.
64. LA. CIV. CODE art. 146(B) (1990); see also LA. CIV. CODE art. 133 (rev. 1994); LA. CIV. CODE art. 131(B) (rev. 1993).
65. Rigby, supra note 58, at 111.
as it affects the welfare of the child.” 68  

Third, a twelfth factor was added to consider “the responsibility for the care and rearing of the child previously exercised by each party.” 69

The details of joint custody were moved from article 131 and were further defined in the Revised Statutes. Section 9:335 of the Louisiana Revised Statutes mandated a joint custody implementation order when joint custody was ordered, except for good cause shown. 70 Additionally, Act 261 adopted the term “domiciliary parent” to describe the parent with whom the child primarily resides and required the court to name a domiciliary parent in the decree of joint custody. 71 The domiciliary parent was given the authority to make all decisions regarding the welfare of the child, unless restrictions were placed on that parent’s authority in the implementation order. 72 The non-domiciliary parent could challenge major decisions of the domiciliary parent in a judicial proceeding, but the decision of the domiciliary parent was presumed to be in the child’s best interest. 73 Because the roles of the parents were better defined under the revised law, a successful joint custody plan was not contingent on parental agreement. 74

Act 261 of 1993 did not define joint custody as an equal sharing of physical custody of the child. 75 The focus of custody was on the best interest of the child. However, after enacting Act 261, the legislature passed Act 905 of 1993, which amended article 131 to provide, “[t]o the extent it is feasible, physical custody of the children shall be shared equally.” 76 The effective date of Act 905 was August 15, 1993. 77 Article 131, however, was being amended and redesignated by Act 261, effective January 1, 1994. 78 Although the law was clear between August 15, 1993 and December 31, 1993, as of January 1, 1994, the changes to article 131 adopted in Act 905, which had been approved after Act 261, were not included in

71. Id.; see also Rigby, supra note 58, at 117.
73. Id.
74. See Rigby, supra note 58, at 113.
77. Id. at 2535.
the revised law.\textsuperscript{79} To rectify the apparent conflict, the Louisiana State Law Institute transferred the language of the shared custody provision, with some modification, into Louisiana Revised Statutes § 9:335.\textsuperscript{80} The best interest of the child was still the primary consideration, but when equal sharing is “feasible and in the best interest of the child,” it can be ordered in a joint custody arrangement.\textsuperscript{81}

The law of custody has remained relatively consistent since the revision of 1993. In 2018, the legislature passed Act 412 on the urging of domestic violence advocates.\textsuperscript{82} The general articles on custody were amended to include references to various domestic violence laws to highlight the application of specific statutes that affect custody when domestic abuse is present.\textsuperscript{83} Additional revisions have been made to the articles and statutes on visitation, which are discussed in the sections below.

II. TYPES OF CUSTODY PROCEEDINGS

Louisiana provides several methods to petition for custody. In fact, custody actions are treated as independent causes of actions, not simply actions incidental to divorce.\textsuperscript{84} Although custody is often requested in a petition for divorce, it can be awarded in several other actions, including annulment of marriage, paternity actions, voluntary relinquishment of custody, writ of habeas corpus, or simply by petition when the parties are unmarried.\textsuperscript{85} The petition for custody, whether incidental to divorce or not, is governed substantively by the best interest of the child standard\textsuperscript{86} and procedurally by summary process.\textsuperscript{87}

\textsuperscript{79} See LA. STAT. ANN. § 9:335 historical and statutory notes (2019).
\textsuperscript{80} See id.; see also Rigby, supra note 58, at 120. The Louisiana State Law Institute is authorized to resolve “conflict[s] between two or more legislative acts affecting the same subject matter.” LA. STAT. ANN. § 24:252(B) (2019).
\textsuperscript{81} LA. STAT. ANN. § 9:335(A)(2)(b) (2019).
\textsuperscript{83} See id.
\textsuperscript{84} LA. CIV. CODE ANN. art. 131 cmt. (e) (2019); see also Pylant v. Pylant, 45,378, p. 6 (La. App. 2 Cir. 6/23/10); 41 So. 3d 1282, 1285 (concluding that a consent judgment of custody was “a legally independent, valid and enforceable judgment, which survived the abandonment of [the] divorce action”).
\textsuperscript{85} See infra Sections ILA–G.
\textsuperscript{86} See LA. CIV. CODE ANN. art. 134 (2019).
\textsuperscript{87} LA. CODE CIV. PROC. ANN. art. 2592(8) (2019).
A. CUSTODY INCIDENTAL TO DIVORCE

In a proceeding for divorce, either spouse may request a determination of custody or visitation of a minor child. If the parties plan to file an article 103(1) no-fault divorce, no divorce petition is initially filed, but the spouses may need a resolution regarding custody while living separate and apart. Although generally spouses may not sue one another during the marriage, Louisiana law permits spouses who are living separate and apart to institute a suit for custody and support of their minor children.

B. CUSTODY INCIDENTAL TO AN ANNULMENT OF MARRIAGE

Custody can be awarded when a party seeks a declaration of nullity of a marriage, whether it is relatively or absolutely null. In the case of a marriage that is relatively null, which is given the effects of marriage until declared null, the right of custody is ultimately based on the existence of the marriage. For an absolutely null marriage, which is considered no marriage at all, the right of custody stems from the legitimacy of children born of the absolutely null marriage when one of the spouses contracted the marriage in good faith, believing no impediment existed at the time of the ceremony. If neither party to the marriage is in good
faith, the children are not considered legitimate.\textsuperscript{95} Regardless, though, even if neither spouse is in good faith, so no civil effects flow from the marriage, the child’s biological parents are entitled to custody simply as a result of parenthood.\textsuperscript{96}

Without marriage, proof of parenthood may be necessary to obtain custody. For a mother, maternity is proven by evidence “that the child was born of a particular woman.”\textsuperscript{97} With a child’s birth certificate, the fact of birth to a particular woman is not difficult to prove.\textsuperscript{98} For a father, however, proof of paternity can be more difficult. A man can formally acknowledge a child in an authentic act, and the Code presumes the paternity of that man and provides him with a limited right of custody and visitation (as well as the obligation of child support).\textsuperscript{99} For this presumption of paternity to apply, however, the child cannot be “filiated to another man.”\textsuperscript{100} If the child is filiated to another man, the father must timely file suit to avow the child and prove his paternity.\textsuperscript{101}

For example, in \textit{Burrell v. Burrell}, the mother and father entered into a marriage knowing that the mother’s prior marriage had never been dissolved.\textsuperscript{102} Three children were born of the bigamous union, and the father was registered on the birth certificates based on the unlawful union.\textsuperscript{103} The court concluded that because the marriage was entered into in bad faith, it produced no civil effects as to either party or the children of the marriage.\textsuperscript{104} Rather, the children were deemed the children of the mother and her legal husband, even though he was not the biological father of the children.\textsuperscript{105} The registration on the birth

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\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} art. 198 (2019).
\textsuperscript{102} \textit{Burrell}, 154 So. 2d at 105.
\textsuperscript{103} \textit{Id.} at 104.
\textsuperscript{104} \textit{Id.} at 108.
\textsuperscript{105} \textit{Id.} at 107.
certificate could not operate as a formal acknowledgment because the children were already filiated to another man—the mother’s legal husband.\(^{106}\)

*Burrell* predates several revisions to the articles on filiation, and under the law today, the result may change. A tutor on behalf of the children could sue to establish their paternity to the biological father (from which child custody and support would flow),\(^{107}\) but the father would remain unable to avow the child for purposes of custody because his action would be untimely.\(^{108}\) When a child is filiated to another man, the biological father has only one year from the birth of the child to bring the action to avow the child, with a limited exception for when the mother in bad faith deceives him regarding paternity.\(^{109}\) If the parties to the null marriage are both in bad faith as to the validity of their marriage, the biological father will only have one year from the birth of the child to file his action to avow because he would naturally know of his paternity.\(^{110}\)

Ultimately, only the child would have the right to prove biological filiation in light of the parents’ bad faith. A tutor on behalf of the child could file the action to establish filiation,\(^{111}\) even though the biological father’s right to do so may have ended.\(^{112}\) If the biological father seeks custody but the mother is unwilling to permit it, the action on behalf of the child would be unlikely. Another person, possibly related to the biological father, could petition to be named tutor for the purpose of filing suit on behalf of the child to establish the father’s paternity. While the tutorship of right belongs to the mother of an unacknowledged child (so another person should be unable to bring suit without the mother’s consent),\(^{113}\) if the best interest of the child would be served by establishing paternity, a court may permit that limited right.\(^{114}\)

C. Custody Incidental to a Paternity Action

When an unmarried man seeks to establish his paternity of a

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107. LA. CIV. CODE ANN. art. 197 (2019).
108. LA. CIV. CODE ANN. art. 198 (2019).
109. *Id.*
110. *See id.*
111. LA. CIV. CODE ANN. art. 197 (2019).
112. LA. CIV. CODE ANN. art. 198 (2019).
113. LA. CIV. CODE ANN. art. 256 (2019).
114. *See* LA. CIV. CODE ANN. art. 152 cmt. (e) (2019). A declaration of nullity of the marriage will not terminate any custody, support, or visitation orders. *See id.*
child without marrying the mother, he will either sign a formal acknowledgment that he is the father, or he will file an avowal action to receive a judgment of paternity from a court. The formal acknowledgment may be made by authentic act and will raise a presumption in his favor that he is the father of the child only for purposes of custody, visitation, and child support. Therefore, once the man signs the formal acknowledgment, he can present it to a court in a request for custody, even though he will not have full filial rights. If the man institutes an avowal action to establish his paternity of a child, he may also seek custody in his petition, and he will have full filial rights. Additionally, if a tutor files an action on behalf of the child to establish paternity of the biological father, the father can reconvene for custody of the child if he is adjudged to be the father.

**D. CUSTODY WHEN THE PARENTS ARE UNMARRIED**

Custody is routinely requested when parents are unmarried. Although the provisions governing custody of children appear in the Civil Code under Title V, “Divorce,” they are equally applicable when the parties are not and were never married. Ultimately, an action for custody without divorce can be instituted by a petition or rule for custody that is treated as an ordinary or summary proceeding, as the case may be.

**E. WRIT OF HABEAS CORPUS**

The habeas corpus writ is an extraordinary remedy at law that can be invoked to obtain the custody of minor children. Under article 3821 of the Louisiana Code of Civil Procedure, the writ is a remedy that enables an individual to command a person who currently has physical custody of a child to produce the child and

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115. See LA. CIV. CODE ANN. art. 196 (2019). The child must not be filiated to another man. Id.

116. LA. CIV. CODE ANN. art. 198 (2019). There are strict time requirements for filing the avowal action. See id.

117. LA. CIV. CODE ANN. art. 196 (2019). The presumption in favor of the child is unlimited. See id.

118. LA. CIV. CODE ANN. art. 198 (2019).

119. LA. CIV. CODE ANN. art. 197 (2019).

120. See, e.g., In re C.A.C., 2017-0108, pp. 4–5 (La. App. 4 Cir. 11/2/17); 231 So. 3d 58, 63 (showing the application of custody articles to same-sex, unmarried partners); Jones v. Coleman, 44,543, p. 1 (La. App. 2 Cir. 7/15/09); 18 So. 3d 153, 155 (showing the application of custody articles to unmarried parents).

121. LA. CODE CIV. PROC. ANN. arts. 851, 2592 (2019).
provide the authority for that custody to the court. Proceeding by writ is appropriate only when brought by a person currently without custody who claims the child is detained by another without a legal right.

The child must be physically produced at the proceeding on the writ. If the child is not present, “a full and satisfactory explanation” must be given “as to why the minor could not or should not be produced; and if the custody [has] been transferred to another to state particularly to whom, at what time, for what cause, and by what authority” the transfer was made. The issuance of the writ forces individuals to present themselves to the court, along with the minor, whether or not they reside in the state.

The writ has been used in custody disputes between divorced parents. The writ has also been permitted between parents during marriage, as long as they are actually living separate and apart. As such, interspousal immunity from suit does not prevent one spouse from proceeding against the other under the

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122. LA. CODE CIV. PROC. ANN. art. 3821 (2019).
123. See Griffith v. Roy, 269 So. 2d 217, 222 (La. 1972); State ex rel. Fazzio v. Triolo, 101 So. 211, 212 (La. 1924) (“The writ of habeas corpus properly issues at the instance of one who claims to be entitled to the custody of a child, to test his right to such custody, and to obtain possession of the minor, if it appear that he is entitled thereto.”).
125. Id. at 308.
127. State ex rel. Jagneau v. Jagneau, 18 So. 2d 913 (La. 1944) (husband successfully maintained habeas corpus proceeding against his ex-wife to obtain custody of children born weeks after the wife left her husband); State ex rel. Billington v. Sacred Heart Orphan Asylum, 98 So. 406, 407 (La. 1923) (habeas corpus writ brought by mother against asylum where father had placed the child when they divorced); see also Snider v. Snider, 474 So. 2d 1374, 1376 (La. Ct. App. 2 Cir. 1985), writ denied, 478 So. 2d 903 (La. 1985); Mendivel v. Simpson, 247 So. 2d 182 (La. Ct. App. 3 Cir. 1971).
128. Stelly v. Montgomery, 347 So. 2d 1145, 1148 (La. 1977) (quoting State ex rel. Lasserre v. Michel, 30 So. 122, 125 (La. 1901)) (“We do not think that either husband or wife should be driven to the necessity of instituting an action of separation from bed and board or divorce, to have the matter of the legal custody of the children judicially inquired into. Actions of separation or divorce should not be forced; nor do we think that where husband and wife are, as a matter of fact, living apart, the spouse out of the possession of the children of the marriage, and claiming the legal right to have such possession, should be driven to force or to fraud to obtain the same . . . . It is right, proper, and legal for the party entitled to the possession of the child to obtain the same under the sanction of judicial proceedings.”) (internal quotation marks omitted).
writ of habeas corpus.\textsuperscript{129}

Upon issuance of the writ, the court determines custody by taking into consideration “[t]he welfare of the child as well as the rights of the parents.”\textsuperscript{130} These proceedings essentially serve as an inquiry concerning “matters in which the state has an interest” but which involve private rights.\textsuperscript{131} Ultimately, courts should “order the child placed in the custody of a proper person,” whether that person is the parent or not.\textsuperscript{132}

\textbf{F. TEMPORARY CUSTODY}

Louisiana law permits an ex parte award of temporary custody in limited circumstances and only upon a showing of “immediate and irreparable injury” to the child.\textsuperscript{133} Temporary custody is distinguishable from interim custody because interim custody contemplates an adversarial hearing after which a court needs additional evidence or additional time before making a final award of custody.\textsuperscript{134} Temporary custody is governed specifically by article 3945 of the Louisiana Code of Civil Procedure and mandates specific rules under penalty of nullity.\textsuperscript{135} A court is permitted to grant an ex parte order of temporary custody only if it clearly appears from verifiable facts that “immediate and irreparable injury will result to the child before the adverse party ... can be heard in opposition.”\textsuperscript{136} The applicant’s attorney, or the applicant

\begin{footnotesize}
\textsuperscript{129} Stelly v. Montgomery, 347 So. 2d 1145, 1147 (La. 1977).
\textsuperscript{130} State ex rel. Jagneau v. Jagneau, 18 So. 2d 913, 914 (La. 1944).
\textsuperscript{131} State ex rel. Aucoin v. Aucoin, 139 So. 645, 646 (La. 1932) (internal quotation marks omitted) (quoting State ex rel. Lasserre v. Michel, 30 So. 122 (La. 1901)).
\textsuperscript{132} Blaine v. Granger, 616 So. 2d 860, 861 (La. Ct. App. 3 Cir. 1993) (quoting Wood v. Beard, 290 So. 2d 675, 677 (La. 1974)) (“The welfare of the child, and not simply the enforcement of a parental right to the possession of the child, is of primary concern to the court.”).
\textsuperscript{133} LA. CODE CIV. PROC. ANN. art. 3945 (2019).
\textsuperscript{134} See Ventura v. Rubio, 2000-0682, pp. 16–18 (La. App. 4 Cir. 3/16/01); 785 So. 2d 880, 892–93 (discussing temporary and interim custody orders). In Ventura, the court was concerned that many temporary or interim orders are issued without any explanation of the court’s reasoning. See id. at p. 14; 785 So. 2d at 890. Without an adequate record for review, a reviewing court is unable to conduct a proper review to determine whether the trial court abused its discretion. As a result, temporary and interim orders effectively operate as permanent orders, “thereby denying the parties a timely and appropriate adjudication of the issues.” Id. at p. 14; 785 So. 2d at 890–91. To remedy the problem, the court mandated that the trial court have a court reporter or transcription of the proceedings leading up to the interim order, set the matter for a final hearing before concluding the interim one, and refuse to extend or enter new interim orders before the final trial on the merits. Id. at p. 17; 785 So. 2d at 892.
\textsuperscript{135} LA. CODE CIV. PROC. ANN. art. 3945 (2019).
\textsuperscript{136} LA. CODE CIV. PROC. ANN. art. 3945(B)(1) (2019).
\end{footnotesize}
if unrepresented, must certify in writing that efforts have been made to notify the opposing party or, alternatively, that reasons exist such that notice should not be required.\textsuperscript{137}

Because of the ex parte nature of the order, it expires by operation of law within thirty days of being signed, and can be extended only once for fifteen days on a showing of good cause.\textsuperscript{138} During the duration of the temporary order, provisions requiring visitation by the adverse party, for “not less than forty-eight hours during any fifteen-day period,” must be provided unless “immediate and irreparable injury will result to the child as a result of such visitation.”\textsuperscript{139}

The rule to show cause hearing to determine whether the adverse party should be awarded custody or visitation must be set within thirty days of the ex parte order of temporary custody.\textsuperscript{140} Indeed, the ex parte order, when signed, must not only contain the date of the order, but the date and hour of the rule to show cause.\textsuperscript{141} Any ex parte order that fails to comply with these provisions shall be deemed null and void.\textsuperscript{142}

The showing of immediate and irreparable injury to obtain a temporary order of custody is a high burden to meet and is within the sound discretion of the trial court. For example, in Wilson v. Paul, the maternal grandparents sought an ex parte order of temporary custody of their seven-year-old grandson.\textsuperscript{143} Because of the parents’ drug use, association with criminals, and ongoing violent relationship, the court found irreparable harm sufficient to justify a temporary sole custody award to the grandparents.\textsuperscript{144}
Courts have likewise found irreparable injury sufficient to award temporary custody of the child when the parent has substance abuse issues, abandons the child, or permits any form of abuse. The trial court is vested with considerable discretion, and the interlocutory ruling is used as a vehicle to protect and serve the best interest of the child.

In the event the court denies an ex parte request for temporary custody, it shall allocate time between the parents, “unless immediate or irreparable injury will result.” This mandate should also apply to nonparents who have cared for the child and are seeking temporary custody. For example, in Trettin v. Trettin, the father sought an ex parte order of temporary custody three weeks after the court entered an interim award of joint custody pending a complete custody trial. The court denied his motion and, as required by article 3945 of the Louisiana Code of Civil Procedure, awarded custody to the parents in accordance with its original interim order.

145. See generally, e.g., Vidrine v. Vidrine, 2017-722 (La. App. 3 Cir. 5/21/18); 245 So. 3d 1266 (holding that the best interest of the child was served by naming his father as the domiciliary parent and modifying the parties’ physical custodial schedule because the mother frequently drove with the minor child in her vehicle after she had been drinking, had developed a substance abuse problem, had anger management issues, mismanaged the child’s medical needs, and was unable to exercise her physical custodial rights because of her alcohol addiction); Beene v. Beene, 43,845 (La. App. 2 Cir. 10/22/08); 997 So. 2d 169 (holding that the immediate and irreparable harm standard was met and that it was proper to award the father sole custody of his child when the mother had a history of substance abuse). But see Szwak v. Szwak, 49,939 (La. App. 2 Cir. 4/15/15); 163 So. 3d 911 (holding that mother’s actions of driving while intoxicated and child’s breaking of his femur while riding an ATV under mother’s care did not constitute immediate and irreparable harm to satisfy the requirements for an ex parte order of temporary custody); Trettin v. Trettin, 37,260 (La. App. 2 Cir. 3/17/03); 839 So. 2d 1272 (holding that allegations of mother’s excessive alcohol use and eating disorder did not represent an immediate and irreparable harm to the children required for an ex parte order of temporary custody).

146. See generally In re Custody of Landry, 95-0141 (La. App. 1 Cir. 10/6/95); 662 So. 2d 169 (noting that abandonment by the mother is often enough to award temporary custody).

147. See generally K.P. v. T.F.P., 2009-146 (La. App. 3 Cir. 10/7/09); 81 So. 3d 1 (abuse by live-in boyfriend enough to show irreparable harm). But see Trettin, 37,260, p. 9; 839 So. 2d at 1276 (finding no irreparable harm based on allegations of mother’s drinking and eating disorder).

148. See generally Trettin, 37,260; 839 So. 2d 1272; LA. CODE CIV. PROC. ANN. art. 2083(A) (2019); LA. CIV. CODE ANN. art. 131 (2019).

149. LA. CODE CIV. PROC. ANN. art. 3945(F) (2019).

150. Trettin, 37,260; 839 So. 2d 1272.

151. Id. at pp. 3–4; 839 So. 2d at 1274.

152. Id. at p. 7; 839 So. 2d at 1275.
The ability to appeal temporary orders was also discussed in Trettin.\textsuperscript{153} Because an ex parte temporary order is not a final judgment, it is not immediately appealable.\textsuperscript{154} Rather, it is an interlocutory ruling that can only be appealed if it causes irreparable injury.\textsuperscript{155} Under prior law, courts found that for provisional custody orders, any irreparable injury necessary to appeal the interlocutory ruling was not present; rather, the proper procedural remedy for a party who objected to a provisional order was to seek an immediate trial on the rule for custody.\textsuperscript{156} After the 1993 changes on custody, true “provisional custody” was replaced with final judgments of custody that are only considered “provisional” in the sense that the custody order can be altered due to a material change of circumstance.\textsuperscript{157} The only court-ordered “provisional” custody that remains today exists under article 3945 for ex parte custody, under which immediate and irreparable injury must be shown.\textsuperscript{158} Because an ex parte order of custody must be followed by an adversarial rule to show cause, the remedy for a party who objects to the ex parte order is to seek an adversarial hearing, after which an appealable final custody judgment will be entered.\textsuperscript{159}

G. VOLUNTARY TRANSFER OF CUSTODY IN JUVENILE COURT

Louisiana provides a procedure in juvenile court under which parents can voluntarily transfer custody of a child to another responsible adult to provide care for the child.\textsuperscript{160} In a voluntary

\begin{itemize}
  \item \textsuperscript{153} Trettin v. Trettin, 37,260, p. 7 (La. App. 2 Cir. 3/17/03); 839 So. 2d 1272, 1275.
  \item \textsuperscript{154} See LA. CODE CIV. PROC. ANN. arts. 1841, 2083 (2019).
  \item \textsuperscript{155} Trettin, 37,260, p. 8; 839 So. 2d at 1276.
  \item \textsuperscript{156} Id. at p. 4; 839 So. 2d at 1274.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. at p. 5; 839 So. 2d at 1274–75. But see Poole v. Poole, 41,960 (La. App. 2 Cir. 1/24/07); 948 So. 2d 382 (viewing an order that prohibited the parties from seeking a modification for one year as interlocutory in nature).
  \item \textsuperscript{159} Trettin, 37,260, p. 6; 839 So. 2d at 1275; Coutee v. Hill, 43,292, pp. 5–6 (La. App. 2 Cir. 3/26/08); 978 So. 2d 1252, 1255 (denying appeal of an ex parte order of custody and noting that the “proper procedural vehicle” is a summary rule for the determination of custody). Courts have found that interim judgments of custody that have been in place for a period of years can only be modified upon a showing of a material change of circumstances. Chandler v. Chandler, 48,891, pp. 5–6 (La. App. 2 Cir. 12/13/13); 132 So. 3d 413, 417; see also Lawson v. Lawson, 48,296 (La. App. 2 Cir. 7/24/13); 121 So. 3d 769. But see Chandler, 48,891, p. 2; 132 So. 3d at 421 (Caraway, J., concurring) (arguing that the material change of circumstances test should not apply to an interim order and that the article 134 factors will suffice to make a proper determination).
  \item \textsuperscript{160} See LA. CHILD. CODE ANN. arts. 1510 et seq. (2019). The “Voluntary Transfer of Custody” statute permits transfer of custody not only to an individual, but to an agency.
transfer of custody proceeding, the juvenile court transfers custody of a child from a parent or parents to a nonparent. Custody disputes among parents, on the other hand, are handled in civil matters by the district court. When the parents transfer custody in juvenile court, they retain “residual parental rights,” which include the “right of visitation, consent to adoption, right to determine religious affiliation, responsibility of support, and the right of inheritance from the child.”

The parents who wish to transfer custody must file a petition in the juvenile court in the parish where the parents reside or where the person to whom the transfer will be made resides. The parents must affirm that they are “knowingly and voluntarily transferring custody,” provide the “factual basis for the transfer of custody,” and “set forth the nature, duration, and extent of the transfer of custody, including any terms and conditions.” The person accepting custody must execute an “Affidavit of Acceptance” stating that he knowingly and voluntarily accepts custody of the child under the conditions as agreed to by the parties. The voluntary transfer of custody can move forward without a parent joining in the petition, but notice of the proceedings must be served on the parent, or a curator must be appointed to accept service and

161. See LA. CHILD. CODE ANN. art. 1520 (2019); see also State ex rel. D.S.C., 2000-1697, pp. 1-3 (La. App. 3 Cir. 4/4/01); 782 So. 2d 1178, 1179–80. In State ex rel. D.S.C., the court found that the parents’ voluntary transfer of custody to the children’s paternal grandfather was proper despite the paternal grandmother’s emergency petition for temporary custody. State ex rel. D.S.C., 2000-1697, p. 3; 782 So. 2d at 1180. The court concluded that granting temporary custody to the paternal grandfather fell within the parents’ wishes, and should that ever change, it would be revocable under articles 1522 and 1523 of the Louisiana Children’s Code. Id.

162. See Lebo v. Lebo, 2004-0444, pp. 3–4 (La. App. 1 Cir. 6/25/04); 886 So. 2d 491, 493 (stating that “[t]he authority to modify a custody order is reserved to the courts pursuant to La. C.C. art. 131 et seq. for contested matters and La. Ch. C. art. 1510 et seq. for uncontested matters”).


165. LA. CHILD. CODE ANN. art. 1515 (2019). The petition must contain additional allegations as set forth in the article and the accompanying form. Id.

166. LA. CHILD. CODE ANN. art. 1516 (2019).
represent the parent’s interests.\textsuperscript{167}

After a hearing, the court must render a written judgment that grants or denies the transfer of custody.\textsuperscript{168} In preparation for the hearing, the court may make any orders that it deems necessary to protect the best interest of the child, including but not limited to a home study, the physical or mental examination of any party, and the appointment of counsel.\textsuperscript{169} If, at any point, the parties wish to dismiss the proceedings and return the child to the parents, the court must be notified and may render an ex parte dismissal or order a hearing.\textsuperscript{170} Otherwise, any modification or enforcement of the judgment transferring custody must be by order of the court on the motion of any party.\textsuperscript{171} In the event the parents wish to revoke their consent without the agreement of the custodian, the court must conduct a contradictory hearing with the custodian to determine whether to dismiss the transfer of custody, with paramount consideration on the best interest of the child.\textsuperscript{172}

In \textit{In re CLS}, the natural parents of CLS voluntarily transferred custody to the child’s great aunt and then subsequently to the Strothers, a childless couple who were seeking to adopt a child.\textsuperscript{173} The parents visited CLS infrequently, and after approximately one year, the relationship between the couples deteriorated.\textsuperscript{174} The natural parents attempted to regain custody of CLS, but the juvenile court terminated their parental rights, finding that they had abandoned CLS and awarded custody to the Strothers.\textsuperscript{175} The natural parents appealed.\textsuperscript{176} The appellate court reversed on termination of parental rights, but affirmed on custody.\textsuperscript{177} The court concluded that the Strothers could not prove

\begin{itemize}
\item \textsuperscript{167} \textit{LA. CHILD. CODE ANN.} art. 1517 (2019).
\item \textsuperscript{168} \textit{LA. CHILD. CODE ANN.} arts. 1519–1520 (2019). Although a hearing is preferred, the court may waive a hearing. \textit{LA. CHILD. CODE ANN.} art. 1519 (2019).
\item \textsuperscript{169} \textit{LA. CHILD. CODE ANN.} art. 1518 (2019).
\item \textsuperscript{170} \textit{LA. CHILD. CODE ANN.} art. 1522 (2019).
\item \textsuperscript{171} \textit{Id.} “If the court is concerned about the child’s protection upon the return [to the parents], the court may decide to refer the case for an investigation as a potential child in need of care . . . .” \textit{LA. CHILD. CODE ANN.} art. 1522 cmt. (2019).
\item \textsuperscript{172} \textit{LA. CHILD. CODE ANN.} art. 1523 (2019). \textit{See generally In re K.R.W.,} 03-1372 (La. App. 5 Cir. 5/26/04); 875 So. 2d 903; \textit{In re CLS,} 94-531 (La. App. 3 Cir. 11/2/94); 649 So. 2d 532; \textit{State ex rel. D.S.C.,} 2000-1697 (La. App. 3 Cir. 4/4/01); 782 So. 2d 1178.
\item \textsuperscript{173} \textit{See In re CLS,} 94-531, pp. 2–3; 649 So. 2d at 534–35. The natural parents did not want the child to be placed in foster care. \textit{Id.} at p. 3; 649 So. 2d at 534–35.
\item \textsuperscript{174} \textit{Id.} at pp. 3–4; 649 So. 2d at 535.
\item \textsuperscript{175} \textit{Id.} at p. 4; 649 So. 2d at 536.
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{In re CLS,} 94-531, p. 12; 649 So. 2d at 540.
\end{itemize}
any of the grounds for termination of parental rights under the Children’s Code. On the issue of custody, because the natural parents had voluntarily transferred custody, the court was required to conduct a best interest analysis to decide whether to return the child to her natural parents. Based on the testimony of the child psychologist, the appellate court agreed with the juvenile court that it was in the child’s best interest to remain in the custody of the Strothers, who could offer her a “caring, loving, stable, and safe environment.”

III. PROVISIONAL CUSTODY BY MANDATE

Provisional custody by mandate allows a parent, tutor, or a grandparent with custody, without the need for court intervention, to transfer custody of a child to another person for a limited period of time. Provisional custody by mandate differs significantly from a full transfer of custody or adoption due to its temporary nature; no court order is required. The legislative scheme allows a parent to retain legal custody while choosing a worthy temporary substitute to care for the child until the mandate is revoked, renounced, or expires, or until a court appoints a tutor for the child.

The scheme for provisional custody by mandate is found in Louisiana Revised Statutes §§ 9:951–962. The law was divided into two chapters. Chapter 3 applies to persons having parental...
authority, which includes parents during marriage and ascendants awarded custody during marriage. It can also apply when a “third person other than an ascendant is awarded custody of the child during parental authority.”

Overall, the law sets forth those persons who are permitted to confer provisional custody, those persons to whom provisional custody may be conferred, the powers that are and may be associated with provisional custody, and the methods of dissolution and termination of provisional custody. Grandparents with custody, either during the parents’ marriage or after it has ended, can confer the mandate. Prior to 2016, the authority had been provided to parents alone. Additionally, when the parents are unmarried, or when a marriage between the parents ends, the child’s natural tutor or a tutor with custody is likewise given the right to confer the mandate.

Section 954 of the law provides a form for the act. The law suggests that the form should be authentic, which requires a notary and two witnesses, but the form is merely “suggested” and nothing in the law requires an authentic form. A public act, an act under private signature, or a letter that expressly conveys the transferred power to the provisional custodian is enough to create the mandate. As a limited grant, the length of the mandate is

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189. LA. STAT. ANN. § 9:951 cmt. (a) (2019); LA. CIV. CODE ANN. art. 234 (2019).
191. See id.
196. LA. STAT. ANN. § 9:961 (2019). The tutor with authority only over the property of the minor would not have the authority to confer the mandate. LA. STAT. ANN. § 9:961 cmt. (a) (2019).
198. Id.
199. Wooley v. City of Baton Rouge, 211 F.3d 913, 920 (5th Cir. 2000).
not permitted to exceed one year from its date of execution.\textsuperscript{200} Although no court has considered the effect of a mandate that is conferred for more than one year, the law contemplates that it must be re-conferred at the end of each year to be a valid transfer of custody.\textsuperscript{201} Regardless of the term stipulated, the provisional custody ends when revoked by the person who conferred the mandate, when the mandatary resigns or renounces the mandate, fifteen days after the death of the person conferring the mandate, or when a court appoints a tutor.\textsuperscript{202} The provisional custodian must accept the mandate, but the statute does not require the acceptance to be in writing.\textsuperscript{203}

The provisional custody by mandate can include the power to consent to and authorize medical care, enroll the child in school, discipline the child in a “reasonable manner,” and undertake any other act that is “necessary for the shelter, support, and general welfare of the child.”\textsuperscript{204} Although not made express in the suggested statutory form, agreeing to serve as the provisional custodian necessarily includes liability for the acts of the minor.\textsuperscript{205} It may not, however, include the ability to file suit on behalf of the minor, as that right lies with a tutor that must be authorized by a court.\textsuperscript{206}

A provisional custodian who maintains the care, custody, and

\begin{itemize}
  \item \textsuperscript{200} \textsc{La. Stat. Ann.} § 9:952 (2019).
  \item \textsuperscript{201} In \textit{Wooley v. City of Baton Rouge}, the court raised, but did not consider, the effect of an act that transferred custody until the young child reached the age of eighteen. \textit{Wooley v. City of Baton Rouge}, 211 F.3d 913, 920 n.27 (5th Cir. 2000).
  \item \textsuperscript{203} \textsc{Wooley}, 211 F.3d at 920 (citing \textsc{La. Civ. Code} art. 2988 (rev. 1997); \textsc{La. Stat. Ann.} § 9:954 cmt. (2019)).
  \item \textsuperscript{204} \textsc{La. Stat. Ann.} § 9:953 (2019).
  \item \textsuperscript{205} Article 2318 of the \textsc{Louisiana Civil Code} provides: “The father and mother are responsible for the damage occasioned by their minor child, who resides with them or who has been placed by them under the care of other persons, reserving to them recourse against those persons.” \textsc{La. Civ. Code Ann.} art. 2318 (2019). Under provisional custody, when the parent has placed the child “under the care of” the provisional custodian, the parents could nonetheless be liable for any damage occasioned by the minor, with the right to sue the provisional custodian for the minor’s acts while under his care and control. \textit{See id.}
  \item \textsuperscript{206} \textsc{La. Code Civ. Proc. Ann.} art. 683 (2019); \textit{see also} Jones v. Allen Par. Corr. Ctr., No. 06-0056, 2008 WL 762077, at *5 (W.D. La. Mar. 20, 2008) (finding that the grandmother, who was the provisional custodian, was not the proper plaintiff to sue to enforce a right of an unemancipated minor because she had not been appointed by a court as a tutor for the minor child).  
\end{itemize}
control of the child after the one-year period expires must seek either another provisional custody grant or permanent custody of the child or risk losing custody to the grantor of the mandate.\textsuperscript{207} In \textit{Peters v. Allen Parish School Board},\textsuperscript{208} a mother left her two young children with Mr. Peters, a former boyfriend, when she moved and got married.\textsuperscript{209} About one year after she left, she signed a provisional custody by mandate in favor of Mr. Peters.\textsuperscript{210} Mr. Peters cared for the children like a father but did not seek legal custody of the children or an extension of the provisional custody.\textsuperscript{211} About four years after she left, the mother came to the children’s middle school and removed them, leaving the state.\textsuperscript{212} The children were distraught and, as a result of her neglect, were eventually placed in foster care.\textsuperscript{213} They subsequently ran away to find and live with Mr. Peters.\textsuperscript{214} Mr. Peters sued the school for releasing the children to their mother.\textsuperscript{215} The court absolved the school from liability, recognizing that Mr. Peter’s provisional custody by mandate expired by its own terms one year after it was issued, and he did not take any legal steps to formalize custody.\textsuperscript{216} At the time the mother arrived at the school, she was the proper custodian, even though she ultimately neglected the children.\textsuperscript{217}

While provisional custodians may operate business as usual once they begin caring for a minor, the law only permits a one-year temporary custody without court intervention.\textsuperscript{218} If the parent issuing the mandate leaves the child with the provisional custodian after the mandate ends, the custodian should seek an extension of the mandate by the parent, or if the parent is no longer a part of the child’s life, seek legal custody. Without a court award of custody, the provisional custodian’s rights will end, resting custody in the parent, which may not be in the child’s best interest.

The Louisiana Attorney General has provided several

\textsuperscript{207} See generally Peters v. Allen Par. Sch. Bd., 2012-201 (La. App. 3 Cir. 10/3/12); 99 So. 3d 1117.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at p. 1; 99 So. 3d at 1118.
\textsuperscript{210} See id.
\textsuperscript{211} See id. at pp. 1, 7; 99 So. 3d at 1118, 1121.
\textsuperscript{212} Peters, 2012-201, pp. 1–3; 99 So. 3d at 1118–19.
\textsuperscript{213} See id. at pp. 2–3; 99 So. 3d at 1119.
\textsuperscript{214} Id. at p. 3; 99 So. 3d at 1119.
\textsuperscript{215} Id. at pp. 3–4; 99 So. 3d at 1119–20.
\textsuperscript{216} Id. at pp. 6–8; 99 So. 3d at 1121–22.
\textsuperscript{217} Peters, 2012-201, pp. 7–8; 99 So. 3d at 1121–22.
\textsuperscript{218} LA. STAT. ANN. § 9:952 (2019).
opinions regarding the propriety and use of provisional custody by mandate. First, the parent need not be a Louisiana citizen to confer provisional custody on a Louisiana citizen.\textsuperscript{219} Second, the provisional custody by mandate confers rights on the custodian on which a school district can rely.\textsuperscript{220} For example, provisional custody by mandate can be used to enroll a child in a school district where the provisional custodian resides, rather than the parent.\textsuperscript{221} And, once a parent has executed a valid provisional custody by mandate, local school boards are free to communicate only with the provisional custodian, even if the parents attempt to retain some rights, such as the ability to attend field trips, take part in parent-teacher conferences, sign forms, and pick up report cards for the child.\textsuperscript{222}

IV. COURT-ORDERED MEDIATION

Once custody or visitation is before the court, it may order the parties to mediate.\textsuperscript{223} The court will first seek agreement by the parties to name the mediator; however, if the parties cannot agree, the court will appoint one.\textsuperscript{224} Once the court issues an order requiring the parties to mediate, it may stay any further determination of custody or visitation, although the stay cannot exceed thirty days from the issuance of the court’s order of mediation.\textsuperscript{225}

Before mediation begins, the court has the option to require the parties to pay in advance for mediation.\textsuperscript{226} If costs are not paid in advance and mediation is successful, the court may apportion the costs of mediation between the parties.\textsuperscript{227} If costs are not paid in advance and the mediation is unsuccessful, however, the court must tax the costs of mediation as court costs.\textsuperscript{228} The cost of

\textsuperscript{220} See id.
\textsuperscript{223} LA. STAT. ANN. § 9:332 (2019). The decision to order mediation is within the discretion of the trial court. See Angelette v. Callais, 2010-2279, p. 6 (La. App. 1 Cir. 5/6/11); 68 So. 3d 1122, 1126.
\textsuperscript{225} LA. STAT. ANN. § 9:332(A) (2019).
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
Mediation is always subject to approval by the court.\textsuperscript{229} If the parties reach an agreement during mediation, the mediator must prepare a written, signed, and dated agreement that will be submitted to the court for its approval and, if approved, become a part of the consent judgment.\textsuperscript{230} If the parties are unable to reach an agreement or if no agreement can be reached within the thirty-day stay, evidence of conduct or statements made in mediation (that are not otherwise discoverable) are inadmissible in any proceeding in the trial court.\textsuperscript{231} In other words, even if disclosed during mediation, such evidence will not be admissible unless it satisfies the rules of evidence at trial.

Mediation can be mandated before or after an initial award of custody as long as the thirty-day stay is honored. For example, in \textit{Edwards v. Edwards}, The Louisiana Third Circuit Court of Appeal enforced a mediation order after an initial award of custody was granted.\textsuperscript{232} In the original order that granted the parents joint custody, the trial court also ordered that if the parties were unable to agree on living and schooling arrangements for the child, the parents must enter into mediation at least six months prior to the child attending kindergarten.\textsuperscript{233} If the parties were unable to agree on a mediator, the parties were required to have the court appoint one.\textsuperscript{234} Six months before the child started kindergarten, without having sought mediation, the mother filed for a change of custody in the venue where she was then living.\textsuperscript{235} The trial court in the new venue did not enforce the mediation order, finding that it was against public policy.\textsuperscript{236} The third circuit reversed, concluding that the mediation mandate authorized by Louisiana Revised Statutes § 9:332 should have been followed, and the court in the new venue should have enforced the mediation order of the original court or transferred the case to the original court.\textsuperscript{237}

\textsuperscript{229} LA. STAT. ANN. § 9:332(A) (2019).
\textsuperscript{230} LA. STAT. ANN. § 9:332(B) (2019).
\textsuperscript{231} LA. STAT. ANN. § 9:332(C) (2019).
\textsuperscript{232} See Edwards v. Edwards, 99-994, p. 4 (La. App. 3 Cir. 12/22/99); 755 So. 2d 331, 334.
\textsuperscript{233} Id. at p. 2; 755 So. 2d at 333.
\textsuperscript{234} Id. at p. 4; 755 So. 2d at 334.
\textsuperscript{235} See id. at p. 3; 755 So. 2d at 333.
\textsuperscript{236} Id. at p. 5; 755 So. 2d at 335.
\textsuperscript{237} Edwards, 99-994, p. 6; 755 So. 2d at 335.
V. USE OF EXPERT WITNESSES

Trial courts must make difficult, fact-based findings when ruling on custody. Expert witnesses can be a vital tool to assist the court in determining what is in the child’s best interest. The written findings by the expert, as well as those conveyed through testimony, can play a significant role in a trial court’s fact-finding process. As such, the admissibility of an expert’s report and testimony is critical and can depend on the type of expert used. Although the most commonly used experts in custody cases are custody evaluators, other experts may also testify during the proceeding. Mental health experts retained by either party, as well as treating physicians or therapists of a party, commonly partake in trial, even when a custody evaluator has been appointed and will also testify.  

Custody evaluators are appointed by a court to help determine the appropriate custody arrangement and to sort through allegations, factual inconsistencies, and conflicts that necessarily occur when a court is tasked with determining the legal and physical custody of a child. Custody evaluators must be “mental health professionals,” and in Louisiana, this can include clinical psychologists, psychiatrists, and licensed clinical social workers. Further, mental health professionals, who only review the work of other mental health professionals or who simply assist in the preparation of an evaluation without actually interviewing the parties, may also be permitted to testify.

Louisiana Revised Statutes § 9:331 provides courts with discretion to appoint an independent custody evaluator.

238. See generally Griffith v. Latiolais, 2010-0754 (La. 10/19/10); 48 So. 3d 1058 (expert testimony was heard by the mother’s therapist, the child’s treating therapist and co-parenting counselor, the doctors who performed the psychological evaluations of the parties and the minor children, and the court-appointed custody evaluator at the custody trial).

239. LA. STAT. ANN. § 9:331(A) (2019).


241. See Raney v. Wren, 98-0869, p. 13 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 62. The trial court heard testimony of a clinical psychologist who reviewed the custody evaluation and personality tests taken by the parties but did not interview the parties. Id. at p. 13; 722 So. 2d at 62. The court also heard testimony of a social worker who assisted the court-appointed clinical psychologist in his evaluation and in preparing the expert report for the court. Id. at pp. 13–14; 722 So. 2d at 62. Although she did not administer the test herself, she was admitted as an expert in the field of social work, and her testimony was considered in the trial court’s award of custody. See id.

242. See LA. STAT. ANN. § 9:331 (2019). However, this statute does not provide courts with authority to order a party to seek counseling as a result of a custody or visitation...
Evaluation can be ordered for a party or the child when “good cause [is] shown.”243 Trial courts most frequently use custody evaluators in highly contentious custody battles.244 Even one instance of domestic violence has been enough to warrant the appointment of a custody evaluator to understand the basis of the conflict.245 Ultimately, trial courts have great discretion to appoint a custody evaluator given the permissive language of the statute.246 As such, refusal to grant a motion seeking appointment of an evaluator is not reversible error, provided the trial court did not abuse its discretion.247

In Bourque v. Bourque, a trial court refused to grant a father’s request for an independent psychological evaluation.248 The trial judge explained in his reasons for judgment that to order such an evaluation would be “nothing more than an abdication of his responsibilities, which often proves expensive to the parties.”249 In essence, the judge felt that he was in the best position to independently evaluate the situation as a neutral third party—a
decision the appellate court commended him for making.\textsuperscript{250} Because of the broad discretion granted to trial courts, a decision to order a custody evaluation and to rely on the recommendation of the evaluator is difficult to attack and overturn.

The evaluator must examine the lives and circumstances of the child and the parties to evaluate the best custody arrangement for the best interest of the child. Custody evaluations require home visits, mental health assessments, and psychological testing when appropriate.\textsuperscript{251} The evaluation also includes interviews of all parties involved, the child whose custody is at issue, as well as any non-parties who play a crucial role in the child’s daily life.\textsuperscript{252}

The mental health professional performing the evaluation must provide the court and all parties involved with a copy of the expert report.\textsuperscript{253} Failure to furnish the expert report to either party will result in a violation of that party’s due process rights, constituting reversible error.\textsuperscript{254} For example, in \textit{Fuge v. Uiterwyk}, the Louisiana Fourth Circuit Court of Appeal reversed the trial court because it refused to allow the parties access to the report of

\textsuperscript{250} Bourque v. Bourque, 03-1254, pp. 3–4 (La. App. 5 Cir. 3/30/04); 870 So. 2d 1088, 1091. On review, the appellate court explained, “We commend the trial judge for retaining his responsibility to evaluate the case himself, based on the evidence presented to him rather than turning it over to an independent evaluator.” \textit{Id.} at p. 4; 870 So. 2d at 1091; \textit{see also} Elliott v. Elliott, 2010-0755, p. 6 (La. App. 1 Cir. 9/10/10); 49 So. 3d 407, 411 (finding no good cause to order an evaluation because the court could render a decision on the issue of physical custodial periods without the input of a mental health evaluator).

\textsuperscript{251} The most common test administered to parents engaged in a custody dispute is the Minnesota Multi-Phased Personality Inventory-2 (MMPI-2). However, various experts note that this test “must be administered with more than just a single interview.” Raney v. Wren, 98-0869, p. 13 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 62. Likewise, it is also often noted that the results of the test tend to display a “guarded profile,” which is common for individuals involved in a custody dispute. Expert Report & Affidavit, Wurtzel v. Wurtzel, No. 552-615, 2003 WL 25277014 (24th J.D.C. La. Feb. 13, 2003), 1999 WL 34002969.

\textsuperscript{252} Non-parties may include such individuals as grandparents, neighbors, treating physicians of the parties, the child’s school teacher, or anyone else who plays a significant role in either the parties or child’s day-to-day lives. \textit{See Guidelines for Child Custody Evaluations in Family Law Proceedings}, AM. PSYCHOL. ASS’N, https://www.apa.org/practice/guidelines/child-custody (last visited Feb. 13, 2019) (“Psychologists . . . frequently make contact with members of extended family, friends and acquaintances and other collateral sources when the resulting information is likely to be relevant.”).

\textsuperscript{253} LA. STAT. ANN. § 9:331(B) (2019) (“The mental health professional shall provide the court and the parties with a written report.”).

\textsuperscript{254} Fuge v. Uiterwyk, 94-1815, p. 6 (La. App. 4 Cir. 3/29/95); 653 So. 2d 707, 712.
the examining mental health professional. The court noted that the trial judge’s ultimate determination relied heavily on the expert report because there existed “no other credible supportive evidence” to form the basis of the judgment. Therefore, “[w]ithout the opportunity to review the report, and to cross-examine the psychiatrist, [the opponents] were denied fundamental due process.” Counsel should ensure that the report is filed into the record to support the trial court’s findings of fact in the event of an appeal.

Although there are no specific requirements regarding the contents of the report, a few general topics and issues are the standard, as they appear in many expert reports of custody evaluators. The report should include the names of the parties, the children, and any other individuals with whom the evaluator met and whose interviews form the basis of the report. The evaluator should also explain any tests administered or methodologies used to assess the parties. The Model Standards of Practice for Child Custody Evaluations warn that evaluators should be prepared to defend their decisions concerning chosen methodologies. Other topics and information contained within the report may include the relationship between the parties, personal histories of each party, psychological statuses of all parties involved, information revealed in interviews with third

255. Fuge v. Uiterwyk, 94-1815, p. 6 (La. App. 4 Cir. 3/29/95); 653 So. 2d 707, 712.
256. Id.
257. Id.; see also Barker v. Barker, 2014-0775, p. 6 (La. App. 1 Cir. 11/7/14); 167 So. 3d 703, 706 (holding that “[w]ithout allowing the parties an opportunity to review the report and cross examine [the expert] violates the mandate in La. R.S. 9:331(B) and constitutes a denial of due process”).
259. See Report or Affidavit of J. Steven York, Ph.D., Lagarde v. Lagarde, No. 614-018 (24th J.D.C. La. July 26, 2006), 2006 WL 3892976 (listing every individual the evaluator met with, detailing the number of times he met with each, along with the purpose of the meeting).
260. David A. Martindale, The Model Standards of Practice for Child Custody Evaluations, 45 FAM. CT. REV. 70, 79 (2007). In Raney v. Wren, MMPI-2 tests were administered by the custody evaluator to both parents, and a clinical psychologist retained by the father testified as an expert regarding the particular methodology used and his experiences with the use of the particular test. Raney v. Wren, 98-0869, p. 13 (La. App. 1 Cir. 11/6/98); 772 So. 2d 54, 62.
261. Personal histories of all parties include their family, social, and mental health histories. See generally Expert Report & Affidavit, supra note 251.
262. This includes test results, prior mental or physical health issues as revealed by interviews, or medical records from prior treating physicians of the examined party.
parties, facts obtained via review of various relevant documents, and finally, the evaluator’s conclusions and recommendations.

While it is preferable to have live testimony of the evaluator, subject to cross-examination by the parties, the law does not require it. Section 331 provides that the mental health professional shall serve as a witness to the court, subject to cross-examination by a party, but the failure of a party to call the expert is not reversible error. When the custody evaluator does not testify in the custody proceeding, the report may be considered inadmissible hearsay. Absent objection by a party, however, an expert report has been considered by a court even without live testimony of the expert.

In Verret v. Verret, after a thorough review of the expert report, the trial court determined that the expert’s findings and recommendations were inconsistent. On appeal, the father argued that the court was in error for rejecting the recommendations without the evaluator being given a chance to address the court’s concerns on the stand. The second circuit disagreed, explaining that the trial court had a sufficient basis for rejecting the recommendations after considering the expert report and all of the testimony and evidence adduced at trial, as well as the demeanor of the parties and witnesses. In fact, neither party called the expert to testify. Presumably, no party objected at trial when the report was introduced into evidence without the expert present. If met with a hearsay objection, the report of the expert would be properly excluded.


263. See generally id. Pertinent documents in performing a custody evaluation can include, but are not limited to, emails from the parties and non-parties expressing concern or relaying information pertinent to the custody determination, letters from the parties or non-parties to the same effect, copies of medical records of any of the parties, results of any forensic examination, etc.

264. LA. STAT. ANN. § 9:331 (2019); see also Verret v. Verret, 34,982, pp. 12–13 (La. App. 2 Cir. 5/9/01); 786 So. 2d 944, 951–52 (explaining that either party could have called the evaluator as a witness, but their failure to do so did not result in reversible error when the trial judge chose not to adopt the evaluator’s recommendations).

265. See Mimms v. Brown, 2002-1681, p. 13 (La. App. 4 Cir. 9/3/03); 856 So. 2d 36, 43–44.

266. Verret, 34,982, p. 12; 786 So. 2d at 952.

267. Id. at p. 12; 786 So. 2d at 951.

268. Id. at p. 12; 786 So. 2d at 952.

269. Id. at pp. 12–13; 786 So. 2d at 952. The trial judge noted in his reasons for judgment that his observation of the parties revealed the “obvious hostility of the father toward the mother and his attempts to limit the child’s contact with her.” Id.

270. Verret, 34,982, p. 12; 786 So. 2d at 952.
Before the evaluator can testify, the court must first qualify the expert based on his “knowledge, skill, experience, training, or education” in the subject matter. Failure to timely object to a proposed expert’s qualifications will operate as a waiver of the right, and may not be asserted collaterally on appeal. The subject of the expert’s testimony is typically limited to the report prepared by the expert and submitted to the parties and the court. The credibility of the expert’s testimony can be examined and tested by any party challenging the conclusions reached by the expert. Both parties are given a chance to cross-examine or confront the evaluator on any perceived inconsistencies or contested issues of fact contained within the report. The expert testimony of a custody evaluator regarding the child’s preferences and feelings, based on the evaluation and interactions with the child, will serve to remedy any judicial error in not allowing the child to testify.

When two mental health professionals evaluate the parties and assist the court in its custody determination, their recommendations and reasons may conflict. Trial judges must resolve conflicting expert testimony and make credibility determinations by examining and assessing the underlying bases for each expert’s recommendations. The effect and weight to be

271. LA. CODE EVID. ANN. art. 702 (2019) provides:
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) The testimony is based on sufficient facts or data; (3) The testimony is the product of reliable principles and methods; and (4) The expert has reliably applied the principles and methods to the facts of the case.

272. LA. CODE EVID. ANN. art. 103 (2019) provides:
Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . when the ruling is one admitting evidence, a timely objection or motion to admonish the jury to limit or disregard appears of record, stating the specific ground of objection . . . .

273. See Leard v. Schenker, 2006-1116, p. 3 (La. 6/16/06); 931 So. 2d 355, 357.
274. See Fuge v. Uiterwyk, 94-1815, p. 6 (La. App. 4 Cir. 3/29/95); 653 So. 2d 707, 712.
275. See Fernandez v. Pizzalato, 2004-1676, pp. 17–18 (La. App. 4 Cir. 4/27/05); 902 So. 2d 1112, 1123.
276. Orrill v. Orrill, 2008-0400, p. 7 (La. App. 4 Cir. 2/4/09); 5 So. 3d 279, 284 (“[R]esolution of conflicts in expert testimony, are factual issues to be resolved by the trier of fact . . . .”). This may happen when parties feel comfortable with different mental health professionals and display inconsistent behavior. It can also often be the result of the number of times the expert meets with each party; the more frequently the evaluator is able to observe a person’s behavior and demeanor, the more accurate their understanding of that individual will be.
277. Moreau v. Moreau, 2015-0564, p. 7 (La. App. 4 Cir. 11/18/15); 179 So. 3d 819,
given to the expert testimony are within the broad discretion of the trial judge. In *Orill v. Orill*, the court addressed conflicting reports and commended an evaluator for her consistent cross-validation of all information provided to her by each party as well as from other parties she interviewed.

Because trial judges are in the best position to make credibility determinations of parties and witnesses, great deference is given to their determinations in child custody cases and will not be disturbed absent clear abuse of discretion. Although court-appointed mental health experts spend significant time inquiring into the lives and well-being of all parties involved, oftentimes, the trial judge will ultimately spend more time with the parties throughout the case. Therefore, consistent observation of the parties’ behavior and demeanor toward one another leaves the judge in the best position to weigh the evidence presented, given the credibility of each party.

The weight given to expert testimony depends on the professional qualifications of the evaluator, the expert’s experience, and the facts upon which the opinion is based. Trial judges may, and oftentimes do, substitute their own judgment and common sense “when such a substitution appears warranted upon the record as a whole.” Such justification permits trial courts to refuse to adopt a custody evaluator’s recommendations. In *Goodwin v. Goodwin*, the court refused to adopt the evaluator’s recommendations, and it explained that after eight days of observing the parties’ interactions, as well as testimony as to their extreme animosity, the court-appointed expert “did not realize the intensity of hatred involved” when he recommended joint

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824; *Orrill v. Orrill*, 2008-0400, p. 7 (La. App. 4 Cir. 2/4/09); 5 So. 3d 279, 284.
278. *McFall v. Armstrong*, 10-1041, p. 8 (La. App. 5 Cir. 9/13/11); 75 So. 3d 30, 36–37.
279. *Orrill*, 2008-0400, p. 8; 5 So. 3d at 284 (explaining that the other evaluator merely accepted as true what each party told her and made recommendations accordingly, without further inquiry into the allegations).
280. *AEB v. JBE*, 99-2668, p. 7 (La. 11/30/99); 752 So. 2d 756, 776 (“[T]he determination of the trial judge in custody matters is entitled to great weight, and his discretion will not be disturbed on review in the absence of a clear showing of abuse.”); see also *Prejean v. Prejean*, No. 11-1571, 2012 WL 1521522, at *4 (La. Ct. App. 3 Cir. May 2, 2012).
281. *Verret v. Verret*, 34,982, p. 11 (La. App. 2 Cir. 5/9/01); 786 So. 2d 944, 951.
282. Id. at p. 11; 786 So. 2d 951 (citing *Curtis v. Curtis*, 34,317 (La. App. 2 Cir. 11/1/00); 773 So. 2d 185); see also *Goodwin v. Goodwin*, 618 So. 2d 579 (La. Ct. App. 2 Cir. 1993) (noting that the trial court rejected the findings and recommendations of the experts after evaluating the evidence and testimony as a whole).
The most frequently appealed judgments in child custody cases are those in which the trial court fails to adopt the recommendation of the court-appointed custody evaluator. However, unless the appellate court can find no factual basis for the trial court’s judgment, it will be upheld. Furthermore, as long as the findings of fact and the reasons for judgment are provided in sufficient detail, as evidenced by the record, appellate courts are reluctant to disturb the trial court’s judgment.

In *Fernandez v. Pizzalato*, the appellate court highlighted the importance of detailed judicial findings and reasons for judgment when considering a trial court’s custody award that was in complete disregard of the custody evaluator’s recommendations. The appellate court reversed the award of custody because the trial judge gave the evaluator’s recommendations no weight in the judgment. The trial court gave no reasons for its decision to discredit the expert, even though the court selected that particular evaluator, making it unlikely that the expert was unqualified to render an opinion. Detailed findings of fact and reasons for judgment are prudent and can be necessary if the case is pursued on appeal.

VI. USE OF PARENTING COORDINATORS

The most common non-expert used by the court in custody

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283. Goodwin v. Goodwin, 618 So. 2d 579, 585–86 (La. Ct. App. 2 Cir. 1993) (opting not to adopt the recommendations of the court-appointed evaluator, a licensed clinical social worker, who conducted comprehensive evaluations of the child and both parents).

284. See generally *Fernandez v. Pizzalato*, 2004-1676, p. 21 (La. App. 4 Cir. 4/27/05); 902 So. 2d 1112; *Goodwin*, 618 So. 2d 579; *McKenzie v. Cuccia*, 2004-0112 (La. App. 4 Cir. 6/23/04); 879 So. 2d 335; *Verret v. Verret*, 34,982 (La. App. 2 Cir. 5/9/01); 786 So. 2d 944; *Kees v. Kees*, 2008-0124 (La. App. 4 Cir. 8/13/08); 992 So. 2d 568; *Molony v. Harris*, 2010-1316 (La. App. 4 Cir. 2/23/11); 60 So. 3d 70; *Moreau v. Moreau*, 2015-0564 (La. App. 4 Cir. 11/18/15); 179 So. 3d 819.

285. See LA. CIV. CODE ANN. art. 134 cmt. (b) (2019) (“A trial court’s custody award will not be disturbed absent a manifest abuse of discretion.”); *Bergeron v. Bergeron*, 492 So. 2d 1193, 1196 (La. 1986); AEB v. JBE, 99-2668, p. 7 (La. 11/30/99); 752 So. 2d 756, 776.

286. See *Fernandez*, 2004-1676, p. 21; 902 So. 2d at 1125.

287. See id.

288. Id. (noting that the custody evaluation was both “extremely comprehensive and thorough”).

289. Id.
cases is a parenting coordinator.\textsuperscript{290} The Association of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination defines parenting coordination as:

[A] child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children’s needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.\textsuperscript{291}

The parenting coordination model stemmed from an idea developed by AFCC, “an interdisciplinary and international association of professionals dedicated to developing, refining, and practicing constructive resolution of family conflict.”\textsuperscript{292}“Assessment-based parenting coordination” was presented at the first AFCC Custody Evaluation Symposium in 1994 by a group of colleagues who realized the need for a more tailored approach to resolving problems with high-conflict families.\textsuperscript{293} In 2000, the American Bar Association also recognized the need for a model to help reduce the impact of high-conflict custody cases on children,\textsuperscript{294} and by 2001, fourteen states had implemented some form of a parenting coordination model.\textsuperscript{295}

In light of the growing acceptance of the model, the AFCC appointed a Task Force on Parenting Coordination.\textsuperscript{296} The Task Force discussed a need for model standards of practice; however, because the parenting coordinator role was so new, it simply laid out various issues that arose and how jurisdictions with parenting coordination models resolved them.\textsuperscript{297} The Task Force published

\textsuperscript{290} LA. STAT. ANN. § 9:358.1 (2019).
\textsuperscript{291} AFCC Task Force on Parenting Coordination, Guidelines for Parenting Coordination, 44 FAM. CT. REV. 164, 165 (2006).
\textsuperscript{293} Sharon Press, Family Court Services: A Reflection on 50 Years of Contributions, 51 FAM. CT. REV. 48, 51 (2013).
\textsuperscript{294} Id.
\textsuperscript{295} Id.
\textsuperscript{296} Id.
\textsuperscript{297} Id.
its approach in “Parenting Coordination: Implementation Issues” in 2003. Then, in 2005, the AFCC published “Guidelines for Parenting Coordination,” which provided specific and detailed recommendations for training parenting coordinators as well as best practices.

Leading the way in parenting coordination legislation, Oklahoma enacted the first parenting coordination statute in 2001, which served as a model for other states. Idaho and Oregon followed in 2002, and Colorado, Texas, and North Carolina in 2005. Louisiana joined in 2007, followed by South Dakota in 2008 and Florida in 2009. Although the AFCC Task Force on Parenting Coordination set out recommendations for best practices, it also encouraged states to define guidelines that would work for them, which has resulted in many similarities, as well as some differences, among these states.

Louisiana Revised Statutes § 9:358.1 sets out the general provisions for appointment of a parenting coordinator. According to the statute, the court may appoint a parenting coordinator either on motion of a party or on motion of the court. The appointment may only be made for good cause shown and only if the court had previously entered a judgment establishing child custody. In other words, no parenting coordinator can be appointed before a court issues a child custody award.

The first limitation of Revised Statutes § 9:358.1 requires that an existing custody order be in place. The custody order may be

299. Guidelines for Parenting Coordination, supra note 291, at 164.
301. Id. at 630.
302. Id.
303. Id. at 629.
306. Id.
307. See id.; LA. STAT. ANN. § 9:358.1 cmt. (b) (2019); see also Broussard-Scher v. Legendre, 2010-1164, p. 12 (La. App. 3 Cir. 3/23/11); 60 So. 3d 1290, 1298 (holding that the trial court lacked authority to appoint a parenting coordinator in a proceeding filed by the grandmother seeking visitation with the grandchild because the trial court had not previously entered a judgment establishing child custody); Griffith v. Latiolais, 2010-0754, p. 19 (La. 10/19/10); 48 So. 3d 1068, 1071–72 (reversing the trial court’s order that the parties continue co-parenting counseling sessions because the counseling was “outside the parameters of La. Stat. Ann. § 9:358.1” in several ways,
Custody

a considered decree or an order based on a joint stipulation, but it cannot be an ex parte custody order.\(^{308}\) The comments to § 9:358.1 explain that “the purpose of this limitation is to prevent the court from using the parenting coordinator process as a means of abdicating responsibility to make the initial custody determination.”\(^{309}\)

The second limitation permits appointment only when good cause is shown.\(^{310}\) According to the statute, “good cause” may include the inability or unwillingness of either or both parties “to collaboratively make parenting decisions without assistance of others or insistence of the court.”\(^{311}\) Additionally, good cause may include:

\[\text{[A]n inability or unwillingness to comply with parenting agreements and orders or a determination by the court that either or both parties have demonstrated an ongoing pattern of unnecessary litigation, refusal to communicate or difficulty in communicating about and cooperation in the care of children, and refusal to acknowledge the right of each party to have and maintain a continuing relationship with the children.}\(^{312}\)

\(^{308}\) LA. STAT. ANN. § 9:358.1 cmt. (b) (2019).

\(^{309}\) Id.

\(^{310}\) LA. STAT. ANN. § 9:358.1(A) (2019); see also LA. STAT. ANN. § 9:358.1 cmt. (c) (2019).

\(^{311}\) Id.; see also Molony v. Harris, 2010-1316, pp. 20–21 (La. App. 4 Cir. 2/23/11); 60 So. 3d 70, 82–83 (finding that the presence of several factors supported appointment of a parenting coordinator); Griffith v. Latiolais, 2010-0754, p. 20 (La. 10/19/10); 48 So. 3d 1058, 1071–72 (holding not only that the trial court had appointed a parenting coordinator outside the confines of Louisiana Revised Statutes § 9:358.1, but also that “good cause had not been shown sufficient to require a parenting coordinator for such an extensive length of time” because the record did not show an “inability or unwillingness to comply with the parenting agreements and orders . . . [or] an ongoing pattern of unnecessary litigation, refusal to communicate[, ] [or] difficulty in communicating about and cooperation in the care of [the child]”); Tracie F. v. Francisco D., 15-224, p. 61 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 817, aff’d but criticized, 2015-1812 (La. 3/15/16); 188 So. 3d 231 (remanding matter and encouraging trial court and parties to consider appointment of a parenting coordinator); Hanks v. Hanks, 2013-1442, p. 33 (La. App. 4 Cir. 4/16/14); 140 So. 3d 208, 229 (recommending appointment of a parenting coordinator upon remand); Palazzolo v. Mire, 2008-0075, p. 54 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 779 (upon remand for determination of visitation rights, recommending use of parenting coordinator because several factors for good cause were present); Council v. Livingston, 2016-1228, 2017 WL 4161681, at *10–11 (La. Ct. App. 4 Cir. Sept. 20, 2017) (finding that the trial court did not abuse its discretion by refraining from appointing a parenting coordinator because the judge found the parties
However, a showing of good cause is not necessary if there is a joint motion of the parties; in that case, the court shall appoint a parenting coordinator.\footnote{LA. STAT. ANN. § 9:358.1(A) & cmt. (d) (2019).}

The appointment of a parenting coordinator is also limited to an initial one-year term, which may be extended for additional one-year terms for good cause shown.\footnote{LA. STAT. ANN. § 9:358.1(B) (2019); see also Griffith v. Latiolais, 2010-0754, pp. 19–20 (La. 10/19/10); 48 So. 3d 1058, 1071–72 (holding that the trial court’s order allowing the parties to see the parenting coordinator for two years and to continue seeing him for an indefinite period after the issuance of the final custody judgment was outside the parameters of LA. STAT. ANN. § 9:358.1).} Termination of the appointment likewise occurs for good cause shown, upon motion of the court or of a party, or upon request of the parenting coordinator.\footnote{LA. STAT. ANN. § 9:358.8 & cmt. (2019).}

Louisiana Revised Statutes § 9:358.1 also outlines responsibility for costs, requiring each party to pay a portion.\footnote{LA. STAT. ANN. § 9:358.1(C) (2019); see also Griffith, 2010-0754, p. 19; 48 So. 3d at 1071 (holding that the trial court erred in appointing a parenting coordinator despite the fact that one of the parties was unable to pay her apportioned cost).} The court may apportion the fee according to the parties’ ability to pay; if the parties have an approximately equal ability to pay, they will typically pay the costs of their time spent with the parenting coordinator and split the costs of any time that the parenting coordinator spent otherwise.\footnote{LA. STAT. ANN. § 9:358.1 cmt. (f) (2019).} In any case, the portion that each party is required to pay must be specified in the order of appointment.\footnote{Id.} Importantly, if a party has been granted pauper status or is unable to pay the apportioned cost, no parenting coordinator shall be appointed at all.\footnote{Id.}

Another limitation on the appointment of a parenting coordinator arises when “a party has a history of perpetrating family violence,” in which case no parenting coordinator shall be appointed unless for good cause shown.\footnote{LA. STAT. ANN. § 9:358.2 (2019).} “Family violence” is defined in the Post-Separation Family Violence Relief Act to communicated with each other).

\footnote{See LA. STAT. ANN. § 9:358.1(A) & cmt. (d) (2019).}

\footnote{LA. STAT. ANN. § 9:358.1(B) (2019); see also Griffith v. Latiolais, 2010-0754, pp. 19–20 (La. 10/19/10); 48 So. 3d 1058, 1071–72 (holding that the trial court’s order allowing the parties to see the parenting coordinator for two years and to continue seeing him for an indefinite period after the issuance of the final custody judgment was outside the parameters of LA. STAT. ANN. § 9:358.1).}

\footnote{LA. STAT. ANN. § 9:358.8 & cmt. (2019). In this instance, “good cause” may include various factors, such as “nonpayment of fees, the process has exhausted itself, safety concerns, a lack of reasonable progress despite the best efforts of the parties, one of the parties is a perpetrator of family violence, or the parenting coordinator is unable or unwilling to serve.” Id.}

\footnote{LA. STAT. ANN. § 9:358.1(C) (2019).}

\footnote{LA. STAT. ANN. § 9:358.1 cmt. (f) (2019).}

\footnote{Id.}

\footnote{LA. STAT. ANN. § 9:358.1(C) (2019); see also Griffith, 2010-0754, p. 19; 48 So. 3d at 1071 (holding that the trial court erred in appointing a parenting coordinator despite the fact that one of the parties was unable to pay her apportioned cost).}
include “physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injuring and defamation, committed by one parent against the other parent or against any of the children.”

Louisiana Revised Statutes § 9:358.3 lists the qualifications that a parenting coordinator must possess as well as the type of training needed. To remain qualified, a parenting coordinator must receive twenty hours of continuing education every two years.

The authority and duties of a parenting coordinator are outlined in Louisiana Revised Statutes § 9:358.4. Parenting coordinators are required to “assist the parties in resolving disputes and in reaching agreements regarding children in [the parties’] care.” The statute provides a non-exclusive list of other types of issues that may arise, including physical schedules, health management, education, religion, travel, communication, interactions, and general child-rearing. When the parties are unable to reach an agreement with the parenting coordinator’s help, the parenting coordinator may make a recommendation to the court, which will ultimately decide the issue. While parenting coordinators assist the court and the parties with daily issues that parents alone are unable to resolve, they should not facilitate an agreement that would change legal custody or significantly change physical custody or visitation that could result in a change in child support.

A parenting coordinator is considered a “mandatory reporter” who must report to the proper department or agency.

321. LA. STAT. ANN. § 9:362(4) (2019). This statute also points out that “family violence does not include reasonable acts of self-defense utilized by one parent to protect himself or herself or a child in the family from the family violence of the other parent.” Id.
322. LA. STAT. ANN. § 9:358.3(A) (2019).
323. LA. STAT. ANN. § 9:358.3(B) (2019).
324. LA. STAT. ANN. § 9:358.3(C) (2019).
326. See generally id.
329. LA. CHILD. CODE ANN. art. 603(17)(h) (2019).
any cause to believe that “a child’s physical or mental health or welfare is endangered as a result of abuse or neglect.”331 The parenting coordinator has an obligation to provide any reports to the court, the parties, and their attorneys.332 However, the parenting coordinator cannot be called as a witness in the child custody proceeding unless the court permits the coordinator to do so because other capable mental health experts involved in the proceeding will testify or furnish a report touching on any conflicts or tension between the parties.333 Therefore, if a court-appointed custody evaluator, or even an examining or treating mental health professional, is available to testify or submit a report, the need for the parenting coordinator’s testimony does not rise to the requisite standard.334 Parenting coordinators cannot communicate with the court ex parte, except in an emergency situation,335 and the parties must cooperate with the coordinator by providing requested information.336 Finally, parenting coordinators are protected by a limitation on personal liability for any loss arising from the exercise of their official duties as long as the loss was not caused by gross negligence or willful or wanton misconduct.337

The parenting coordinator model has been criticized for improper delegation of judicial authority because of the fact-finding and decision-making that parenting coordination may entail.338 Some states have responded by implementing parenting

332. LA. STAT. ANN. § 9:358.5(B) (2019); see also Schneider v. Schneider, 2012-1241, p. 7 (La. App. 3 Cir. 6/20/13); 115 So. 3d 1279, 1284 (holding that “the trial court erred in requiring the parenting coordinator to report directly to the court”).
333. LA. STAT. ANN. § 9:358.5(A) (2019). Comment (a) specifies that “a judge should not authorize the issuance of a subpoena to a parenting coordinator unless the calling party demonstrates a need for the testimony and that evidence cannot be adduced from other sources,” and that “the court may not call the parenting coordinator as a witness on its own motion.” LA. STAT. ANN. § 9:358.5 cmt. (a) (2019); see also Carollo v. Carollo, 2013-0010, pp. 10–11 (La. App. 1 Cir. 5/31/13); 118 So. 3d 53, 61 (finding no error in the trial court’s decision to exclude the parenting coordinator’s testimony).
334. The general purpose of the parenting coordinator is to “assist[] parents . . . to implement a parenting plan by facilitating the resolution of their disputes in a timely manner and by reducing their child-related conflict so that the children may be protected from the impact of that conflict,” as well as “[to assist[] the parties in promoting the best interests of the children by reducing or eliminating child-related conflict through the use of the parenting coordination process.” LA. STAT. ANN. § 9:358.1 cmt. (a) (2019).
335. LA. STAT. ANN. § 9:358.6 (2019).
coordination procedures that allow for the court to review and approve a parenting coordinator’s recommendations, as well as provide an opportunity for an unhappy party to object.\textsuperscript{339} Louisiana has avoided this issue by limiting the role of the parenting coordinator, who can only make recommendations to the court and only when the parties are unable to reach an agreement.\textsuperscript{340}

Some have also argued that parenting coordination infringes on a parent’s constitutional rights.\textsuperscript{341} No Louisiana court has entertained the issue. However, in \textit{Barnes v. Barnes},\textsuperscript{342} the Oklahoma Supreme Court considered the argument that the Oklahoma Parenting Coordinator Act was unconstitutional because it required “nothing more than a best-interest determination to infringe on a parent’s fundamental right to make child-rearing decisions and in treating a divorced parent differently than a married parent.”\textsuperscript{343} There, the court found that the act was constitutional, noting that neither the order nor the statute itself gave the parenting coordinator authority to hear and decide any more than limited issues that aid in communication between the parties and enforcement of the court’s order.\textsuperscript{344}

While courts across Louisiana may handle the use of parenting coordinators differently, their use undoubtedly eases judicial involvement on specific, ministerial issues over which the parties simply need third-party help to reach an agreement. When the parties are unable to reach an agreement, the court must still decide the issue and can consider the recommendation of the parenting coordinator, who is knowledgeable about the parties’ interactions and daily life. Nonetheless, the parties still receive needed judicial oversight, which may be necessary in a hotly-contested child custody matter.

\section*{VII. DRUG TESTING IN CUSTODY OR VISITATION PROCEEDINGS}

A court “may order a party in a custody or visitation proceeding to submit to specified drug tests and the collection of hair, urine, tissue, and blood samples” upon good cause shown

\begin{footnotesize}
\begin{enumerate}
\item[339.] Coates et al., \textit{supra} note 338, at 249–50.
\item[340.] Parks et al., \textit{supra} note 300, at 635.
\item[341.] \textit{See} Coates et al., \textit{supra} note 338, at 251.
\item[342.] \textit{See generally} Barnes v. Barnes, 107 P.3d 560 (Okla. 2005).
\item[343.] Coates et al., \textit{supra} note 338, at 251; \textit{see also generally} Barnes, 107 P.3d at 563.
\item[344.] Barnes, 107 P.3d at 565; \textit{see also} Coates et al., \textit{supra} note 338, at 251–52.
\end{enumerate}
\end{footnotesize}
after a contradictory hearing.\textsuperscript{345} The refusal to submit to testing can be considered by the court and the rules for the admissibility of the testing reports are governed by the blood and tissue sampling statutes found in Louisiana Revised Statutes § 9:397.2 and :397.3, rather than the general rules of evidence.\textsuperscript{346} Both the order for and results of the drug test are confidential and are not admissible in any other proceeding.\textsuperscript{347}

VIII. CUSTODY HIERARCHY

Prior to the revision of 1993, joint custody to the parents was presumed, as the arrangement would naturally be in the best interest of the child.\textsuperscript{348} The inquiry was largely directed to the quality of the relationship between the parents and their willingness to encourage the child to have a close relationship with the other parent.\textsuperscript{349} Following the revision, the sole focus was the best interest of the child.\textsuperscript{350} As a result, the preference for court-ordered joint custody was replaced with the preference for parental agreement, even if the parents agreed to sole custody or nonparent custody.\textsuperscript{351}

If the parents cannot reach an agreement or if the agreement is not in the best interest of the child, then custody must be awarded to the parents jointly.\textsuperscript{352} If one parent can provide clear and convincing evidence that custody in that parent alone would serve the best interest of the child, then the court must award sole custody.\textsuperscript{353} Last in the custody hierarchy is custody to the

\textsuperscript{345} LA. STAT. ANN. § 9:331.1 (2019); see also Hogan v. Hogan, 49,979, p. 6 (La. App. 2 Cir. 9/30/15); 178 So. 3d 1013, 1017 (reasoning that drug testing was proper when mother alleged that father had issues with alcohol and was also concerned as to the safety of the children while in their father’s care, particularly because of the people with whom he associated); Richardson v. Richardson, 2007-0430, pp. 17–18, 22 (La. App. 4 Cir. 12/28/07); 974 So. 2d 761, 773, 776 (holding that suspicion that both parties to a custody action were habitual drug users was sufficient to warrant random drug testing).

\textsuperscript{346} See LA. STAT. ANN. § 9:331.1 (2019); see also Richardson, 2007-0430, pp. 12–13; 974 So. 2d at 771 (rejecting the use of drug test results that were simply read into the record without following the prerequisites of the Revised Statutes).

\textsuperscript{347} L.E.P.S. v. R.G.P., 2008-1349, p. 14 (La. App. 3 Cir. 6/03/09); 11 So. 3d 633, 642–43. Costs can be taxed against any parties as may be equitable. \textit{Id.}

\textsuperscript{348} \textit{See supra} Section I.C.

\textsuperscript{349} \textit{Id.}

\textsuperscript{350} Evans v. Lungrin, 97-0541, p. 7 (La. App. 3 Cir. 12/22/99); 708 So. 2d 731, 735–736.

\textsuperscript{351} LA. CIV. CODE ANN. art. 132 (2019).

\textsuperscript{352} \textit{Id.}

\textsuperscript{353} \textit{Id.; see also} Harrell v. Harrell, 2017-0561, p. 7 (La. App. 1 Cir. 12/5/17); 236 So.
nonparent, which will only be granted when the nonparent can prove substantial harm to the child. Each step in the custody hierarchy must be considered amidst the backdrop of the United States Constitution, which gives parents a constitutionally protected interest in the care, custody, and control of their children.

A. CONSTITUTIONAL RIGHT OF PARENTS TO CUSTODY

Parents have enjoyed the longstanding tradition of nurturing and rearing their children. This tradition has roots in natural law, the United States Constitution, and more modern-day state statutes. The basis of this parental right is found in the Due Process Clause of the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” While the Due Process Clause ensures fair process, it has long been held to include a substantive component providing “heightened protection against government interference with certain fundamental rights and liberty interests.”

The freedom of personal choice in matters of family life has historically been recognized as a fundamental liberty interest protected by the Fourteenth Amendment. This interest has been further defined to encompass the special right of parents to the care, custody, and control of their children. As a result, state statutes or policies that infringe on parents’ rights have been struck down.

354. LA. CIV. CODE ANN. art. 133 (2019); see also McCormic v. Rider, 2009-2584, pp. 2–3 (La. 2/12/10); 27 So. 3d 277, 279; In re C.A.C., 2017-0108, pp. 16–17 (La. App. 4 Cir. 11/2/17); 231 So. 3d 58, 69.
356. U.S. CONST. amend. XIV.
360. See, e.g., Santosky, 455 U.S. at 758 (striking down a New York statute that permitted the state to terminate parental rights under a “fair preponderance of the evidence” standard of proof, rather than the more stringent clear and convincing standard); Troxel, 530 U.S. at 75 (striking down a Washington state statute that permitted a court to grant visitation of a child, over the parent’s objection, upon a showing that visitation was in the child’s best interest); Stanley, 405 U.S. at 658.
The importance of this constitutionally protected right is reflected in Louisiana jurisprudence. Justice Tate, in his concurring opinion in *State ex rel. Paul v. Peniston*, explained:

The right of a parent to his child existed before governments or other social institutions of mankind. This natural right proceeds from our Creator and exists independently of the state; the state . . . does not in my humble opinion possess the power to take away in favor of a stranger the God-given right of a parent to his child, in the absence of the parent’s forfeiture or abandonment of such right or of positive detriment to the child.

Louisiana’s laws of custody reflect the paramount right of parents on issues involving their children. The court must honor the parental choice of custody unless that choice runs afoul of the child’s best interest. For a parent to be denied joint custody of their child, the other parent must prove by the heightened burden of clear and convincing evidence that sole custody in the other parent alone will serve the child’s best interest. Finally, to deprive the parents of custody, a nonparent must prove substantial harm to the child if custody were to rest with the parents.

Louisiana’s grandparent visitation statutes, rather than its custody statutes, have been the subject of constitutional challenges. Louisiana Revised Statutes § 9:344 permits grandparents to receive visitation with a grandchild if their child is deceased, interdicted, or incarcerated, as long as it serves the best interest of the child. Several courts have upheld the constitutionality of the statute under the due process challenge that the statute violates a parent’s fundamental right to make decisions regarding the care, custody, and control of their children. Specifically, in *Galjour v. Harris*, the court found the
visitation statute to be narrowly tailored so that it did not infringe on the parents’ liberty interest to raise their children without unnecessary interference.\textsuperscript{368}

In 2012, the legislature amended article 136 of the Civil Code, which permitted a grandparent to seek reasonable visitation with a grandchild if it was in the child’s best interest.\textsuperscript{369} Extraordinary circumstances such as death, incarceration, or interdiction were no longer prerequisites for a grandparent to seek visitation. The article was amended again in 2018, with due concern over constitutional issues, to permit a grandparent to seek reasonable visitation when it is in the best interest of the child, only when married parents have filed for divorce or when the parents are unmarried and not living together as though they are married.\textsuperscript{370} Are these limitations enough to protect the article from a facial constitutional challenge? Louisiana Revised Statutes § 9:344 contains more significant limitations and now applies when the parents of the child are married and have not filed for divorce or when the parents are living together.\textsuperscript{371} With these recent changes, a constitutional claim may still be imminent.

Harkening back to the United States Supreme Court’s mandate in \textit{Troxel v. Granville}, a visitation statute that is “breath-takingly broad” may permit a court to disregard the decision of a parent in favor of what the court believes is in the child’s best interest, rather than giving the parent the right to make decisions regarding the rearing of their child.\textsuperscript{372} While grandparents naturally may enjoy a closer relationship with a grandchild than other relatives, a showing of best interest alone, without due deference given to the parent’s decision to limit or prevent visitation, may run afoul of the parent’s constitutional guarantees.

\textbf{B. PARENTAL AGREEMENT}

Article 132 of the Civil Code provides that “[i]f the parents

\begin{footnotesize}
\begin{enumerate}
\item Galjour v. Harris, 2000-2696, p. 12 (La. App. 1 Cir. 3/28/01); 795 So. 2d 350, 358.
\item LA. CIV. CODE art. 136 (2012). The court is required to hold a contradictory hearing before awarding the grandparent visitation “to determine whether the court should appoint an attorney to represent the child.” \textit{Id.}
\item LA. CIV. CODE ANN. art. 136 (2019). The article applies to unmarried parents, but if the parents are unmarried and cohabitating in the manner of married persons, then LA. STAT. ANN. § 9:344 will apply. \textit{Id.; see also infra Section XI.B.1.}
\item See LA. STAT. ANN. § 9:344 (2019).
\end{enumerate}
\end{footnotesize}
agree who is to have custody, the court shall award custody in accordance with their agreement unless . . . the best interest of the child requires a different award.\footnote{373} In other words, if the parents can agree on custody, the court must consider whether their proposal is in the child’s best interest before accepting their agreement. The parents need not agree to joint custody; they can agree to custody in one parent or custody in a third person, provided the agreement serves the best interest of the child.\footnote{374}

Courts have various tools at their disposal to encourage parents to agree. The court can require parents to “mediate their differences . . . for a period not to exceed thirty days.”\footnote{375} The court can also require the parents to attend a court-approved seminar to educate the parties of the needs of children while adjusting to the divorce.\footnote{376} Evaluations of the parties or the child that are conducted by a mental health professional can also be ordered by the court, which can give the parents an unbiased view of the child’s behavior and relationship with the parents.\footnote{377} The court can appoint an attorney to represent the child if, after hearing, it is in the best interest of the child.\footnote{378}

The preference for parental agreement supports “the God-given” constitutionally protected right of parents to care and control of their children.\footnote{379} A parent’s obligation to parent his child does not expire at the end of marriage—it exists as a result of parenthood—and the court must allow the parent to make choices in the best interest of the child.

Parents have broad discretion over provisions in their agreement. Courts have explained that “a bilateral contract . . .
signed by the parties and accepted by the court... has binding force from the voluntary acquiescence of the parties, not from the court's adjudication." Courts will uphold an agreement of custody as long as the provisions are in the best interest of the child and do not violate public policy. For example, courts have upheld agreements to pay for college after the child reaches the age of majority. The agreement must be valid under general contract principles, and if so, the court will enforce the free consent of the parents.

Some courts have upheld agreements by parents to apply the heightened Bergeron standard to subsequent custody modifications while others have not. Generally, when the court issues a consent decree in accordance with the parents' agreement, any subsequent modification of custody will require the party seeking the modification to prove "a material change of circumstance[] since the original decree was entered, and... that the proposed modification is in the best interest of the child." When the court issues a considered decree after a hearing during which parental fitness is examined, any subsequent modifications require the party to prove a heightened evidentiary standard known as the Bergeron standard. The Bergeron standard requires the proponent of the change to prove the heavy burden that "continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or... that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child."

The Louisiana Second Circuit Court of Appeal in Adams v.

380. Gray v. Gray, 37,884, p. 3 (La. App. 2 Cir. 12/12/03); 862 So. 2d 1097, 1099.
381. The cause of one's obligation is unlawful if it "would produce a result prohibited by law or against public policy." LA. CIV. CODE ANN. art. 1968 (2019).
382. Gray, 37,884, pp. 1–2 (La. App. 2 Cir. 12/12/03); 862 So. 2d 1097, 1098.
383. Id. at p. 4; 862 So. 2d at 1099. The court in Gray construed "monies necessary for the college education of the minor children" to be tuition at any Louisiana state-supported college, textbook and lab expenses, dormitory fees, spending money, meal ticket, laundry allowance, and transportation allowance, but not funds for a car, fraternity or sorority expenses, or entertainment or "beer-drinking" expenses. Id. at p. 4; 862 So. 2d at 1100; see also Miller v. Miller, 44,163, p. 6 (La. App. 2 Cir. 1/14/09); 1 So. 3d 815, 818–19 (setting aside a provision related to the payment of college expenses for vagueness and ambiguity); Headrick v. Headrick, No. 2006-2292, 2007 WL 2684886, at *5 (La. Ct. App. 1 Cir. Sept. 14, 2007) (upholding a percentage of college expenses to be paid by each parent).
384. Evans v. Lungrin, 97-0541, 97-0577, pp. 12–13 (La. 2/6/98); 708 So. 2d 731, 738.
Adams upheld a stipulation in a joint custody agreement that “any action to modify custody would be governed by the heavy burden applicable to considered decrees as set forth in Bergeron.” In a modification request years after the agreement, one parent challenged the provision as unenforceable. The court disagreed, explaining that parties are free to contract for any object that is not a violation of public policy, and it could find no policy reason to infringe on the freedom of contract. In fact, the court concluded that the agreement supported the policies that underlie Bergeron, including the “protection against harm done to children by custody litigation and threats thereof, changes in custody, continued parental conflict, and erroneous judgments.”

One judge dissented from the majority, arguing that an agreement to impose the Bergeron standard negates “the opportunity for a judicial assessment of parental fitness” and is therefore against public policy.

The Louisiana Fifth Circuit Court of Appeal in Rodriguez v. Wyatt agreed with the dissent. Again, the parents in an agreement stipulated to the Bergeron standard for any subsequent modifications. The court disagreed with the majority opinion in Adams and concluded that “parties cannot shield themselves from custody modifications by stipulating to Bergeron in cases where there has been no judicial assessment of parental fitness.” The court left open the question of whether parties, who enter into an agreement after a judicial assessment of parental fitness, can agree to the heightened Bergeron standard. The Louisiana Supreme Court has not yet spoken on this issue.

Courts will not uphold a provision in a parental agreement

386. Adams v. Adams, 39,424, p. 1 (La. App. 2 Cir. 4/6/05); 899 So. 2d 726, 727.
387. See id. at pp. 2–3; 899 So. 2d at 728.
388. Id. at p. 6; 899 So. 2d at 730.
389. Id. at p. 7; 899 So. 2d at 730.
390. Id. at p. 1; 899 So. 2d at 732 (Gaskins, J., dissenting).
391. See Rodriguez v. Wyatt, 11-82, pp. 11–12 (La. App. 5 Cir. 12/12/11); 102 So. 3d 109, 116.
392. See id. at p. 12; 102 So. 3d at 116.
393. Id. Compare Poole v. Poole, 41,220, p. 4 (La. App. 2 Cir. 3/2/06); 926 So. 2d 60, 63 (refusing to apply the Bergeron standard to an agreement that was entered into after the court took evidence of parental fitness of one of the parties but that contained no stipulation regarding the Bergeron standard), with Long v. Long, 28,763, pp. 4–5 (La. App. 2 Cir. 12/11/96); 684 So. 2d 1099, 1101 (applying the Bergeron standard to an agreement that was entered into after the court began a hearing on parental fitness and that contained a provision stipulating to the Bergeron standard).
394. Rodriguez, 11-82, p. 12; 102 So. 3d at 116.
that it deems to be unlawful or against public policy. 395 An agreement that permanently negates the requirement to pay child support is contrary to the nonwaivable duty of support that fathers and mothers owe to their minor children, and will not be upheld. 396 Further, an agreement by parents to share the status of domiciliary parent, as co-domiciliaries, is no longer permitted. 397 In 2015, the Louisiana Supreme Court settled a circuit split and concluded that co-domiciliary parents are not permitted under the statutory scheme, and the failure to name a single domiciliary parent is permitted in only two instances—when good cause is shown or when there is an implementation order to the contrary. 398 Parties could therefore outline who is to have decision-making authority over major decisions, like education, healthcare, religion, and travel and leave day-to-day decision making to the parent with whom the child is residing with at the time. 399 This may be particularly useful in a shared custody arrangement because there is not one parent with whom the child primarily resides, the statutory definition of a domiciliary parent. 400

C. COURT-ORDERED JOINT CUSTODY

In the absence of an agreement by the parents, or if the agreement by the parents is not in the best interest of the child, the court must award joint custody. 401 A court will deviate from joint custody in the parents when there is a history of family violence or clear and convincing evidence is presented that sole custody in one parent is in the best interest of the child. 402 Prior to

396. Durfee v. Durfee, 44,281, pp. 4–5 (La. App. 2 Cir. 5/13/09); 12 So. 3d 984, 988.
397. See Hodges v. Hodges, 2015-0585, p. 18 (La. 11/23/15); 181 So. 3d 700, 711 (“We hold that R.S. 9:335 precludes the designation of ‘co-domiciliary parents’ in a joint custody arrangement.”).
398. See id. at p. 17; 181 So. 3d at 711.
399. See Ehlinger v. Ehlinger, 2017-1120 (La. App. 1 Cir. 5/29/18); 251 So. 3d 418, 426 (concluding that to meet the requirements of Hodges, an implementation order without a domiciliary parent named should “at a minimum allocate the legal authority and responsibility for major decisions, such as medical care, elective surgery, dental or orthodontic care, and school and/or preschool choices”).
400. Hodges, 2015-0585, p. 7; 181 So. 3d at 720 (Hughes, J., dissenting) (arguing that shared custody necessitates a finding of co-domiciliaries); see also LA. STAT. ANN. § 9:335 (2019) ("The domiciliary parent is the parent with whom the child shall primarily reside . . .").
401. LA. CIV. CODE ANN. art. 132 (2019).
402. Id.; see also LA. STAT. ANN. § 9:364(A) (2019) ("There is created a presumption that no parent who has a history of perpetrating family violence . . . shall be awarded sole or joint custody of children.").
1994, Louisiana law provided a rebuttable presumption that joint custody was in the best interest of the child, but that presumption was abandoned in the revision of 1993 in favor of a custody hierarchy, with joint custody coming in second after the agreement of the parents, with focus on the best interest of the child.\footnote{403}{See supra Section VIII.A.}

Louisiana Revised Statutes § 9:335 provides detailed requirements for an award of joint custody. When the court awards joint custody, it must “render a joint custody implementation order except for good cause shown.”\footnote{404}{LA. STAT. ANN. § 9:335(A)(1) (2019).} No particular form is mandated,\footnote{405}{Hodges v. Hodges, 2015-0585, p. 18 (La. 11/23/15); 181 So. 3d 700, 711; Caro v. Caro, 95-0173, p. 2 (La. App. 1 Cir. 10/6/95); 671 So. 2d 516, 518.} but it must provide for two things: (1) the allocation of physical custody of the child; and (2) the allocation of legal authority and responsibility of the parents (i.e., legal custody).\footnote{406}{Hodges, 2015-0585, p. 18 (La. 11/23/15); 181 So. 3d at 711.} The trial court is vested with a great deal of discretion when establishing the particulars of joint custody and can be overturned only when there is an abuse of that discretion.\footnote{407}{Thompson v. Thompson, 532 So. 2d 101, 101 (La. 1988); see also Bergeron v. Bergeron, 492 So. 2d 1193, 1196 (La. 1986).}

1. PHYSICAL CUSTODY

In allocating physical custody between the parents, the goal is “frequent and continuing contact with both parents.”\footnote{408}{LA. CIV. CODE art. 131(D) (1992); see also supra Section I.C.} Under prior law, equal physical custody was presumed to be in the best interest of the child.\footnote{409}{LA. STAT. ANN. § 9:335(A)(2)(a) (2019); see also, e.g., Bridges v. Bridges, 09-742, pp. 6–7 (La. App. 5 Cir. 2/9/10); 33 So. 3d 914, 918–19 (finding that custody every other weekend, six weeks over the summer, and alternating holidays ensured frequent and continuing contact with the child); Schaeffer v. Schaeffer, 40,562, p. 4 (La. App. 2 Cir. 10/26/05); 914 So. 2d 631, 634 (finding that physical custody of the child for approximately 109 days per year was sufficient to afford the non-domiciliary parent frequent and continuing contact with the child).} After the 1993 revision, equal time is preferable, but only “[t]o the extent it is feasible and in the best interest of the child.”\footnote{410}{LA. STAT. ANN. § 9:335(A)(2)(b) (2019); see also, e.g., Molony v. Harris, 2010-1316, p. 18 (La. App. 4 Cir. 2/23/11); 60 So. 3d 70, 81–82 (finding that a fifty-fifty split, one week on and one week off, was in the best interest of the child because both parents worked at home and had “flexibility in their work schedules to accommodate [the child’s] needs”); Semmes v. Semmes, 45,006, p. 11 (La. App. 2 Cir. 12/16/09); 27 So. 3d 1024, 1031–32 (failing to award father “equal time” because of his “unwillingness to communicate” with the mother); Evans v. Lungrin, 97-0541, p. 15 (La. 2/26/98); 708 So. 2d 731, 739 (holding that equal, four-month alternating arrangement was not in the...
shared physical custody is both feasible and in the best interest of
the child, can such an arrangement be ordered; otherwise, if both
prongs are not met, then the court should institute a custody
arrangement that ensures each parent has frequent and
continuing contact with the child. 411

With a focus on the child’s best interest, substantial time,
rather than strict equality of time, is required under the legislative
scheme. 412 In Schaeffer v. Schaeffer, the mother argued that
alternating weekends, two weeks each month over the summer,
and alternating holidays made her a “mere visitor” in the life of her
child and did not amount to frequent and continuing contact. 413
The court disagreed, concluding that her physical custody
schedule, which amounted to 109 days per year, was sufficient to
afford the mother substantial time as well as frequent and
continuing contact with her child. 414

On the other hand, in Wilson v. O’Neal, the father made the
same arguments based on a physical custody schedule of every
other weekend, nine days over the summer, and some holiday
time. 415 The court found that sixty-seven days per year, and in
some cases eleven-day spans when the child would not see the
father, did not amount to frequent and continuing contact with the
father. 416 The court amended the order to award the father every
other Wednesday night and concluded that in all other respects,
the schedule was affirmed. 417 With an award of twenty-six more
days, the court determined that ninety-three days, without long

411. See Penn v. Penn, 09-213, pp. 9–10 (La. App. 5 Cir. 10/27/09); 28 So. 2d 304, 310.
412. Brewer v. Brewer, 39,647, p. 9 (La. App. 2 Cir. 3/2/05); 895 So. 2d 745, 750;
McKenzie v. Cuccia, 2004-0112, p. 5 (La. App. 4 Cir. 6/23/04); 879 So. 2d 335, 339; see
also Ellinwood v. Breaux, 32,730, p. 5 (La. App. 2 Cir. 3/1/00); 753 So. 2d 977, 980;
Nichols v. Nichols, 32,219, p. 8 (La. App. 2 Cir. 9/22/99); 747 So. 2d 120, 125.
413. Schaeffer v. Schaeffer, 40,562, p. 2 (La. App. 2 Cir. 10/26/05); 914 So. 2d 631, 633.
414. See id. at p. 4; 914 So. 2d at 634; see also Nichols, 32,219, p. 10; 747 So. 2d at
126 (finding that physical custody one week a month during the school year, two weeks
during the summer, and one-half of all holiday periods was sufficient custodial time to
the non-domiciliary parent). But see Ellinwood, 32,730, p. 5; 753 So. 2d at 980 (noting
that in some cases, granting the non-domiciliary parent less than 100 days of custody
has been grounds for reversal).
415. Wilson v. O’Neal, 50,711, pp. 6–7 (La. App. 2 Cir. 4/13/16); 193 So. 3d 207, 211–
12.
416. Id. at p. 11; 193 So. 3d at 214.
417. See id.
spans away from the father, reached the threshold of frequent and continuing contact.\textsuperscript{418}

While each decision turns solely on the facts of the case, in general, courts consider every other weekend, one day during the alternating week, and the sharing of the summer and holidays to be a typical physical custody schedule for the non-domiciliary parent.\textsuperscript{419} Courts are more likely to award an equal sharing of time when the parents live a short distance from one another, live near the child’s school, and are able to co-parent effectively with one another.\textsuperscript{420}

If a joint custody order provides that each parent shall have physical custody for an equal or approximately equal amount of time, this is referred to as “shared custody.”\textsuperscript{421} If the joint custody order specifies that each parent is designated the domiciliary parent of at least one child, this is referred to as “split custody.”\textsuperscript{422} These designations are significant for purposes of child support.\textsuperscript{423} Physical custody is only one aspect of joint custody; the implementation order must also provide for legal custody—decision-making authority over the child.\textsuperscript{424}

2. **Legal Custody**

Legal custody, as compared to physical custody, gives the parents the authority and responsibility to make decisions regarding the child. Joint custody by its very nature gives both parents decision-making authority, but equal decision-making authority is not generally permitted under the statute. In a joint custody decree, the court is required to name a domiciliary parent unless “there is an implementation order to the contrary or for other good cause shown.”\textsuperscript{425}

\begin{itemize}
\item \textsuperscript{418} Wilson v. O’Neal, 50,711, pp. 6–7 (La. App. 2 Cir. 4/13/16); 193 So. 3d 207, 211–12.
\item \textsuperscript{419} See Schaeffer v. Schaeffer, 40,562, p. 2 (La. App. 2 Cir. 10/26/05); 914 So. 2d 631, 633.
\item \textsuperscript{420} Swope v. Swope, 521 So. 2d 656, 659 (La. Ct. App. 1 Cir. 1988); see also Meylian v. Meylian, 478 So. 2d 218, 220–22 (La. Ct. App. 3 Cir. 1985); Peyton v. Peyton, 457 So. 2d 321, 323 (La. Ct. App. 2 Cir. 1984); Duhe v. Duhe, 451 So. 2d 1198, 1202 (La. Ct. App. 5 Cir. 1984).
\item \textsuperscript{421} LA. STAT. ANN. § 9:315.9 (2019).
\item \textsuperscript{422} LA. STAT. ANN. § 9:315.10 (2019).
\item \textsuperscript{423} See LA. STAT. ANN. § 9:315.9–10 (2019).
\item \textsuperscript{424} LA. STAT. ANN. § 9:335(A)(3) (2019).
\item \textsuperscript{425} LA. STAT. ANN. § 9:335(B)(1) (2019).
\end{itemize}
The domiciliary parent has the authority to make the final decision affecting the child if the parents disagree “unless the implementation order provides otherwise.” Joint custody obligates parents to confer with one another when making decisions, but if the parents disagree, the domiciliary parent’s decision will prevail. This authority is not boundless. “All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court on motion of the other parent.” The decision of the domiciliary parent is presumed to be in the best interest of the child, but this presumption can be rebutted by the other parent in a court proceeding. Major decisions could include significant medical and dental treatments or surgeries, school choice, and international travel, but would not include decisions regarding minor issues such as bedtime, curfew, or chores.

If no domiciliary parent is named in the joint custody order, then the parents enjoy the rights and responsibilities as outlined in the Civil Code title on parental authority. Until the comprehensive revision of the chapter on parental authority in 2015, the law contained the “father-knows-best provision” that identified the father as the decision-maker and administrator of the minor’s estate. As a result, the father had the ultimate decision-making authority for the child. The revision repealed the father-knows-best provision in favor of equal authority, providing, “[t]he father and mother who are married to each other have parental authority over their minor child during the marriage.” Therefore, today, the failure to name a domiciliary

426. LA. STAT. ANN. § 9:335(B)(3) (2019). If the non-domiciliary parent does not want the domiciliary parent to have decision-making authority over one or more aspects of the child’s life, those limitations can be placed in the joint custody implementation order. See LA. STAT. ANN. § 9:335(A)(3) (2019) (“The implementation order shall allocate the legal authority and responsibility of the parents.”) (emphasis added).

427. See LA. STAT. ANN. § 9:335(B)(3) (2019); see also LA. STAT. ANN. § 9:336 (2019) (“Joint custody obligates the parents to exchange information concerning the health, education, and welfare of the child and to confer with one another in exercising decision-making authority.”).


429. See id.

430. See Ehlinger v. Ehlinger, 2017-1120, p. 7 (La. App. 1 Cir. 5/29/18); 251 So. 3d 418, 424.

431. LA. STAT. ANN. § 9:335(C) (2019). See generally Title VII of Book I of the Louisiana Civil Code on parental authority.


433. See id.

434. LA. CIV. CODE ANN. art. 221 (2019).
parent results in equal decision-making authority over the child.

After the revision of 1993, when parties did not want to designate a domiciliary parent and courts were reluctant to choose one parent over the other when physical custody was shared, the designation of “co-domiciliary” parents was born. The designation had no basis in the law but had been agreed on by parents and ordered by some courts.435

The law on joint custody requires the court to “designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown.”436 Some courts construed the law to give a court discretion not to designate a domiciliary parent when an exception applied,437 while others viewed the law as less restrictive, permitting a court to name co-domiciliaries when an exception applied.438 The Louisiana Supreme Court spoke on the issue in 2015 and concluded that courts could only designate a single domiciliary parent.439

In Hodges v. Hodges, the Louisiana Supreme Court settled the circuit split, concluding that “the plain language of La. R.S. 9:335 manifests the legislature’s clear intent to establish a custodial system in which a child has a domiciliary parent and no more than one such parent . . . . Although each parent can share physical custody, the court can only designate a single domiciliary parent.”440 The court tipped its hat to the appellate courts,

435. See Hodges v. Hodges, 14-1575, pp. 9–10 (La. App. 1 Cir. 3/6/15); 166 So. 3d 348, 354–55 (permitting co-domiciliaries); see also Distefano v. Distefano, 14-1318 (La. App. 1 Cir. 1/22/15); 169 So. 3d 437 (permitting co-domiciliaries); Stewart v. Stewart, 11-1334 (La. App. 3 Cir. 3/07/12); 86 So. 3d 148 (permitting co-domiciliaries); cf. Hanks v. Hanks, 13-1442 (La. App. 4 Cir. 4/16/14); 140 So. 3d 208 (co-domiciliaries not permitted); Molony v. Harris, 10-1316 (La. App. 4 Cir. 2/23/11); 60 So. 3d 70 (co-domiciliaries not permitted); Ketchum v. Ketchum, 39,082 (La. App. 2 Cir. 9/1/04); 882 So. 2d 631 (co-domiciliaries not permitted).


437. Molony, 2010-1216, p. 19; 60 So. 3d at 82 (reversing the trial court’s designation of co-domiciliary parents because there was no authority in the law to do so); Ketchum, 39,082, p. 11; 882 So. 2d at 639 (finding that there was no authority in the law for the trial court to designate “co-domiciliary” parents).

438. Stewart, 2011-1334, p. 8; 86 So. 3d at 155 (“If a designation of co-domiciliary parents is in the best interest of the child, then we see no reason to reverse such a decision of the trial court.”); see also Beaudion v. Beaudion, 11-53, pp. 10–11 (La. App. 5 Cir. 12/29/11); 83 So. 3d 355, 361 (finding “good cause shown” to name co-domiciliaries based on the trial court’s determination that shared custody is in the best interest of the children); St. Philip v. Montalbano, 2012-1090 (La. App. 4 Cir. 1/9/13); 108 So. 3d 277.


440. Id. at p. 9; 181 So. 3d at 706. The court conducted a detailed analysis of the
recognizing that the well-intentioned designation of co-domiciliary parents was used as a panacea to provide both parents with shared legal and physical custody.\(^{441}\) That desire, the court explained, can be accomplished through the exceptions to the statute, when there is an implementation order to the contrary or for other good cause shown.\(^{442}\) It explained that courts could choose not to designate a domiciliary parent at all and instead allocate the authority of each parent in the implementation order.\(^{443}\)

For example, a court could give one parent the authority to make final decisions regarding major aspects of the child’s life, such as education, religion, healthcare, or travel, and the other parent could make final decisions regarding the others.\(^{444}\) As is customary when co-parenting and as legislated by other states, the court could authorize daily decision-making authority to be permitted by the parent with whom the child is residing at the time.\(^{445}\) Daily decision making should involve only minor decisions, as legal authority over major decisions should be allocated between the parents unless good cause is shown.

In Hodges, the court did not thoroughly discuss the second exception of “good cause shown.”\(^{446}\) This exception could be used to permit the court to issue a consent judgment based on the parents’ agreement not to designate a domiciliary parent. Without a named domiciliary parent, the parents would enjoy equal rights. Section 9:335 refers back to Title VII of Book I of the Civil Code, which includes the articles on parental authority and gives both parents equal rights to the authority over their child.\(^{447}\) Hodges involved a considered decree of custody and recognized that an exception for good cause shown would prevent the designation of a single domiciliary parent.\(^{448}\) Although naming the parents co-domiciliaries in a consent judgment may run afool of the court’s

lower court decisions that found both for and against co-domiciliary status. Hodges v. Hodges, 2015-0585, pp. 8–13 (La. 11/23/15); 181 So. 3d 700, 706–09.

441. Id. at p. 13; 181 So. 3d at 708.

442. Id. at p. 13; 181 So. 3d at 708–09.

443. Id.

444. See Ehlinger v. Ehlinger, 2017-1120, p. 10 (La. App. 1 Cir. 2018); 251 So. 3d 418, 426.


446. See generally Hodges, 2015-0585; 181 So. 3d 700.

447. LA. STAT. ANN. § 9:335(C) (2019); see also LA. CIV. CODE ANN. art. 221 (2019).

448. Hodges, 2015-0585, pp. 13–14; 181 So. 3d at 708–09.
edict, not naming one, which would have the same practical effect, would seem to comport with the statute and the court’s holding in Hodges. Indeed, the very purpose of a child custody case is to protect the child’s emotional, physical, material and social health; preventing parental strife, when the parents are agreeing to agree, should be good cause to depart from the statute. If and when parental agreement ends, a single domiciliary parent could be named at that time.

Joint custody has been awarded beyond two-parent relationships. Courts have awarded joint custody among three individuals, which has included parents and nonparents. In McCormic v. Rider, the Louisiana Supreme Court affirmed the district court’s grant of joint custody with the grandmother who was also the adoptive mother, the biological mother, and biological father, naming the biological mother as domiciliary parent. Additionally, in Cerwonka v. Baker, joint custody was awarded to the biological mother, biological father, and legal father and the court named the legal father as domiciliary parent because he could best communicate and facilitate access to the biological parents. Courts have also awarded joint custody to a parent and

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449. The result is only the same after the revision of the title on parental authority, which vested equal decision-making authority in both parents. See LA. CIV. CODE ANN. art. 221 (2019). Prior to the revision, the result of not naming a domiciliary parent would place the father in the superior position as decision maker and administrator. LA. CIV. CODE art. 216, repealed by Act No. 260, 2015 La. Acts 1794.

450. The statute defines the domiciliary parent as “the parent with whom the child . . . primarily reside[s].” LA. STAT. ANN. § 9:335(B)(2) (2019). When custody is shared, the child resides equally with each parent, so naming a domiciliary parent results in a legally inconsistent result. Hodges v. Hodges, 2015-0585, pp. 6–7 (La. 11/23/15); 181 So. 3d 700, 719–20 (Hughes, J., dissenting).

451. Hodges, 2015-0585, p. 18; 181 So. 3d at 711 (majority opinion) (“We hold that La. R.S. 9:335 precludes the designation of ‘co-domiciliary parents’ in a joint custody arrangement. It is unnecessary and contrary to the plain language of La. R.S. 9:335 to designate both parents as ‘co-domiciliary parents’ in order to allocate parental responsibility. For example, when a court wishes to depart from the default rule that the sole domiciliary parent has superior decision-making authority, a court can make different provisions for decision making within the joint custody implementation order.”).

452. Id. at p. 3; 181 So. 3d at 702.

453. McCormic v. Rider, 2009-2584, pp. 2–4 (La. 2/12/10); 27 So. 3d 277, 279–280.

454. Cerwonka v. Baker, 2006-856, pp. 6–7 (La. App. 3 Cir. 11/02/06); 942 So. 2d 747, 752–53; see also C.M.H. v. D.M., No. 2013-1477, 2013 WL 6858331, at *1–3 (La. Ct. App. 1 Cir. Dec. 27, 2013) (awarding joint custody to adoptive parents/great-grandparents and biological mother/nonparent); Whitman v. Williams, 2008-1133, pp. 1–4 (La. App. 3 Cir. 2/04/09); 6 So. 3d 852, 853–54 (awarding joint custody between the mother, father, and maternal aunt/nonparent with the maternal aunt designated as the domiciliary parent); Smith v. Tierney, 2004-2482, p. 17 (La. App. 1
a nonparent (most often grandparents) upon finding that joint custody in both parents or sole custody in one parent alone would cause substantial harm to the child,\textsuperscript{455} a topic discussed in more detail below. Because joint custody is preferred when the parents cannot agree, courts have successfully crafted joint custody arrangements that ensure parents’ constitutional rights are protected, with the best interest of the child being paramount.

**D. COURT-ORDERED SOLE CUSTODY**

A court can award sole custody to one parent if that parent can prove by clear and convincing evidence that sole custody is in the best interest of the child.\textsuperscript{456} Prior to the 1993 revision, a party was required to rebut the presumption of joint custody with a preponderance of the evidence that joint custody was not in the child’s best interest.\textsuperscript{457} Not only was the burden elevated to clear and convincing evidence—highly probable or much more probable than not—but the focus shifted to whether sole custody was in the child’s best interest, rather than whether joint custody was not.\textsuperscript{458}

Understandably, after the revision, sole custody awards declined. Courts could still rely on pre-revision cases but apply the heightened burden of proof. Although generally, the reasons for awarding sole custody have remained the same, the incidence of successful awards is lower. Of course, the unique factual circumstances of each case will dictate the outcome, but courts are more likely to award sole custody upon a showing of egregious acts by a parent, proof of abuse, or unreasonable interference from third parties.

\textsuperscript{455} Howard v. Oden, 44,191, p. 1 (La. App. 2 Cir. 2/25/09); 5 So. 3d 989, 991 (awarding joint custody to mother and paternal grandfather); Rupert v. Swinford, 95-0395, p. 9 (La. App. 1 Cir. 10/06/95); 671 So. 2d 502, 507–08 (awarding joint custody to the father and maternal grandmother, granting visitation to the mother, and naming the grandmother domiciliary custodian); Schloegel v. Schloegel, 584 So. 2d 344 (La. Ct. App. 4 Cir. 1991) (awarding joint custody to the father and maternal grandmother); Tierney, 2004-2482, pp. 13–14; 906 So. 2d at 594 (awarding joint custody to the mother and paternal grandparents); Robert v. Gaudet, 96-2506, p. 2 (La. App. 1 Cir. 3/27/97); 691 So. 2d 780, 781 (awarding joint custody to the mother and paternal grandparents, with the paternal grandparents being named domiciliary custodians); In re Landrum, 97-826, pp. 7–8 (La. App. 3 Cir. 12/10/97); 704 So. 2d 872, 876 (awarding the mother and maternal grandfather joint custody, with the grandfather being named domiciliary custodian).

\textsuperscript{456} LA. CIV. CODE ANN. art. 132 (2019).

\textsuperscript{457} See supra Section I.C.

\textsuperscript{458} See Rigby, supra note 58, at 109–10 (describing the changes in the burden of proof for sole custody awards).
parties. Practical considerations, like the physical distance between the parties’ residences or a parent who travels excessively, can also warrant a sole custody award. Furthermore, animosity between the parents resulted in an award of sole custody before the revision. After the revision, however, without focus on the child’s best interest, animosity between the parents alone is generally not sufficient to result in an award of sole custody.

Egregious acts by one parent can result in sole custody to the other parent. While the facts of each particular case will affect the outcome, the actions of a parent must be serious, ongoing, and relative to the child’s best interest. For example, in *Hawthorne v. Hawthorne*, the court awarded sole custody to the father because the mother had a personality disorder that manifested itself in prolonged fits of rage and serious irrational behaviors. Similarly, in *Stevens v. Stevens*, the court awarded sole custody to the father because the mother was a habitual drug abuser and subjected the child to harmful living arrangements.

Abuse of the child at issue will preclude any award of custody to the abuser, but abuse against others can also prevent custody in the abuser, resulting in a sole custody award to the other parent. For example, in *Harper v. Harper*, the court awarded sole custody to the mother based on evidence that the father was physically abusive toward his children of a prior marriage, and he had not attempted to establish a relationship with the child whose custody was at issue. The court concluded that it was highly probable that sole custody with the mother was in the child’s best interest.

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459. See infra notes 463–475 and accompanying text.
460. See Verret v. Verret, 34,982, pp. 7–8 (La. App. 2 Cir. 5/9/01); 786 So. 2d 944, 949 (finding that sole custody was appropriate because one parent lived in Florida and the other in Louisiana).
461. See infra notes 476–480 and accompanying text.
462. Hawthorne v. Hawthorne, 96-89, p. 17 (La. App. 3 Cir. 5/22/96); 676 So. 2d 619, 627.
463. Stevens v. Stevens, 2007-1133, p. 8 (La. App. 1 Cir. 11/02/07); 978 So. 2d 916, 921; see also Johnson v. Butler, No. 10-1502, 2011 WL 1264146, at *3 (La. Ct. App. 3 Cir. Apr. 6, 2011) (granting sole custody to mother because father had never been a big part of the child’s life and was of questionable moral character).
465. Harper v. Harper, 33,452, pp. 1, 6 (La. App. 2 Cir. 6/21/00); 764 So. 2d 1186, 1187, 1190.
466. Id. at p. 7; 764 So. 2d at 1190; see also Wyatt v. White, 626 So. 2d 816, 818–19 (La. Ct. App. 2 Cir. 1993) (applying preponderance of the evidence standard and
In addition, instances of abuse within a family that do not involve the child can lead to a change in domiciliary status even if the evidence is insufficient to result in sole custody to one parent. 467

When a child has been adjudged in need of care, the heightened burden of proof for sole custody does not apply, and the best interest test will permit an award of sole custody. For example, in State ex rel. V.B., the court awarded sole custody to the father, over the mother’s objection, after the three children had been taken into state custody because of neglect and violence between the parents. 468 Although the parents had been violent toward one another during the marriage, for the year the children were in state custody, the father underwent anger management and parenting counseling, while the mother was inconsistent in her treatment. 469 The court found that the Children’s Code applied, rather than Civil Code article 132, due to the health and safety concerns surrounding a child in need of care. 470 Custody would therefore be awarded “on such terms and conditions as deemed in the best interest of the child.” 471 The court found that sole custody in the father was in the children’s best interest because he had completed his counseling and genuinely sought to improve his parenting skills. 472

Interference by third parties can also result in an award of sole custody to one parent. Interference can be exerted by someone close to one parent, which can ultimately harm the relationship with the other parent who then seeks sole custody as a result. For

awardng sole custody to father because mother’s boyfriend, who she intended to marry, had physically abused the child); Galeano v. Galeano, 444 So. 2d 658, 659 (La. Ct. App. 1 Cir. 1983) (applying preponderance of the evidence standard and awarding sole custody to the mother because there were “serious allegations of improper sexual conduct” against the father by an older child).

467. See McGee v. McGee, 552 So. 2d 576, 578–80 (La. Ct. App. 2 Cir. 1989) (modifying the original joint custody order that named the mother as domiciliary parent to name the father as domiciliary parent due to the violent domestic disputes between the mother and the stepfather).

468. See State ex rel. V.B., 2009-653, pp. 1–3 (La. App. 3 Cir. 11/04/09); 24 So. 3d 281, 281–83.

469. Id. at p. 3; 24 So. 3d at 283.

470. Id. at p. 2; 24 So. 3d at 282. Louisiana Children’s Code article 681 provides that when a child has been adjudicated in need of care, the child’s health and safety is the paramount concern, so the court can place the child in the custody of a parent or other person deemed to be in the best interest of the child. LA. CHILD. CODE ANN. art. 681(A)(1) (2019).

471. State ex rel. V.B., 2009-653, pp. 2–3; 24 So. 3d at 282 (quoting LA. CHILD. CODE art. 681(A)(1)).

472. See id. at pp. 1–3; 24 So. 3d at 283–84.
example, in *Dooley v. Dooley*, the children’s stepmother spoke disparagingly about the mother to the three children, harassed the children, and subverted the mother’s authority. The father delegated all of the decisions regarding his children to his new wife. The mother was successful in seeking sole custody of the three children because the father had not demonstrated the capacity to foster a relationship with his children due in part to the permitted interference by the stepmother.

Prior to the revision, sufficient animosity and rancor between the parents could result in an award of sole custody because the parents could not work together to the extent required in a joint custody arrangement. When the focus of the analysis shifted to the best interest of the child, rather than rebutting the presumption of joint custody, courts recognized that the actions of the parents alone would not be sufficient to award sole custody. Post-revision, in *D.R.S. v. L.E.K.*, the trial court awarded sole custody to the mother, finding that “[t]he evidence of continued and unreasonable conflict is clear and convincing evidence that the[] parents are not able to jointly parent the child.” The appellate court reversed because the trial court provided no explanation as to why sole custody was in the best interest of the child. Because the evidence relied on by the trial court surrounded the parents’ actions, rather than the child’s best interest, the court conducted a de novo review and awarded joint custody to the parents.

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473. *Dooley v. Dooley*, 2010-785, p. 3 (La. App. 3 Cir. 2/02/11); 55 So. 3d 985, 986.
474. *Id.* at p. 6; 55 So. 3d at 989.
475. *See id.* at p. 7; 55 So. 3d at 989; *see also S.J. v. S.M.*, 505 So. 2d 897, 898–99 (La. Ct. App. 2 Cir. 1987) (applying preponderance of the evidence standard and awarding sole custody to mother based in part on paternal grandparents who caused the four-year-old child to make false allegations of sexual abuse toward the stepfather in an attempt to help the father receive custody).
476. *See Yelverton v. Yelverton*, 621 So. 2d 36, 39–40 (La. Ct. App. 2 Cir. 1993) (finding that proof of animosity between parents is sufficient to overcome the presumption of joint custody); *see also Cahanin v. Cahanin*, 533 So. 2d 27, 27 (La. Ct. App. 4 Cir. 1988) (finding that the animosity level and inability to communicate rendered a joint custody arrangement unworkable).
477. *D.R.S. v. L.E.K.*, 2009-1274, p. 7 (La. App. 3 Cir. 3/10/10); 33 So. 3d 428, 433.
478. *Id.*
479. *Id.*; *see also Griffith v. Latiolais*, 2010-0754, p. 18 (La. 10/19/10); 48 So. 3d 1058, 1071 (reversing an award of sole custody to the mother because it was based mostly on the father’s bad behavior toward the mother, rather than the best interest of the child); *Walet v. Caulfield*, 2002-2009, p. 11 (La. App. 1 Cir. 6/27/03); 858 So. 2d 615, 623 (concluding that proof that the mother and father had strong animosity toward one another did not provide by clear and convincing evidence that an award of sole custody to the mother was in the child’s best interest).
A parent seeking sole custody would need to prove by clear and convincing evidence that sole custody is in the best interest of the child because the animosity has a detrimental effect on the child. From a practical standpoint, it may be difficult to prevail because the animosity generally involves both parents and neither would appear justified to receive sole custody. With proper attention placed on the effects of this animosity on the child, however, an award of sole custody can be proper.  

E. COURT-ORDERED NONPARENT CUSTODY

Last in the custody hierarchy is custody to a nonparent, which requires the nonparent to prove substantial harm to the child if custody is awarded to a parent. Upon a showing of substantial harm, the court may award custody to “another person with whom the child has been living in a wholesome and stable environment” or “to any other person able to provide an adequate and stable environment.” The best interest of the child analysis must be done, as is required in any custody case.

Prior to 1982, Louisiana law governing nonparent custody developed jurisprudentially, permitting the deprivation of parental custody only when “the parent is unable or unfit, having forfeited parental rights.” The Louisiana Supreme Court explained that a simple best interest test was not sufficient, and courts should refrain from comparing the home of the parent with the nonparent to determine who can provide greater advantages to the child. In 1982, the legislature codified the jurisprudential rule in a two-part statutory test under which the nonparent was required to show that parental custody was “detrimental” to the child and that divesting the parent of custody was required to serve the child’s

480. See Whitmore v. Stamp, No. 2012-2069, 2013 WL 2490337, at *3 (La. Ct. App. 1 Cir. June 7, 2013) (finding that the trial court inappropriately concluded that sole custody could be awarded based on animosity between the parents but finding sufficient effects on the best interest of the child to affirm the sole custody award).
481. LA. CIV. CODE ANN. art. 133 (2019).
482. Id. “The use of the singular ‘person’ . . . is intended to rule out any inference that this article might require the awarding of joint custody between nonparents.” LA. CIV. CODE ANN. art. 133 cmt. (c) (2019). Joint custody with parents is permitted but not required. Id.; see also Street v. May, 35,589, p. 11 (La. App. 2 Cir. 12/5/01); 803 So. 2d 312, 318 (stating that the use of the singular “person” . . . does not exclude the designation of several persons”).
483. LA. CIV. CODE ANN. art. 131 (2019).
485. Id. at 677; see also State ex rel. Rothrock v. Webber, 161 So. 2d 759, 764 (La. 1964).
best interest.\textsuperscript{486}

During the 1993 revision, terminology was changed to require the nonparent to prove that parental custody would result in “substantial harm” to the child.\textsuperscript{487} It does not appear that there was any intent to change the law when “substantial harm” replaced “detrimental” to the child, and it is clear that the primary right of parental custody remained.\textsuperscript{488} Therefore, for a nonparent to receive custody over a parent, the nonparent must prove: (1) that custody to the parent would cause substantial harm to the child; and (2) that custody to the nonparent is in the best interest of the child.\textsuperscript{489} When applying the two-pronged test of article 133, the best interest of the child factors set forth in article 134 are not considered until after a finding of substantial harm.\textsuperscript{490} Again, merely showing that the nonparent is in a better position to raise the child than the parent is not enough to deprive the natural parent of custody.\textsuperscript{491}

Although a difficult burden to meet, nonparents have been successful in proving the presence of substantial harm to the child. “Substantial harm” has been recognized to include unfitness, neglect, abuse, and any other circumstance, such as prolonged separation of the child from his natural parents, that would cause the child to suffer substantial harm.\textsuperscript{492} Courts have considered a

\textsuperscript{486}. Act No. 307, 1982 La. Acts 804, 805. One court concluded that the statutory language was significantly different and permitted broader application than the jurisprudential rule. Boyett v. Boyett, 448 So. 2d 819, 822 (La. Ct. App. 2 Cir. 1984).  
\textsuperscript{488}. The jurisprudence has used the terms “substantial harm” and “detrimental” interchangeably. \textit{See}, e.g., Smith v. Tierney, 2004-2482, p. 7 (La. App. 1 Cir. 2/16/05); 906 So. 2d 586, 590; McCormic v. Rider, 2009-2584, p. 2 (La. 2/12/10); 27 So. 3d 277, 279; Wilson v. Paul, 2008-382, p. 2 (La. App. 3 Cir. 10/01/08); 997 So. 2d 572, 574; Dalferes v. Dalferes, 98-1233, 98-1234, p. 2 (La. App. 4 Cir. 11/18/98); 724 So. 2d 805, 806.  
\textsuperscript{489}. See \textit{LA. CIV. CODE ANN.} art. 133 (2019); see also \textit{LA. CIV. CODE ANN.} art. 131 (2019).  
\textsuperscript{490}. Duplessy v. Duplessy, 12-69, p. 6 (La. App. 5 Cir. 6/28/12); 102 So. 3d 209, 213; Black v. Simma, 2008-1465, p. 5 (La. App. 3 Cir. 6/10/09); 12 So. 3d 1140, 1143.  
\textsuperscript{491}. Creed v. Creed, 94-268, p. 8 (La. App. 3 Cir. 12/21/94); 647 So. 2d 1362, 1366. In \textit{Creed}, the court explained that the grandparent’s ability to provide a more stable lifestyle, standing alone, could not be used to deprive the mother of custody. \textit{Id.} The mother’s “unfortunate economic status” and “marginal lifestyle” did not amount to substantial harm. \textit{Id.} The \textit{Creed} decision is also interesting because the grandparents did not petition for custody and were not even parties to the litigation, yet the trial court granted them custody of the child. \textit{Id.} at p. 2 n.1; 647 So. 2d at 1364 n.1.  
\textsuperscript{492}. Neathery v. Neathery, 51,388, p. 3 (La. App. 2 Cir. 2/17/17); 216 So. 3d 251, 253; Ramirez v. Ramirez, 13-166, p. 16 (La. App. 5 Cir. 8/27/13); 124 So. 3d 8, 17; Bowden v. Brown, 48,268, p. 8 (La. App. 2 Cir. 5/15/13); 114 So. 3d 1194, 1200; Jones
parent’s drug use or alcohol abuse, the child living in substandard or dangerous living conditions, the parent’s sexual promiscuity or deviance, and the loss of a strong emotional bond with a nonparent caregiver when finding substantial harm, all on a case-by-case basis.\textsuperscript{493}

Nonparents can be awarded sole or joint custody.\textsuperscript{494} When joint custody is awarded, it can be shared with another nonparent or with the parent.\textsuperscript{495} In a custody contest between two nonparents, only the best interest of the child analysis is necessary, as a showing of substantial harm is used when a nonparent seeks custody from a parent.\textsuperscript{496} When a nonparent seeks custody against another nonparent, the status of one as a blood relative does not elevate that nonparent in a custody analysis.\textsuperscript{497} Nor is there a preference for the nonparent with whom the child has been living when another nonparent can provide an adequate and stable environment.\textsuperscript{498}

\textsuperscript{493} See, e.g., Duplessy v. Duplessy, 12-69 (La. App. 5 Cir. 6/28/12); 102 So. 3d 209 (awarding sole custody to the child’s brother, who acted as the child’s father, in a contest against the adoptive parent, who functioned like a grandparent, due to the strong relationship with the brother and marginal living conditions of the father); Martin v. Dupont, 32,490 (La. App. 2 Cir. 12/08/99); 748 So. 2d 574 (awarding sole custody to man who was led to believe he was the child’s father because the mother’s boyfriend was dangerous, he tried to induce the child to drink whiskey, he beat the neighbor’s dog, the child was malnourished while living with the mother, the mother’s residence was filthy and without food, and the mother and her boyfriend were sexually explicit in the presence of the child); Dalferes v. Dalferes, 98-1233, 98-1234 (La. App. 4 Cir. 11/18/98); 724 So. 2d 805 (awarding sole custody to the child’s aunt, who the child had been living with for the past five years because the mother had no plans to care for the child, had mental problems, had put the child in harm’s way with men, and had no permanent address); Teague, 44,005, 44,006, pp. 17–19; 999 So. 2d at 97 (awarding custody to grandparents because parents were drug users). See\textsuperscript{ Merritt} for several cases in which nonparent custody was permitted. Merritt v. Merritt, 550 So. 2d 882, 891 n.1 (La. Ct. App. 2 Cir. 1989).

\textsuperscript{494} See LA. CIV. CODE ANN. art. 133 (2019).

\textsuperscript{495} See LA. CIV. CODE ANN. art. 133 cmt. (c) (2019).

\textsuperscript{496} Compare LA. CIV. CODE ANN. art. 133 (2019), with LA. CIV. CODE ANN. art. 134 (2019).

\textsuperscript{497} Knisely v. Knisely, 2005-1015, p. 6 (La. App. 3 Cir. 3/1/06); 924 So. 2d 423, 427 (awarding custody to the child’s stepmother who had raised him for eight years in a contest against the paternal grandmother, who was named tutrix in deceased father’s will); In re Tuccio, 95-0302, p. 6 (La. App. 1 Cir. 11/16/95); 665 So. 2d 199, 200 (denying paternity tests on the basis that the status as a grandparent of the child does not affect the right to nonparent custody).

\textsuperscript{498} Cathey v. Ogea, 2012-563, p. 5 (La. App. 3 Cir. 8/22/12); 98 So. 3d 953, 957
will of a tutor for the child does not elevate the nonparent in a custody dispute, which must be based on the child’s best interest. 499

Joint custody between a nonparent and a parent can raise a more difficult question. If the nonparent must prove that custody in the parent will result in substantial harm to the child, then how can the parent ultimately end up with joint custody? The answer lies in relativity—in the temporal sense, not the kinship sense. If a parent is unfit for sole custody (or for joint custody with the other parent), it may be less demanding on the parent to share custody with the nonparent. The parent will still be a part of the child’s life and have the opportunity to participate in decision-making, but the nonparent, who is already involved in the child’s life, will remain a constant source of love and direction.

Therefore, in cases where joint custody is awarded to a parent and a nonparent, courts must find that substantial harm would result if joint custody is awarded to both parents or if sole custody is awarded to either parent. 500 By concluding that an award of sole custody to one parent would result in substantial harm to the child, the court is not deciding that the parent is prevented from serving as a joint custodian with the nonparent. 501 Then, the court must consider what serves the child’s best interest.

The Louisiana Supreme Court considered an interesting custody dispute between two parents and a nonparent grandmother. In McCormic v. Rider, the grandmother had adopted the child as an infant, and the unmarried mother and father who sought custody were required to prove substantial harm if custody remained with the grandmother, because the grandmother enjoyed the paramount right of custody as a parent by adoption. 502 The trial court determined that sole custody in the

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499. Knisely v. Knisely, 2005-1015, p. 6 (La. App. 3 Cir. 3/1/06); 924 So. 2d 423, 427.
500. Black v. Simms, 2008-1465, p. 3 (La. App. 3 Cir. 6/10/09); 12 So. 3d 1140, 1142 (citing Rupert v. Swinford, 95-0395 (La. App. 1 Cir. 10/06/95); 671 So. 2d 502); cf. In re Landrum, 97-826, p. 6 (La. App. 3 Cir. 12/19/97); 704 So. 2d 872, 875. In In re Landrum, the court concluded that an express finding of substantial harm to the child if the father was awarded sole custody was not necessary before it awarded joint custody to the mother and grandmother. See In re Landrum, 97-826, p. 6; 704 So. 2d at 875. This decision has been criticized and is not an accurate interpretation of Louisiana Civil Code article 133. See Black, 2008-1465, pp. 3–4; 12 So. 3d at 1142.
501. La. Civ. Code Ann. art. 133 cmt. (c) (2019); Black, 2008-1465, p. 3; 12 So. 3d at 1142 (citing Rupert, 95-0395. 671 So. 2d 502). See generally In re C.A.C., 2017-0108 (La. App. 4 Cir. 11/2/17); 231 So. 3d 58.
502. McCormic v. Rider, 2009-2584, pp. 1–3 (La. 2/12/10); 27 So. 3d 277, 278–79.
grandmother would cause substantial harm to the child.\textsuperscript{503} It then concluded that a joint custody arrangement with the grandmother and biological parents would serve the child’s best interest as they had all lived together for several years.\textsuperscript{504}

Courts before and after \textit{McCormic} have ordered joint custody between a parent and a nonparent when the standards of article 133 are met.\textsuperscript{505} Grandparents are most often the nonparents who seek custody, but “nonparent” encompasses any relative or nonrelative.\textsuperscript{506} In fact, courts have awarded custody to grandparents even when they are not a party to the action.\textsuperscript{507} Awarding custody to a nonparent without discovery and a hearing promotes judicial efficiency, but it raises serious policy concerns. Although courts are required to consider the best interest of the child, without the nonparents as parties to the litigation, no other litigant has prepared, and no court has considered, the parental fitness of the nonparents.

Awarding custody to a parent who is not filiated to the child also implicates the article 133 burden of proof, unless the court can construe the request for custody as an avowal action and the action is timely. In \textit{Jackson v. McNeal}, the court awarded custody to the

\textsuperscript{503} \textit{McCormic} v. \textit{Rider}, 2009-2584, p. 2 (La. 2/12/10); 27 So. 3d 277, 278–79. Evidence was adduced that the grandmother tethered the child to his bed, regularly medicated the child without him being evaluated and assessed, and whipped the child. \textit{Id.} at p. 1; 27 So. 3d at 280 (Johnson, J., concurring).

\textsuperscript{504} \textit{Id.} at p. 2; 27 So. 3d at 279 (majority opinion). The court designated the mother as domiciliary parent. \textit{Id.} Other courts have also awarded tripartite joint custody. See \textit{Whitman v. Williams}, 2008-1133, p. 4 (La. App. 3 Cir. 2/4/09); 6 So. 3d 852, 854 ( awarding joint custody to the mother, father, and father’s maternal aunt, with domiciliary status given to the aunt); \textit{Smith v. Tierney}, 2004-2482, pp. 3, 17 (La. App. 1 Cir. 2/16/05); 906 So. 2d 586, 588, 596 ( awarding joint custody between the mother and paternal grandparents, who had raised the child since her birth).

\textsuperscript{505} See, e.g., \textit{Schloegel v. Schloegel}, 584 So. 2d 344, 345, 346–47 (La. Ct. App. 4 Cir. 1991) ( awarding joint custody to father and maternal grandmother because father’s prior drug use was detrimental to the child); see also \textit{Rupert v. Swinford}, 95-0395 (La. App. 1 Cir. 10/6/95); 671 So. 2d 502 ( awarding custody to the father and maternal grandmother because of the father’s involvement in drugs and failure to care for the child’s health needs); \textit{Merritt v. Merritt}, 550 So. 2d 882 (La. Ct. App. 2 Cir. 1989); \textit{Robert v. Gaudet}, 96-2506 (La. App. 1 Cir. 3/27/97); 691 So. 2d 780; \textit{In re Landrum}, 97-826 (La. App. 3 Cir. 12/10/97); 704 So. 2d 872.

\textsuperscript{506} See generally \textit{Black v. Simms}, 2008-1465 (La. App. 3 Cir. 6/10/09); 12 So. 3d 1140 ( nonparent challenger was a lesbian former partner); \textit{Whitman}, 2008-1133; 6 So. 3d 852 ( nonparent challenger was a maternal aunt).

\textsuperscript{507} \textit{Creed v. Creed}, 94-268, p. 2 n.1 (La. App. 3 Cir. 12/21/94); 647 So. 2d 1362, 1364 n.1; \textit{Schloegel}, 584 So. 2d at 348 ("Grandparents of a minor child need not be parties to an action for child custody to be awarded to them."); \textit{Stuckey v. Stuckey}, 276 So. 2d 408, 411 (La. Ct. App. 2 Cir. 1973).
alleged father of the child, who was not married to the mother, even though the man did not specifically request a judgment of paternity.\(^{508}\) The mother appealed, claiming that the heightened burden of proof under article 133 should apply because the man was not adjudged to be the father.\(^{509}\) Relying on supreme court precedent involving filiation for purposes of tort claims, the court found the allegations in the petition that the child was “his son” and the “minor child” of the parties were sufficient to put the mother on notice that he was claiming filiation, even though he did not request a declaration of paternity in his petition.\(^{510}\) The court found sufficient evidence that the man was the father of the child, so the best interest of the child standard applied.\(^{511}\) Not only must the father prove paternity for the best interest standard to apply, but the avowal action must be timely.\(^{512}\)

**F. CUSTODY OF CHILDREN OF SAME-SEX COUPLES**

Same-sex couples face unique challenges in a custody dispute. Post-\textit{Obergefell}, courts are beginning to recognize the difference between an uninvolved nonparent seeking custody of a child and a person acting as a parent but biologically unrelated to the child. While Louisiana has not yet taken the step to adopt de facto parentage, the law has evolved to address the needs of the child in a nontraditional family arrangement. Furthermore, the law of filiation must be revised to address the parentage of same-sex married couples who have children through alternative means and by nature do not always share a biological connection to the child. While adoption by the nonbiological parent is always an option, legal presumptions would better protect the rights of parents and the child, whether or not they share a biological connection to the child.

When both spouses in a same-sex marriage are recognized

\(^{508}\) See \textit{Jackson v. McNeal}, 2015-0067, p. 5 (La. App. 1 Cir. 7/13/15); 180 So. 3d 376, 379.

\(^{509}\) \textit{Id.} at p. 2; 180 So. 3d at 377–78.

\(^{510}\) Id. at p. 7; 180 So. 3d at 380.

\(^{511}\) Id. at pp. 8–9; 180 So. 3d at 381. The “child was born while [the parents] were in a relationship,” albeit unmarried, “the child was given the same first, middle, and last name” as the father, and the father testified that he was indeed the child’s father. \textit{Id.}

\(^{512}\) In \textit{Jackson}, the child was not filiated to another man, so the father could institute the action at any time. \textit{Jackson}, 2015-0067, pp. 6–7; 180 So. 3d at 379 (citing \textit{LA. CIV. CODE} art. 198). If the child is presumed to be the child of another man, preemptive time periods to file the avowal action will apply. \textit{Id.} at p. 4; 180 So. 3d at 379 (citing \textit{LA. CIV. CODE} art. 198).
parents by adoption, the provisions of article 132 apply.\footnote{Palazzolo v. Mire, 2008-0075, pp. 35–36, 38 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 768–70 (granting the biological parent sole custody of the child in a custody dispute with the adoptive same-sex parent based on the best interest of the child).} When one spouse is a parent to the child biologically or by adoption, and the other spouse functions as a parent in name only, without a valid adoption, the latter has no rights to the child.\footnote{Louisiana law does not permit unmarried persons to jointly adopt (often referred to as second parent adoptions). See LA. CHILD. CODE ANN. art. 1221 (2019); In re C.A.C., 2017-0108, p. 4 (La. App. 4 Cir. 11/2/17); 231 So. 3d 58, 74 n.1 (same-sex partner could not have adopted biological child of partner without biological parent relinquishing parental rights because the parties were not married); Ferrand v. Ferrand, 16-7, p. 9 n.16 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 918 n.16 (same-sex partner could not have adopted biological child of partner without biological parent relinquishing parental rights because the parties were not married). Post-2015, when same-sex couples in Louisiana were permitted to marry, adoption by the same-sex married partner (stepparent adoption) is now permitted. LA. CHILD. CODE ANN. art. 1221 (2019). Louisiana will also give full faith and credit to an out-of-state adoption by a same-sex parent. See Palazzolo, 2008-0075, p. 38; 10 So. 3d at 770.} The other spouse is therefore treated as a nonparent, even though the nonparent may have assumed the role of parent to the child for many years. The provisions of article 133 will apply and the nonparent must prove substantial harm to the child to deprive the parent of custody. Joint custody between the parent and nonparent same-sex couple is permitted if the nonparent can prove that an award of sole custody to the parent would cause substantial harm to the child and joint custody with the nonparent is in the best interest of the child.\footnote{See generally In re C.A.C., 2017-0108; 231 So. 3d 58; Ferrand, 16-7; 221 So. 3d 909; Black v. Simms, 2008-1465 (La. App. 3 Cir. 6/10/09); 12 So. 3d 1140.}

Prior to the legalization of same-sex marriage, courts were reluctant to award custody to the nonparent same-sex partner. In 2009, in\footnote{Black, 2008-1465, p. 1; 12 So. 3d at 1141.} Black v. Simms, a lesbian couple each gave birth to one child using the same donor sperm.\footnote{Id. at pp. 1–2; 12 So. 3d at 1141.} Ms. Simms gave birth to a daughter, and Ms. Black gave birth to a son.\footnote{Id.} When the couple split up, the daughter was six years old and had lived with her two mothers since birth; the family had also moved in with the parents of Ms. Black two years before the separation.\footnote{Id. at p. 2; 12 So. 3d at 1141.} Ms. Simms moved out with the child and refused to allow Ms. Black or her parents to see her.\footnote{Id. at pp. 1–2; 12 So. 3d at 1141.} One year later, Ms. Black sought custody.\footnote{Id. at pp. 1–2; 12 So. 3d at 1141.} She argued that severing the ties of a parent–child relationship, as well as the
relationship with the child’s brother and grandparents, would cause substantial harm to the child.521 Applying article 133, the court disagreed, finding that denying the obvious love and affection the Blacks have for the child may be harsh and inconsiderate but does not rise to the level of substantial harm.522

Prior to Obergefell, courts also refused to issue a consent judgment of custody based on an agreement by a parent to share custody with her nonparent same-sex partner. In In re Melancon, a biological mother and her same-sex partner used artificial insemination to have a child.523 They lived together in the nonparent partner’s home.524 The biological mother consented to joint custody with her partner, but the trial court refused to issue a consent judgment of custody, stating that the nonparent must plead and prove that the award of sole custody to the parent (with whom she wanted to share joint custody) would cause substantial harm to the child under article 133.525 The nonparent argued that article 132 applied because the court was asked to issue a judgment in accordance with the agreement of the parents.526 The court disagreed.527 Ultimately, because no allegations of harm were present, the court sua sponte raised the exception of no cause of action and dismissed the case.528 The appellate court affirmed.529

Both the Black and Melancon decisions have been limited, if not abrogated, post-Obergefell. The Louisiana Supreme Court has made clear that in all custody determinations—even between a parent and a nonparent—the paramount goal and primary consideration must be the best interest of the child.530 The Louisiana Supreme Court has likewise recognized the right of a

521. Black v. Simms, 2008-1465, p. 1 (La. App. 3 Cir. 6/10/09); 12 So. 3d 1140, 1141. Ms. Black and Ms. Simms raised their daughter as a family unit for four years. Id. When the couple first split, Ms. Black moved in with her parents, and ultimately Ms. Simms followed, with all four of them participating in raising the two children. Id. Ms. Simms moved two years later, when her daughter was six, and she no longer had contact with the Blacks. Id.

522. Id. at p. 8; 12 So. 3d at 1145.

523. In re Melancon, 2010-1463, p. 3 (La. App. 1 Cir. 12/22/10); 62 So. 3d 759, 763, abrogated by In re J.E.T., 2016-0384 (La. App. 1 Cir. 10/31/16); 211 So. 3d 575.

524. Id.

525. Id. at pp. 3–4; 62 So. 3d at 763.

526. Id. at p. 4; 62 So. 3d at 763.

527. Id.

528. In re Melancon, 2010-1463, p. 5; 62 So. 3d at 764.

529. Id. at p. 6; 62 So. 3d at 764.

530. Tracie F. v. Francisco D., 2015-1812, p. 2 (La. 3/15/16); 188 So. 3d 231, 235.
parent to consent to custody with a nonparent, and other Louisiana courts have observed that substantial harm can befall a child who is separated from a loving parent, no matter the gender.

In In re J.E.T., the court refused to nullify a stipulated judgment of joint custody between an unmarried lesbian couple, one parent and one nonparent, when they split up when the child was eleven years old. The adoptive mother argued that the stipulated judgment was null because the court at the time had not determined that custody in her alone would cause substantial harm to the child. The court disagreed, finding ample authority for a parent to consent to joint custody with a nonparent without implicating the article 133 burden of substantial harm. It refused to nullify the stipulated judgment and found no material change of circumstance to modify the arrangement.

Without an agreement of custody or a valid adoption by the nonparent, courts must apply article 133 to a same-sex couple, mindful of the constitutionally protected right of the parent. The court did just that in In re C.A.C., which involved the breakup of a lesbian couple, who co-parented a child carried by one of the partners. The other partner did not adopt the child. The women lived together in a committed relationship for eighteen years, and at the time of separation, their daughter was seven. The women both raised the child as mothers, the child treated both women as mothers, and there was documentary evidence that the

531. Tracie F. v. Francisco D., 2015-1812, p. 17 (La. 3/15/16); 188 So. 3d 231, 243. See generally Bowden v. Brown, 48-286 (La. App. 2 Cir. 5/15/13); 114 So. 3d 1194 (awarding custody of the four children in a consent judgment to the grandmother based on the agreement of the parents who were still married).

532. See In re C.A.C., 2017-0108, p. 15 (La. App. 4 Cir. 11/2/17); 231 So. 3d 58, 68; Ferrand v. Ferrand, 16-7, p. 11 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 920; Bowden, 48-286, p. 8; 114 So. 3d at 1200.

533. See In re J.E.T., 2016-0384, pp. 2, 19 (La. App. 1 Cir. 10/31/16); 211 So. 3d 575, 578, 588.

534. Id. at p. 8; 211 So. 3d at 582.

535. Id. at pp. 12–13; 211 So. 3d at 584. The court also found that In re Melancon was not controlling because the petition for custody was filed by the nonparent in Melancon, rather than the parent in J.E.T., and the Melancon decision involved a direct appeal, while the request in J.E.T. was attacking a judgment rendered ten years before. Id. at pp. 13–14; 211 So. 3d at 584–85.

536. See id. at p. 20; 211 So. 3d at 588.

537. See generally In re C.A.C., 2017-0108; 231 So. 3d 58.

538. Id. at p. 3; 231 So. 3d at 73 (Broussard, J., concurring in part & dissenting in part).

539. Id. at pp. 2, 4; 231 So. 3d at 61, 63 (majority opinion).
biological mother expected her partner to be involved in the child’s life forever.\footnote{See In re C.A.C., 2017-0108, pp. 3–4 (La. App. 4 Cir. 11/2/17); 231 So. 3d 58, 62. The biological mother signed a Domestic Partnership Agreement, which contemplated joint custody in the event of the parties’ separation, a power of attorney in which she granted her partner unlimited rights over the child, and a testament which left her partner as trustee of the trust in favor of her daughter and instructed both extended families to be involved in the child’s life. Id.}

When the couple broke up, the biological mother asserted her constitutionally protected right to limit physical custody of the child with her former partner.\footnote{Id. at p. 5; 231 So. 3d at 63.} The former partner sought joint custody; the trial court applied article 133 and awarded joint custody with liberal custodial time in favor of the nonbiological mother.\footnote{Id. at p. 8; 231 So. 3d at 64.} On appeal, the fourth circuit affirmed, finding significant factual differences from the \textit{Black v. Simms} case and recognizing “the difficulty in applying art. 133 to cases that present a factual anomaly to the traditional family situation.”\footnote{Id. at p. 16; 231 So. 3d at 68.} The court explained:

The difficulty in applying La. C.C. art. 133 to same-sex custody contests is that article 133 presupposes an issue regarding the fitness of one or both parents exists, thus creating a threat of harm to the child.

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\ldots These articles were fashioned to manage circumstances in which a parent, or parents become unable or unwilling to properly parent the child and an extended family member or other concerned adult seeks custody.

In same-sex relationships the third party is much more likely to be a co-parent from the child’s point of view than in situations where a grandparent or other extended family member seeks custody. The third party life partner was there when the child was born and has established a bond that, to the child, is indistinguishable from that shared with the biological parent.\footnote{In re C.A.C., 2017-0108, pp. 16–18; 231 So. 3d at 69.}

The court concluded that substantial harm to the child would result if she was separated from either of her mothers and the
award of joint custody was in the child’s best interest.\textsuperscript{545} The court made clear that the biological mother was not an unfit parent and the other mother was not a typical third party envisioned by article 133.\textsuperscript{546} Joint custody was appropriate given the unique factual circumstances and the best interest of the child.\textsuperscript{547}

Disputes between same-sex couples who raise a child together as parents are more akin to heterosexual divorcing parents than a typical parent–nonparent relationship.\textsuperscript{548} Although a natural parent has rights protected by the Constitution,\textsuperscript{549} those rights must be balanced against the best interest of the child.\textsuperscript{550} Louisiana’s law on nonparent custody strikes a principled balance by requiring the nonparent to prove substantial harm to the child if custody would be vested solely in the biological parent. Once a court determines that a child will experience substantial harm or detrimental consequences if the nonparent is denied custody, it should permit custody to the nonparent. Courts should keep in mind the changing nature of the family and the best interest lens under which each particular set of facts and circumstances should be viewed.

The court in \textit{Ferrand v. Ferrand} considered a cisgender biological mother and her female transgender partner who identified as a man.\textsuperscript{551} The couple had twins through artificial insemination during their relationship.\textsuperscript{552} The couple had been together for seven years when the twins were born and they presented themselves as a married couple, sharing the same last name and co-parenting the children.\textsuperscript{553} The children called the transgender father “Daddy,” and he was active in the children’s lives.\textsuperscript{554} The mother moved out of the home when the children were four years old, and the transgender father became the primary caregiver for approximately two years, until the mother removed

\begin{footnotes}
\footnotetext{545}{\textit{In re C.A.C.}, 2017-0108, pp. 19–20 (La. App. 4 Cir. 11/2/17); 231 So. 3d 58, 70–71.}
\footnotetext{546}{{\textit{Id.} at p. 21; 231 So. 3d at 71.}}
\footnotetext{547}{{\textit{Id.} at p. 22; 231 So. 3d at 71.}}
\footnotetext{548}{{\textit{Id.} at p. 19; 231 So. 3d at 70.}}
\footnotetext{549}{{Troxe v. Granville, 530 U.S. 57, 66 (2000); Tracie F. v. Francisco D., 2015-1812, p. 14 (La. 3/15/16); 188 So. 3d 231, 242.}}
\footnotetext{550}{{\textit{See Ferrand v. Ferrand}, 16-7, pp. 10–11 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 919 (noting that the right of a parent is not unconditional).}}
\footnotetext{551}{{\textit{See generally id.}}}
\footnotetext{552}{{\textit{Id.} at p. 4; 221 So. 3d at 916.}}
\footnotetext{553}{{\textit{Id.}}}
\footnotetext{554}{{\textit{Id.} at p. 5; 221 So. 3d at 916.}}
\end{footnotes}
his name from the birth certificate, changed the children’s last names, and prevented the father from seeing them.\(^{555}\) In a suit for custody, the father presented expert testimony that the children would suffer emotional problems without the presence of their father.\(^{556}\) The trial court dismissed his petition for custody, finding no evidence that the biological mother was “unable, unfit, neglectful, abusive, unwilling, or that she abandoned her rights” such that her constitutionally protected right should be overridden.\(^{557}\)

In a comprehensive opinion, the fifth circuit vacated the decision of the trial court and ordered a custody evaluation to be performed to determine whether the children would suffer substantial harm if sole custody were granted to the mother.\(^{558}\) The court conducted a thorough examination of the law in several southern states governing nonparent custody, suggesting that a more malleable standard may be needed given the changing nature of the American family.\(^{559}\) Without opining on what standard may be appropriate, and cognizant that article 133 undeniably applies to a nonparent seeking custody, the court recognized the need to know the impact of a sole custody award on the children given the test of substantial harm.

Although article 133 has been described as a “dual part” analysis—first, the nonparent must prove substantial harm to the child if custody is awarded to the parent, and second, the nonparent must prove that custody with the nonparent is in the best interest of the child—can one prong really be examined without considering the other?\(^{560}\) Whether the children would suffer substantial harm necessitates looking at their best interest. Indeed, integrating these prongs is most desirable when the

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\(^{555}\) Ferrand v. Ferrand, 16-7, p. 6 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 917.

\(^{556}\) Id. at p. 8; 221 So. 3d at 918.

\(^{557}\) Id. at pp. 8–9; 221 So. 3d at 918.

\(^{558}\) Id. at p. 41; 221 So. 3d at 939.

\(^{559}\) See id. at pp. 14–41; 221 So. 3d at 928–38. The court discussed the doctrines of in loco parentis, psychological parent, and de facto parent, which allow courts to consider the child’s best interest in light of the changing demographics of the family. See id. at pp. 14–16; 221 So. 3d at 922–24.

\(^{560}\) Ferrand, 16-7, p. 13; 221 So. 3d at 922 (“In light of the Supreme Court’s recent emphasis in Tracie F. v. Francisco D. that the best interest of the child is the principal consideration in all child custody determinations, including initial custody contests between parents and non-parents, however, the legal question arises—may a trial judge rule on whether a non-parent has met his burden of proving substantial harm under La. C.C. art. 133 without also considering the best interest of the child, as provided in La. C.C. art. 1347?”).
nonparent is acting as a parent. Determining that a nonparent is a psychological or de facto parent, as compared to a nonparent who has never functioned as a parent, could assist in a finding of substantial harm. In fact, a doctrine that differentiates between a nonparent who is welcomed by the parent to function as another parent and a nonparent who functions only as a close relative or friend of the child better protects the wishes of the parent, the expectations of the parties, and the best interest of the child.

**IX. BEST INTEREST OF THE CHILD FACTORS**

The hallmark consideration in an award of custody is the best interest of the child. Courts use the enumerated factors found in article 134 of the Civil Code to make its determination. When applying these factors, the court should not perform a mechanical application of the factors but should decide each case in light of those applicable to the unique factual circumstances of each case. These factors are not exclusive but are provided as a guide to the court, and the relative weight given to each factor is left to the discretion of the court. Further, courts can consider the conduct of the parents both before and during the marriage in assessing best interest.

Trial courts have inherent power to determine a child’s best interest; as a result, courts can tailor custody and visitation orders to minimize any negative consequences on the child. Courts are required to weigh and balance the factors favoring or opposing custody based on the evidence presented, and the court is not

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561. *LA. CIV. CODE ANN. art. 131* (2019); see also *Orrill v. Orrill*, 2008-0400, p. 4 (La. App. 4 Cir. 2/4/09); 5 So. 3d 279, 282 (stating the best interest of the child is the “principal substantive criterion for granting and changing custody”); *Lee v. Davis*, 579 So. 2d 1130, 1132 (La. Ct. App. 2 Cir. 1991); *Schloegel v. Schloegel*, 584 So. 2d 344, 346 (La. Ct. App. 4 Cir. 1991).

562. *Noland v. Noland*, 2016-641, p. 5 (La. App. 3 Cir. 4/26/17); 218 So. 3d 215, 220; *Dunklin v. Dunklin*, 46-885, p. 5 (La. App. 2 Cir. 2/29/12); 86 So. 3d 741, 744; *Thibodeaux v. O'Quin*, 2009-1266, p. 3 (La. App. 3 Cir. 3/24/10); 33 So. 3d 1008, 1012; *Martello v. Martello*, 2006-0594, p. 5 (La. App. 1 Cir. 3/23/07); 960 So. 2d 186, 191; *Verret v. Verret*, 34-982, p. 15 (La. App. 2 Cir. 5/9/01); 786 So. 2d 944, 953; *Breaux v. Breaux*, 96-214, pp. 3–4 (La. App. 3 Cir. 7/17/96); 667 So. 2d 1106, 1108.

563. *Langford v. Langford*, 49,080, p. 3 (La. App. 2 Cir. 4/9/14); 138 So. 3d 101, 104; see also *LA. CIV. CODE ANN. art. 134 cmts. (a)–(b)* (2019); *C.M.J. v. L.M.C.*, 2014-1119, p. 17 (La. 10/15/14); 156 So. 3d 29; *Turner v. Turner*, 455 So. 2d 1374, 1377 n.2 (La. 1984).

564. *Hargrove v. Hargrove*, 29,590, p. 3 (La. App. 2 Cir. 5/9/97); 694 So. 2d 645, 647.

565. *Lucky v. Way*, 51,706, p. 31 (La. App. 2 Cir. 9/17/17); 245 So. 3d 110, 129; see also *Duplessy v. Duplessy*, 12-69, p. 13 (La. App. 5 Cir. 6/28/12); 102 So. 3d 299, 216.
bound to give more weight to one factor over another.\textsuperscript{566} Additionally, the court is not permitted to apply any presumption or preference based solely on the gender of the parent.\textsuperscript{567} 

On appellate review, the trial court’s determination of custody is afforded great weight, and its discretion will not be disturbed on review in the absence of a clear showing of abuse of discretion because the trial court is in a better position to evaluate the credibility of the witnesses.\textsuperscript{568} Even the trial court’s failure to include an analysis of the article 134 factors has not been deemed an abuse of discretion, because “no exhaustive analysis of La. Civ. Code art. 134 is required under the law.”\textsuperscript{569} 

Through the comprehensive revision of the laws on custody in 1993 until the year 2018, the best interest of the child factors remained the same. In 2018, Act 412 was passed, which added two additional factors and expounded on two existing factors, all with a focus on potential abuse that could affect a child.\textsuperscript{570} Best interest is now defined in fourteen, rather than twelve, factors, but the factors remain illustrative, so any fact having a bearing on the child should be considered in the court’s analysis.

A. FACTOR 1: THE POTENTIAL FOR THE CHILD TO BE ABUSED

In 2018, the legislature renumbered the existing best interest of the child factors and added a new first factor: “The potential for the child to be abused, as defined by Children’s Code Article 603(2), which shall be the primary consideration.”\textsuperscript{571} Article 603(2) defines abuse expansively and includes attempted or actual mental or physical injury, exploitation or overwork, and involvement in sexually related activities.\textsuperscript{572} Any form of abuse performed or tolerated by the parent will be a factor affecting the custody of a child, and the Post-Separation Family Violence Relief Act,\textsuperscript{573} as

\begin{itemize}
\item 566. Moreau v. Moreau, 2015-0564, p. 6 (La. App. 4 Cir. 11/18/15); 179 So. 3d 819, 823; Martello v. Martello, 2006-0594, p. 5 (La. App. 1 Cir. 3/23/07); 960 So. 2d 186, 191; Luplow v. Luplow, 41,021, p. 5 (La. App. 2 Cir. 2/28/06); 924 So. 2d 1135, 1140; Romanowski v. Romanowski, 2003-0124, p. 4 (La. App. 1 Cir. 2/23/04); 873 So. 2d 656, 659; Hill v. Hill, 34,104, pp. 2–3 (La. App. 2 Cir. 12/24/01); 777 So. 2d 1263, 1265.
\item 567. Hill, 34,104, p. 3; 777 So. 2d at 1266; Dubois v. Dubois, 532 So. 2d 360, 361 (La. Ct. App. 3 Cir. 1988).
\item 568. LA. CIV. CODE ANN. art. 134 cmt. (b) (2019).
\item 569. Stewart v. Stewart, 2011-1334, p. 6 (La. App. 3 Cir. 3/7/12); 86 So. 3d 148, 154.
\item 571. LA. CIV. CODE ANN. art. 134(A)(1) (2019).
\item 572. LA. CHILD. CODE ANN. art. 603(2) (2019).
\end{itemize}
well as the Domestic Abuse Assistance Act, provide mandatory, nonwaivable restrictions on custody and visitation. This factor contemplates abuse not yet attempted or performed, but the potential that the child could be abused by the person seeking custody or other people in the company of that person.

B. FACTOR 2: THE LOVE, AFFECTION, AND OTHER EMOTIONAL TIES BETWEEN EACH PARTY AND THE CHILD

When evaluating the child’s best interest, courts can consider the love, affection and emotional ties between the party and the child. Courts generally do not spend a great deal of time on this factor because both parties are seeking custody and thus genuinely love the child. If there is evidence that one party has abdicated parenting responsibilities to another or has little interest in the child, this factor can favor the other party. A custody evaluation can help determine whether one party has stronger emotional ties with the child. Courts consider the emotional connection that exists at the time custody is determined, even if the connection changed due to the acts of another party. Courts have also

575. Paragraph B of article 134 was added to include direct reference to the Post-Separation Family Violence Relief Act and the Domestic Abuse Assistance Act when abuse, as defined by those acts and other criminal laws, are present. See LA. CIV. CODE ANN. art. 134(B) (2019).
576. LA. CIV. CODE ANN. art. 134(A)(2) (2019); see also, e.g., Bourque v. Bourque, 03-1254, p. 12 (La. App. 5 Cir. 3/30/04); 870 So. 2d 1088, 1096 (finding that father played an important role in child’s life by fishing, hunting, and attending church services with him); Masters v. Masters, 35,477, p. 5 (La. App. 2 Cir. 10/2/01); 795 So. 2d 1271, 1276 (determining that child’s establishment of a support system in father’s community, despite the mother constantly trying “to thwart the father-daughter relationship,” was sufficient to establish that love, affection, and other emotional ties weighed in the father’s favor).
577. See, e.g., Hobbs v. Hobbs, 42,353, pp. 8–9 (La. App. 2 Cir. 8/15/07); 962 So. 2d 1148, 1153 (weighing factor one equally because both parents equally loved the child); Greene v. Taylor, 2001-1137, p. 10 (La. App. 3 Cir. 2/27/02); 809 So. 2d 1187, 1194 (weighing factor one equally because “the children show[ed] their affection to both parents”); In re Marriage of Blanch, 2010-1686, p. 16 (La. App. 4 Cir. 9/28/11); 76 So. 3d 557, 568 (noting that the court-appointed evaluator determined that both parents genuinely loved the child).
578. See Cortez v. Cortez, No. 2011-1485, 2012 WL 1079201, at *6 (La. Ct. App. 1 Cir. Mar. 29, 2012) (weighing factor one against the mother because she abdicated her parenting responsibilities to her sister-in-law when her husband was not home); Griffith v. Latiolais, 2009-0824, pp. 11, 22 (La. App. 3 Cir. 3/3/10); 32 So. 3d 380, 388, 395 (weighing factor one in mother’s favor because father had only a “passing interest” in child and saw custody award as “nothing more than victory over his former lover”).
579. See Palazzolo v. Mire, 2008-0075, p. 47 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 775 (finding that a disruption of the maternal or paternal bond that once existed between the party and the child affects the “emotional ties” and tends to be detrimental
recognized that a parent’s mode of discipline can affect the emotional ties with the child, particularly when the discipline is not age-appropriate. 580

C. FACTOR 3: THE CAPACITY AND DISPOSITION OF EACH PARTY TO GIVE THE CHILD LOVE, AFFECTION, AND SPIRITUAL GUIDANCE AND TO CONTINUE THE EDUCATION AND REARING OF THE CHILD

Courts also consider the capacity and disposition of the parties to give love, affection, spiritual guidance, and a good education to the child. Because those vying for custody can generally show sincere love and affection for the child, 581 courts tend to focus on whether a party attends church 582 and whether a party has some special ability or has shown an inability to assist in the educational rearing of the child. 583

Consideration of a party’s religious preference has the potential to interfere with the Free Exercise Clause of the First Amendment, so courts are careful in their discussion. Generally,

580. See., e.g., Bergeron v. Clark, 2002-493, p. 7 (La. App. 3 Cir. 10/16/02); 832 So. 2d 327, 331 (finding that mother’s discipline for toddler was not age appropriate, and as a consequence, her emotional connection suffered).


582. See generally Schneider v. Schneider, 2012-1241 (La. App. 3 Cir. 6/20/13); 115 So. 3d 1279 (finding that emotional ties to one’s church are strong considerations); Crowson v. Crowson, 32,314, p. 6 (La. App. 2 Cir. 9/22/99); 742 So. 2d 107, 111 (La. App. 2 Cir. 1999) (favoring the father because he was the child’s “only exposure to organized religion” before and after the divorce).

583. See, e.g., Greene v. Taylor, 2001-1137, p. 10 (La. App. 3 Cir. 2/27/02); 809 So. 2d 1187, 1194 (weighing factor against mother because of child’s consistent tardiness at school while in mother’s custody and mother’s inability to assist the child in completing the child’s home assignments); Hobbs v. Hobbs, 42,353, pp. 5–6 (La. App. 2 Cir. 8/15/07); 962 So. 2d 1148, 1152 (weighing factor in favor of mother because she was an educator); Palazzolo v. Mire, 2008-0075, p. 48 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 776 (weighing factor in favor of mother that had home schooled the child and continued to assist the child with school work); Richard v. Richard, 2009-0296, p. 17 (La. App. 1 Cir. 6/12/09); 20 So. 3d 1061, 1073 (weighing factor in favor of father because of mother’s unrealistic expectations for special needs child and the fact that she was distracted by new marriage and baby).
courts have recognized the custodial parent’s authority to make decisions relative to the child’s religious upbringing. However, parents cannot force their religious affiliation on the noncustodial or nondomiciliary parent or prevent the parent from introducing a different religious affiliation to the child, absent some negative effect on the child’s best interest.

The third circuit, in the only comprehensive discussion of the issue, protected the religious interests of a nondomiciliary parent when those interests conflicted with that of the domiciliary parent. In D.R.S. v. L.E.K., the trial court granted the mother sole custody with the sole authority to decide the children’s religion. The third circuit reversed the award of sole custody to the mother because she had not met her clear and convincing burden of proof. The court awarded the parents joint custody and found it necessary to address the issue of religious preference because it named the mother as the domiciliary parent.

The court pointed to the Children’s Code, which defines “residual parental rights” as those rights provided to a parent without custody, which includes the right to determine religious affiliation. The court also considered a fifth circuit case in which a mother attempted to restrict the father’s visitation rights based on the asserted religious beliefs of the children. The fifth circuit recognized the importance of both parents in the life of a child and the “realistic necessity” that a child needs to learn to interact with

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584. Pardue v. Pardue, 285 So. 2d 552, 554–55 (La. Ct. App. 1 Cir. 1978) (noting that the mother, as legal tutrix of the children, was charged with responsibility for their religious training, and the children preferred her choice of religion, so the father’s visitation had to comply with those wishes); see also Reynier v. Reynier, 545 So. 2d 663, 664–65 (La. Ct. App. 5 Cir. 1989) (finding that the father was required to take his daughter to her religious training when she was visiting him on Sunday mornings, and he was not to talk about his religion because it was scary for the child).

585. D.R.S. v. L.E.K., 2009-1274, pp. 9–10 (La. App. 3 Cir. 3/10/10); 33 So. 3d 428, 433. But see Reynier, 545 So. 2d at 665 (stopping the father from discussing religion with the child). See also Linda D. Elrod, CHILD CUSTODY PRACTICE AND PROCEDURE § 6:21 (2013).

586. D.R.S., 2009-1274, p. 8; 33 So. 3d at 433.

587. Id. at p. 7; 33 So. 3d at 433.

588. Id. at p. 8; 33 So. 3d at 433.

589. La. CHILD. CODE ANN. art. 116(24) (2019) (defining “residual parental rights” as “those rights and responsibilities remaining with the parents after the legal transfer of custody of their child, including but not necessarily limited to right of visitation, consent to adoption, right to determine religious affiliation, responsibility of support, and the right of inheritance from the child”) (emphasis added).

590. See generally Becnel v. Becnel, 98-593 (La. App. 5 Cir. 3/25/99); 732 So. 2d 589.
others of different religious backgrounds.\textsuperscript{591}

Ultimately, the court in \textit{D.R.S. v. L.E.K.} balanced the rights of the parents to further the best interest of the child when it concluded:

Though the custodial or domiciliary parent may raise the child in a legitimate religion of his/her own choosing, that parent may not force that religion or religious affiliation upon the noncustodial parent or preclude the noncustodial parent from pursuing his/her own religious affiliation and sharing same with the child provided doing so does not negatively affect the best interests of the child.\textsuperscript{592}

Undoubtedly, the best interest of the child, even in religious disagreements, remains the primary consideration. And, while spiritual guidance provided by a parent can be a catalyst to receiving custody, it cannot be used as a sword to minimize the religious rights of the other parent.

\textbf{D. FACTOR 4: THE CAPACITY AND DISPOSITION OF EACH PARTY TO PROVIDE THE CHILD WITH FOOD, CLOTHING, MEDICAL CARE, AND OTHER MATERIAL NEEDS}

The best interest of the child also involves the capacity and disposition of each party to provide for the child, namely food, clothing, medical care, and any other needs. Although custody cannot be determined solely by comparing the parents’ financial abilities, it may be considered when weighing the parents’ respective abilities to provide.\textsuperscript{593} Therefore, courts have considered the income and job stability of the parties,\textsuperscript{594} and have favored the

\textsuperscript{591}. Becnel v. Becnel, 98-593, p. 8 (La. App. 5 Cir. 3/25/99); 732 So. 2d 589, 595; see also Susan Higginbotham, "Mom, Do I Have to Go to Church?: The Noncustodial Parent's Obligation to Carry Out the Custodial Parent's Religious Plans", 31 Fam. L.Q. 585, 596 (1997) (noting that "curtailing" the noncustodial parent's visitation with a child "in order to further the religious wishes of a custodial parent is not in harmony with [the] goal of maintaining a healthy relationship with the noncustodial parent).

\textsuperscript{592}. D.R.S. v. L.E.K., 2009-1274, pp. 9–10 (La. App. 3 Cir. 3/10/10); 33 So. 3d 428, 434.

\textsuperscript{593}. Millet v. Andrasko, 93-0520, p. 7 (La. App. 1 Cir. 3/11/94); 640 So. 2d 368, 371; see also Boyd v. Boyd, 26,292, p. 7 (La. App. 2 Cir. 12/7/94); 647 So. 2d 414, 417–18 (noting that one parent’s greater material wealth is not a factor when the other parent’s home is adequate).

\textsuperscript{594}. See, e.g., Hobbs v. Hobbs, 42,353, p. 5 (La. App. 2 Cir. 8/15/07); 962 So. 2d 1148, 1151 (favoring the father who made more money and was a better financial manager than the mother who had filed for bankruptcy); Greene v. Taylor, 2001-1137, pp. 10–11 (La. App. 3 Cir. 2/27/02); 809 So. 2d 1187, 1194 (favoring the father who had a steady job when compared to the mother who was remarried and no longer working
party who historically provided for the child’s material needs.\textsuperscript{595}

Public policy would dictate that no factor should weigh against a party in a custody contest simply because the party has a lower income and will need an award of child support if custody is granted. At least one court, however, noted that the mother’s dependency on child support and public assistance weighed against her.\textsuperscript{596}

\textbf{E. FACTOR 5: THE LENGTH OF TIME THE CHILD HAS LIVED IN A STABLE, ADEQUATE ENVIRONMENT, AND THE DESIRABILITY OF MAINTAINING CONTINUITY OF THAT ENVIRONMENT}

Factor five is often considered the most debated among the factors. When courts consider the length of time the child has lived in a stable and adequate environment, it considers whether it is desirable to maintain that living environment. Change is difficult for a child, and stability for the child can help to ameliorate any negative feelings the child may have about the separation of his parents. Courts have analyzed this factor pragmatically, considering the size of the house and room available for the child,\textsuperscript{597} as well as whether the home is a loving and caring home.\textsuperscript{598} In a
modification request, courts have also focused on whether the home environment is stable and whether the physical custody arrangement is beneficial to the child. When the child is flourishing in his current environment, any change of custody is less likely, but if changes in physical custody are stressful on the child, this factor can be used to modify physical custody to create more stability for the child.

**F. FACTOR 6: THE PERMANENCE, AS A FAMILY UNIT, OF THE EXISTING OR PROPOSED CUSTODIAL HOME OR HOMES**

The permanence of the existing or proposed custodial home requires the court to consider the continuity of the child’s family unit, specifically siblings. When examining the permanence of the home, courts focus on the amount of time the child has lived in the home and whether the parent has maintained a stable home.

father also has stable and suitable housing, but he did move, requiring the child to change schools.; Thibodeaux v. O’Quain, 2009-1266, p. 7 (La. App. 3 Cir. 3/24/10); 33 So. 3d 1008, 1014 (finding that the mother’s idea of stability amounted to control and prevented the child from having fun, thereby weighing the factor in favor of the father); see also Rogers v. Stockmon, 34,327, p. 5 (La. App. 2 Cir. 11/1/00); 78 So. 2d 386, 389.

599. See, e.g., Holland v. Spellman, 10-982, pp. 14–15 (La. App. 5 Cir. 6/14/11); 71 So. 3d 996, 1004 (rejecting father’s request to modify physical custody of child despite shortcomings of mother because child was happy and “living in a warm, stable, and loving environment with his mother at his grandmother’s house”); Chandler v. Chandler, 45,308, p. 10 (La. App. 2 Cir. 5/19/10); 37 So. 3d 569, 576 (rejecting father’s proposed change to shared equal custody because the “child ha[d] flourished under the current custody arrangement . . . [and] benefited greatly from stability and continuity under existing custody decree”); Ketchum v. Ketchum, 39,082, p. 9 (La. App. 2 Cir. 9/1/04); 882 So. 2d 631, 638 (rejecting a father’s request to alternate physical custody on a week-to-week basis because the young child was thriving under the present custody arrangement); Lee v. Lee, 34,925, p. 9 (La. App. 2 Cir. 8/25/00); 766 So. 2d 723, 728 (“Stability of environment is an important factor to be taken into account in considering changes in custody. A change from a stable environment should not be made absent a compelling reason.”).

600. See, e.g., Griffith v. Latiolais, 2009-0824, p. 23 (La. App. 3 Cir. 3/3/10); 32 So. 3d 380, 395 (weighing this factor in favor of the mother because child had lived with the mother his entire life, child’s emotional problems arose when the father disrupted that environment, and the mother still offered stability to child); Lemoine v. Lemoine, 2009-861, p. 10 (La. App. 3 Cir. 12/16/09); 27 So. 3d 1062, 1068 (weighing factor in favor of the mother’s request for a change in physical custody because the “resultant upheaval in [the child’s] life and constant change of domicile” was not in his best interest); Miller v. Miller, 32,506, p. 4 (La. App. 2 Cir. 6/16/99); 743 So. 2d 221, 224 (rejecting a modification request because the children were living in a safe and nurturing environment).

601. See, e.g., Ketchum, 39,082, p. 10; 882 So. 2d at 638 (maintaining primary physical custody in the home where the child was born and lived since that date because of the importance of permanence to a young child); Flanagan v. Flanagan, 36,852, p. 8 (La. App. 2 Cir. 3/5/03); 839 So. 2d 1070, 1075 (denying a modification of custody because the father had maintained the custodial home for his three daughters.
When examining the permanence of the “family unit,” courts look beyond immediate family and have favored custody to a parent who has a large extended family near the custodial home. For example, in *Trahan v. Kingrey*, the court emphasized that it was in the best interest of the child for him to remain in Houma, as he had approximately ninety-one relatives living in or around the area, instead of moving to West Virginia with his mother.

Whether to separate siblings in a custody dispute has been a recurring issue. In 1969, the Louisiana Supreme Court in *Tiffee v. Tiffee* set forth the “family solidarity rule”:

The separation of children of a family, though sometimes necessary, is a custodial disposition that courts seek to avoid. Normally, the welfare of these children is best served by leaving them together, so they can have the full benefit of companionship and affection. When feasible, a court should shape its orders to maintain family solidarity.

The court reaffirmed the family solidarity rule in 1999, in *Howze v. Howze*, when it reversed the award of split custody of two boys who were five years apart in age. The court explained that “the age gap is not so large as to preclude the children from sharing some similar interests and from deriving great benefit and comfort from living together as part of a family.”

Courts must only apply the family solidarity rule if it is in the best interest of the children. To determine whether keeping siblings together is in the children’s best interest, courts have

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602. See *Masters v. Masters*, 35,477, p. 6 (La. App. 2 Cir. 10/2/01); 795 So. 2d 1271, 1276 (weighing the factor in father’s favor because he maintained his residence in Ouachita Parish, while the mother had moved repeatedly in and out of state and had failed to move back to Ouachita Parish as she claimed).

603. See *Trahan v. Kingrey*, 2011-1900, pp. 14–15 (La. App. 1 Cir. 5/4/12); 98 So. 3d 347, 355 (weighing the factor in favor of the father because the father and child had strong ties to Louisiana as their home, with over ninety relatives nearby, rather than moving to West Virginia with his mother); see also *Bonnecarrere v. Bonneccarrere*, 2011-0061 (La. App. 1 Cir. 7/1/11); 69 So. 3d 1225.


605. *Tiffee v. Tiffee*, 223 So. 2d 840, 843 (La. 1969). The Louisiana Supreme Court reversed the lower court’s split custody of two sisters, ages six and seven, and reinstated the original custody in favor of the mother with reasonable visitation by the father. *Id.*

606. *Howze v. Howze*, 99-0996, p. 3 (La. 5/14/99); 735 So. 2d 619, 621.

607. *Id.*
considered the age of the siblings, the age difference between the siblings, the sex of the siblings, and the consanguinity of the siblings. In some circumstances, separation of siblings has been deemed to be in the best interest of the children. Courts will consider any fact that affects the child’s best interest, and to aid in its analysis, courts have relied on the testimony of experts and have been sensitive to any emotional or physical concerns within the family.

G. FACTOR 7: THE MORAL FITNESS OF EACH PARTY, INSO FAR AS IT AFFECTS THE WELFARE OF THE CHILD

The moral fitness of a party has long been a consideration in custody awards, but the focus has shifted toward the effects on the child, rather than simply the parent’s behavior. To explain, the predecessor to factor seven instructed courts to consider “the moral

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608. See, e.g., Roberie v. Roberie, 33,168, pp. 7–8 (La. App. 2 Cir. 12/8/99); 749 So. 2d 849, 854 (determining that teenage boys benefit from companionship and affection, just as younger boys).

609. See, e.g., Tiffee v. Tiffee, 223 So. 2d 840, 843 (La. 1969) (refusing to separate sisters one year apart in age); Howze v. Howze, 99-0996, p. 3 (La. 5/14/99); 735 So. 2d 619, 621 (refusing to separate brothers who were approximately four years apart); Walker v. Walker, 38,982, pp. 3–4 (La. App. 2 Cir. 8/18/04); 880 So. 2d 956, 959–60 (separating brothers who were seven and a half years apart and who preferred to live with different parents); Lee v. Davis, 579 So. 2d 1130, 1133–34 (La. Ct. App. 2 Cir. 1991) (refusing to separate two sisters who were six years apart).

610. See Guidry v. Guidry, 2007-1272, p. 8 (La. App. 3 Cir. 3/5/08); 979 So. 2d 603, 608 (separating a son who was fifteen and a daughter who was fourteen to live with their father and mother, respectively, in light of the troubled relationship the son had with the mother; the parents lived one block from one another, and the children attended the same school). Same-sex siblings are less likely to be separated. See, e.g., Tiffee, 223 So. 2d 840; Houze, 99-0996, p. 3; 735 So. 2d at 621; Roberie, 33,168; 749 So. 2d 849.

611. It does not appear that the family solidarity rule applies with the same vigor as it applies to full-blooded siblings; regardless, the best interest of the child overarches any analysis. See, e.g., Cathy v. Ogea, 2012-563, pp. 9–10 (La. App. 3 Cir. 8/22/12); 98 So. 3d 953, 959 (awarding custody of an infant half-sibling to a different relative than was raising the other half-siblings because it would be best for one child’s financial and health needs, but awarding visitation with the half-siblings); McKinley v. McKinley, 631 So. 2d 45, 50 (La. Ct. App. 2 Cir. 1994) (refusing to separate brother from two half-sisters, even though custodian of half-sister was not the biological father of the boy); see also Street v. May, 35,589 (La. App. 2 Cir. 12/5/01); 803 So. 2d 312; Mills v. Hardy, 2002-1062 (La. App. 3 Cir. 3/26/03); 842 So. 2d 443.


613. See Winzor v. Winzor, 2003-329, p. 11 (La. App. 3 Cir. 10/1/03); 856 So. 2d 107, 115 (refusing to separate three children because the middle and youngest of the children suffered mental and physical problems and would rely on the older child); Price v. Price, 451 So. 2d 1187, 1191 (La. Ct. App. 1 Cir. 1984) (separating the brother and sister to preserve the father-son relationship).
fitness of the parties involved.”

Because the focus at that time was the parent’s immoral behavior, parents who lived in “open and public adultery” were considered morally unfit to maintain custody of children. To soften the harsh result of this rule, the Louisiana Supreme Court created the “reformation rule,” which permitted a parent to retain custody of a child if the parent reforms or abstains “from any previous course of open indiscretion and probable immorality.”

Over the course of the following two decades, courts applied the reformation rule liberally, and the focus began to shift to the effect the parent’s immorality had on the children.

The legislature recognized that shift when, during the 1993 revision, it added the phrase “insofar as it affects the welfare of the child” to the morality factor. After the revision, the statutory provision fell in line with the fundamental purpose of custody awards—to serve the best interest of the child, rather than to regulate human behavior. Today, the reformation rule has little use because, regardless of whether the parent’s immoral behavior occurred

614. LA. CIV. CODE art. 131(C)(2) (rev. 1992); see also LA. CIV. CODE ANN. art. 134 cmt. (f) (2019).


617. See Albarado v. Toler, 495 So. 2d 355, 358 (La. Ct. App. 3 Cir. 1986) for a development of the law after the creation of the reformation rule.


619. LA. CIV. CODE ANN. art. 134 cmt. (f) (2019); see also Stephenson v. Stephenson, 404 So. 2d 963, 966 (La. 1981) (upholding award of custody to wife whose past adulterous behavior was not shown to have any detrimental effect on the children); Cleeton v. Cleeton, 383 So. 2d 1231, 1236 (La. 1980) (upholding award of custody to wife whose past adulterous behavior was not shown to have any detrimental effect on the children); see also Monsour, 347 So. 2d at 205 (primary consideration was welfare of child, not past misconduct of custodian). But see Bagents v. Bagents, 419 So. 2d 460, 462 (La. 1982) (upholding change of custody from mother who had lived in open concubinage in the custodial home). The rule embodied in this article should apply not only to past misconduct, as in the cases just cited, but also to continuing immorality that does not harm the child. See Rollins v. Rollins, 521 So. 2d 647, 649 (La. Ct. App. 1 Cir. 1988), writ denied, 522 So. 2d 573 (La. 1988) (joint custody not modified where there was no showing that mother’s discrete illicit relationship had detrimental effect on child); Montgomery v. Marcantel, 591 So. 2d 1272, 1274 (La. Ct. App. 3 Cir. 1991) (change of custody to sole custody to wife due to father’s living in concubinage reversed in absence of evidence of detrimental effect on child); Peters v. Peters, 449 So. 2d 1372, 1375 (La. Ct. App. 2 Cir. 1984) (upholding judgment refusing to take child from custody of mother who was living in concubinage with man she planned to marry); Peyton v. Peyton, 457 So. 2d 321, 324–25 (La. Ct. App. 2 Cir. 1984) (upholding equal joint custody award where both parents were engaged in discrete sexual relationships that had no adverse effect upon the child).
before or at the time of the custody determination, the focus remains on the effect the behavior has on the child.\footnote{See Weaver v. Weaver, 2001-1656, pp. 6–7 (La. App. 3 Cir. 5/29/02); 824 So. 2d 438, 443 (noting that the reformation rule does not apply to absolve the mother’s eight-year history of having seven boyfriends who lived or slept over at her residence in the presence of her young daughter).}

Courts apply this factor to various parental behaviors. Sexual relationships,\footnote{See, e.g., Crowson v. Crowson, 32,314, pp. 7–8 (La. App. 2 Cir. 9/22/99); 742 So. 2d 107, 112 (extramarital relationships); Scott v. Scott, 95-0816 (La. App. 1 Cir. 12/15/95); 665 So. 2d 760 (homosexual relationship); Richard v. Richard, 2009-0299 (La. App. 1 Cir. 6/12/09); 20 So. 3d 1061 (homosexual relationship).} drug and alcohol abuse,\footnote{See L.E.P.S. v. R.G.P., 2008-1349, p. 20 (La. App. 3 Cir. 6/3/09); 11 So. 3d 633, 646; Fernandez v. Pizzalato, 2004-1676, p. 19 (La. App. 4 Cir. 4/27/05); 902 So. 2d 1112, 1124; Long v. Dossett, 98-1160, p. 23 (La. App. 3 Cir. 4/28/1999); 732 So. 2d 773, 786; Gill v. Dufrene, 97-0777, p. 10 (La. App. 1 Cir. 12/29/97); 706 So. 2d 518, 523.} criminal convictions,\footnote{See generally Scott, 95-0816; 665 So. 2d 760.} and parental alienation\footnote{Id. at p. 2; 665 So. 2d at 762.} are consistently relevant in evaluating the moral fitness of a parent. Activities can range in severity from lack of judgment to sociopathic qualities, all of which can affect a custody award depending on the specific factual circumstances present in each case.

The effect of a parent’s sexual lifestyle on a child receives considerable discussion in the jurisprudence. Courts consider the effect a parent’s unmarried heterosexual or homosexual acts have on a child. As society’s opinions on sexuality have changed, so too has the case law.

One of the first cases to consider the effect of a parent’s sexual preference on a child was \textit{Scott v. Scott}, decided in 1995.\footnote{Id.} In \textit{Scott}, the parents initially had a joint custody agreement with the mother named as the domiciliary parent.\footnote{Id. at p. 2; 665 So. 2d at 762.} When the mother moved back to Louisiana to live with another woman, the father filed a rule to change custody.\footnote{The boys were approximately nine and six years of age at the time of the divorce.} The father argued that her lesbian relationship, and open displays of affection, had a detrimental effect on their two boys.\footnote{The boys were approximately nine and six years of age at the time of the divorce.} To determine whether a
parent’s sexual lifestyle is cause for affecting custody, the court set forth a four-part analysis: “(1) whether the children were aware of the illicit relationship, (2) whether sex play occurred in their presence, (3) whether the furtive conduct was notorious and brought embarrassment to the children, and (4) what effect the conduct had on the family home life.”

After a review of each factor, the court concluded that domiciliary custody should be changed to the father based on the mother living with her girlfriend, concerns that the children had experienced embarrassment, and the “indiscreet displays of affection beyond mere friendship.” The court reaffirmed a statement made in a prior case that the mere fact of homosexuality will not deprive a parent of joint custody, but went on to say, “It is the opinion of this court that under such facts, primary custody with the homosexual parent would rarely be held to be in the best interests of the child.”

Almost fifteen years later, in Richard v. Richard, the court modified a custody agreement to name the father as domiciliary parent even though he was in an openly gay relationship. Upon the parents’ divorce, the father moved in with his partner and agreed to give domiciliary status of the four-year-old child to the mother. Four years later, out of concern for the child’s safety due to the mother’s new husband and the father’s relocation back to Louisiana, the father sought a change of custody requesting that he be named domiciliary parent of his now eight-year-old son.

The court considered several factors to determine the child’s best interest and when focusing on the issue of the father’s

and custody hearing. See Scott v. Scott, 95-0816, p. 2 (La. App. 1 Cir. 12/15/95); 665 So. 2d 760, 762.

629. Id. at p. 9; 665 So. 2d at 766.

630. Id. at pp. 9–10; 665 So. 2d at 766. The father admitted to sexual activity with his fiancée while the children were sleeping, but the two did not spend the night together. Id. at p. 8; 665 So. 2d at 765.

631. Id. at p. 10; 665 So. 2d at 766; see also Lundin v. Lundin, 563 So. 2d 1273, 1277 (La. Ct. App. 1 Cir. 1990) (reversing the trial court’s grant of sole custody to the mother and awarding joint custody with more custodial time to the father because the indiscreet displays of affection could affect the child’s gender identity, which was not in his best interest).

632. Richard v. Richard, 2009-0299, pp. 16–17 (La. App. 1 Cir. 6/12/09); 20 So. 3d 1061, 1072–73.

633. Id. at p. 2; 20 So. 3d at 1063–64.

634. Id. at p. 3; 20 So. 3d at 1064.
sexuality, applied the principles set forth in Scott.\textsuperscript{635} The court noted that the father lived with his partner, who was actively involved in the child's life, the child knew that his father was gay, and there was no evidence that the child was embarrassed or that the men engaged in inappropriate contact in front of the child.\textsuperscript{636} The court affirmed the trial court's decision to name the father as the domiciliary parent, regardless of "[w]hether personal feelings and moral judgments would incline individuals to consider otherwise."\textsuperscript{637}

The Scott four-factor test predated the decision of the United States Supreme Court in Obergefell v. Hodges\textsuperscript{638} that legalized same-sex marriage, so its continued application is not clear.\textsuperscript{639} While the Scott test was crafted in a case involving homosexuality, it can be applied to any sexual preference, including heterosexuality, to the extent the conduct causes embarrassment to the child and affects the child's family life. Indeed, when considering the best interest of the child, a parent's sexual conduct that reasonably causes distress to a child and affects the child's daily living should be considered regardless of the sexual preference of the parent.

The concepts of parental alienation and parental alienation syndrome have also been discussed as an element of moral fitness, as well as a part of factor twelve, the willingness to facilitate a relationship with the other party.\textsuperscript{640} Although often confused, parental alienation is not the same as parental alienation syndrome, the latter of which has generated more controversy. Parental alienation involves a wide scope of behaviors by the alienating parent, whether conscious or unconscious, that disturbs the relationship between the child and the other parent.\textsuperscript{641} Parental alienation syndrome occurs when a child is preoccupied with deprecation and criticism of a parent that is unjustified or

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\item \textsuperscript{635} Richard v. Richard, 2009-0299, p. 16 (La. App. 1 Cir. 6/12/09); 20 So. 3d 1061, 1072.
\item \textsuperscript{636} Id.
\item \textsuperscript{637} Id. at pp. 16–17; 20 So. 3d at 1072–73.
\item \textsuperscript{638} See generally Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
\item \textsuperscript{639} See Ferrand v. Ferrand, 16-7, p. 12 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 921 (noting the dearth of Louisiana case law on custody of a child of a same-sex couple since the Supreme Court's decision).
\item \textsuperscript{640} See Hilkirk v. Johnson, 2015-0577, p. 38 (La. App. 4 Cir. 12/23/15); 183 So. 3d 731, 752–53; Palazzolo v. Mire, 2008-0075, pp. 40–46 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 771–75.
\item \textsuperscript{641} Sandi S. Varnado, Inappropriate Parental Influence: A New App for Tort Law and Upgraded Relief for Alienated Parents, 61 DEPAUL L. REV. 113, 120 (2011).
\end{itemize}
Parental alienation focuses on the parent’s behavior alone, and parental alienation syndrome requires the child to be an active participant with the alienating parent.\footnote{Varnado, supra note 641, at 116–17. The syndrome was coined by Dr. Richard Gardner in the 1980s and has generated controversy in the mental health and legal fields. Although the existence of Parental Alienation Syndrome is controversial, there is little doubt that parental alienation has existed for years. \textit{Id.} at 117 n.12.}

One Louisiana court comprehensively discussed parental alienation syndrome. In \textit{Palazzolo v. Mire}, the court did not decide whether to recognize the disorder per se, but considered the facts and the opinions of the experts to determine that the child was an “alienated child.”\footnote{Palazzolo v. Mire, 2008-0075, p. 40 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 771 (“[T]he classic alienated child is one that unjustifiably turns against the alienated parent solely as a result of the alienating parent’s hostile actions, parenting tactics, and programming.”).} One expert opined that it would be best for an alienated parent to receive sole custody to begin to repair the damage to the relationship, and another expert opined that the alienating parent should receive sole custody because the child’s alienation was not due solely to the alienating parent’s tactics but the unwavering preference of the nine-year-old child.\footnote{Neither of the experts based their decision on Parental Alienation Syndrome, although both recognized that alienation was present. \textit{Id.} at pp. 45–46; 10 So. 3d at 774–75.} The court concluded that the presence of alienation favored the alienated parent for the moral fitness and willingness to facilitate a close relationship factors but ultimately granted sole custody to the alienating parent with visitation to the other parent due to other factors.\footnote{Id. at pp. 46–51; 10 So. 3d at 775–77. The parents in the \textit{Palazzolo} case had a twenty-four-year-long lesbian relationship. \textit{Id.} at pp. 1, 23; 10 So. 3d at 750, 762. The alienating parent was the biological mother who changed her lifestyle after the breakdown of the relationship, and the alienated parent was the adoptive mother who was still living as a lesbian. \textit{Id.}}

In \textit{White v. Kimrey}, the court likewise discussed parental alienation syndrome when a father sought a change of custody because of the alienating acts of the mother.\footnote{White v. Kimrey, 37,408 (La. App. 2 Cir. 5/14/03); 847 So. 2d 157.} For the three years that the mother had domiciliary custody of the child, she intentionally undermined the father–daughter relationship, made relentless false allegations of sexual abuse, and constantly refused the father his court-ordered visitation.\footnote{Id. at p. 10; 847 So. 2d at 163.} One expert diagnosed the situation as parental alienation syndrome because the mother...
was programming the child to be negative about the father.\textsuperscript{649} If left with the mother, the child was at risk for developing more serious emotional problems. When considering the best interest factors, the court recognized that the alienation impacted the mother’s moral fitness as well as her willingness to facilitate a relationship with the father, and it named the father as the domiciliary parent.\textsuperscript{650}

Although not always couched in terms of “parental alienation syndrome,” courts recognize the damaging results possible when a parent partakes in any alienating behavior.\textsuperscript{651} Even without using the term, courts understand alienating behavior when presented with it.\textsuperscript{652} Whether the actions are discussed in the context of moral fitness or facilitating a relationship, alienating acts will have a bearing on custody.\textsuperscript{653}

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\textsuperscript{649}. White v. Kimrey, 37,408, p. 10 (La. App. 2 Cir. 5/14/03); 847 So. 2d 157, 163 ("Dr. Baker further testified in effect that the mother was programming the child to be negative as regards the father. He diagnosed the situation as parental alienation syndrome, which is harmful to the child. He further related that the accepted method of treatment for parental alienation syndrome is to give the child to the parent not causing the alienation.").

\textsuperscript{650}. Id. at pp. 11–12; 847 So. 2d at 163–64.

\textsuperscript{651}. See Hilkirk v. Johnson, 2015-0577, p. 38 (La. App. 4 Cir. 12/23/15); 183 So. 3d 731, 752 (considering parental alienation to favor the father because the mother’s negative and hostile attitude toward the father caused the child’s negative view and alienation to her father).

\textsuperscript{652}. See England v. England, 2017-0493, p. 8 (La. App. 4 Cir. 3/2/18); 238 So. 3d 1064, 1070 (the mother brought four frivolous claims of abuse against the father and subjected children to several “welfare checks” by the police while they were with their father; court determined that actions were detrimental to the children and awarded the father sole custody and supervised visitation to the mother); Lucky v. Way, 51,706, p. 21 (La. App. 2 Cir. 9/1/17); 245 So. 3d 110, 124 (emotional abuse by mother was an attempt to alienate child from his father; court awarded sole custody to the father with supervised visitation to the mother).

\textsuperscript{653}. See Watts v. Watts, 2008-0834, p. 7 (La. App. 4 Cir. 4/8/09); 10 So. 3d 855, 860 (designating the mother as domiciliary parent because of the alienating behavior of the father and his new wife); Masters v. Masters, 35,477, p. 3 (La. App. 2 Cir. 10/2/01); 795 So. 2d 1271, 1274 (finding that the mother’s perjury and coaching of the child to falsely allege sexual abuse bore negatively on her moral fitness); Goodwin v. Goodwin, 618 So. 2d 579, 586 (La. Ct. App. 2 Cir. 1993) ("[T]o intentionally damage a child’s relationship with his father and to use children as instrumentality to inflict pain on a former spouse is a serious shortcoming in the area of moral fitness."); see also Winzor v. Winzor, 2003-329, p. 9 (La. App. 3 Cir. 10/1/03); 856 So. 2d 107, 114 (noting the harmfulness of alienating statements made by the maternal grandparent, but refusing to impute the actions to the mother seeking to maintain custody).
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H. FACTOR 8: THE HISTORY OF SUBSTANCE ABUSE, VIOLENCE, OR CRIMINAL ACTIVITY OF ANY PARTY

The history of substance abuse, violence, or criminal activity of a party was added as a new factor in 2018. Although each of these actions could have been considered under other factors, they are now express. Presumably, though, crimes or violence that occurred in the past, which have been resolved by the person seeking custody, should not prevent an award of custody. Likewise, the history of an addict or alcoholic who has recovered and been clean for years should not affect custody.

I. FACTOR 9: THE MENTAL AND PHYSICAL HEALTH OF EACH PARTY

The mental and physical health of the parties is another factor courts consider when assigning custody. In 2018, this factor was amended to include a specific situation that could negatively affect a parent’s mental health; namely, “evidence that an abused parent suffers from the effects of past abuse by the other parent” cannot prevent the abused parent from gaining custody.

In assessing health, courts have considered the drug and alcohol use of a parent and the physical ailments or impairments of a parent, as well as the mental health of a parent. In what was considered a “close case,” the mother’s emotional and physical health issues that caused her to deal with the children in a “stringent manner” impacted a trial court’s decision to name the

655. Id.
656. See generally Molony v. Harris, 2010-1316 (La. App. 4 Cir. 2/23/11); 60 So. 3d 70 (mother’s alcohol dependence was the basis for a motion to change custody that was ultimately denied); Brown v. Brown, 2005-1346 (La. App. 3 Cir. 3/1/06); 925 So. 2d 662 (mother’s former drug use considered when maintaining sole custody with the father).
657. See Hargrove v. Hargrove, 29,590, pp. 7–8 (La. App. 2 Cir. 5/9/97); 694 So. 2d 645, 649 (mother’s diagnosis of scleroderma, a potentially debilitating disease, contributed to a material change in circumstances, but was not enough to conclude that the mother was unable to care for the child); Gill v. Dufrene, 97-0777, pp. 12–13 (La. App. 1 Cir. 12/29/97); 706 So. 2d 518, 524 (considering the fact that the mother, who was deaf, turned off her hearing aid at night, which could affect her ability to hear the child cry out or the telephone).
658. See Watson v. Watson, 45,652, p. 6 (La. App. 2 Cir. 8/11/10); 46 So. 3d 218, 222 (considering father’s mental health due to his pornography problem); Hobbs v. Hobbs, 42,353, pp. 4, 9 (La. App. 2 Cir. 8/15/07); 962 So. 2d 1148, 1151, 1153 (mother’s depression resulted in weighing factor seven in father’s favor, but did not preclude an award of joint custody because it was being treated).
father as the primary domiciliary parent.659

The interdiction of a parent impacts the threshold question of fitness and can preclude an award of joint custody with that parent. In a custody dispute between a mother and a father, who had been interdicted due to a massive head injury, the court found that joint custody was inappropriate due to the father’s interdiction alone.660 The trial court awarded the mother sole custody, relying on the fact that the father could not make decisions regarding his children without the aid of his curator (the children’s grandfather).661 The appellate court affirmed, recognizing that an award of joint custody to the mother and father would effectively be an award of custody between a parent and a nonparent because the father’s decision-making authority over himself—and therefore the children—would rest with his curator, a nonparent.662

**J. FACTOR 10: THE HOME, SCHOOL, AND COMMUNITY HISTORY OF THE CHILD**

Closely aligned with the permanence of the existing or proposed family home is the home, school, and community history of the child. When analyzing this factor, courts generally consider how long a child has resided in the home, what school the child is attending, the child’s success in the school, and the involvement of the child in the community, including family relationships and extra-curricular activities.

In *Leblanc v. Leblanc*, the trial court based its decision on the home and community history of the child.663 The father filed a motion to modify custody to name him as the domiciliary parent because the mother was moving to a nearby city with her new husband.664 Because both parents were equal in the other best interest factors, the court focused on the home and community history of the child.665 The trial court modified custody and named

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659. See Luplow v. Luplow, 41,021, pp. 13–14 (La. App. 2 Cir. 2/28/06); 924 So. 2d 1135, 1144.
660. Breaux v. Breaux, 96-214, pp. 4–6 (La. App. 3 Cir. 7/17/96); 677 So. 2d 1106, 1108–1109.
661. *Id.* at p. 5; 677 So. 2d at 1109.
662. *Id.* at p. 5; 677 So. 2d at 1108–09.
663. See generally Leblanc v. Leblanc, 2006-1052 (La. App. 3 Cir. 2/14/07); 951 So. 2d 500. The child was a preschooler and “did not have a significant school history yet.” *Id.* at p. 10; 951 So. 2d at 507.
664. *Id.* at p. 6; 951 So. 2d at 505.
665. Because the move was less than 150 miles within the state, the relocation
the father as the domiciliary parent, focusing on the fact that the child had lived in the same parish his entire life and had extended family from both sides and close family friends in the parish, the loss of which would be a significant change in his life.\textsuperscript{666} The appellate court reversed, finding that the father was unable to show a material change of circumstances simply based on the fact that the mother was moving.\textsuperscript{667}

While this factor has relevance in any child custody determination, unless the child is a newborn, it is generally not a factor that is dispositive of custody. At the time when a child has a significant history in a home or with a school, the child is old enough to establish a preference, which is generally given greater weight in the custody analysis.\textsuperscript{668} In fact, if children have successfully moved around and assimilated well, then this factor carries less weight.\textsuperscript{669}

**K. Factor 11: The Reasonable Preference of the Child, If the Court Deems the Child to Be of Sufficient Age to Express a Preference**

Once a child is of an age and maturity to express a preference regarding custody, the court will give that preference weight. A child’s preference, however, is not dispositive in deciding custody. The weight to be placed on the desires of a child varies from case to case. Indeed, a child’s wishes may not be in the child’s best interest.\textsuperscript{670} Although a court should consider the child’s wishes in awarding custody, it should not disregard the overwhelming evidence if the desired custody is contrary to the child’s best

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\textsuperscript{666} Leblanc v. Leblanc, 2006-1052, p. 6 (La. App. 3 Cir. 2/14/07); 951 So. 2d 500, 505.
\textsuperscript{667} Id. at p. 4; 951 So. 2d at 503–04.
\textsuperscript{668} Id. at p. 9; 951 So. 2d at 506–07. One judge on the panel dissented, arguing that deference should have been given to the trial court. Id. at p. 1; 951 So. 2d at 508 (Genovese, J., dissenting).
\textsuperscript{669} See, e.g., Palazzolo v. Mire, 2008-0075, p. 50 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 777.
\textsuperscript{669} See L.E.P.S. v. R.G.P., 2008-1349, p. 19 (La. App. 3 Cir. 6/3/09); 11 So. 3d 633, 646 (triplet girls had successfully moved from Slidell to Jonesville, so making new friends in Arizona, where their mother was moving, should not be problematic).
\textsuperscript{670} See Jones v. Jones, 46,315, p. 8 (La. App. 2 Cir. 4/13/11); 63 So. 3d 1074, 1078 (twelve-year-old’s desire to live with father was not in his best interest); Richardson v. Richardson, 2001-0777, pp. 12, 15 (La. App. 1 Cir. 9/28/01); 802 So. 2d 726, 733, 735 (twelve-year-old’s desire to remain in Louisiana with friends and family was insufficient to show it was in his best interest to stay in state); Simmons v. Simmons, 554 So. 2d 238, 243 (La. Ct. App. 3 Cir. 1989) (preference of nine-year-old alone was insufficient to modify custody).
\end{footnotes}
Stability and continuity can be more important considerations than the wishes of the child. But, “where the parents are relatively equally balanced in terms of caring for the child, the preference of a mature and grounded teenager . . . is entitled to great weight,” notwithstanding instability. The court’s ultimate task is to determine what is in the child’s best interest; the child’s preference can be indicative but not dispositive.

To determine the child’s preference, the judge may interview the child, but before doing so, the judge must first determine the child’s competency to testify. Judges may also choose not to question the child at all. If the judge uses an interview to discover the child’s preference, he must conduct what is referred to as a “Watermeier hearing” based on the landmark Watermeier v. Watermeier decision.

In Watermeier, the child’s father challenged the interview of his five-year-old son by the judge in chambers without a record being made and over the objection of his counsel. The fifth circuit concluded that the judge could not conduct an in-chambers interview of the child without a record being made, but did set forth a detailed procedure under which a judge could interview a child:

[T]he interview must be conducted in chambers outside of the presence of the parents, but in the presence of their attorneys, with a record being made by the court reporter. The judge shall first determine his competency as “a person of proper understanding” by interrogating the child with appropriate questions. The attorneys shall be allowed to participate in the

671. See L.E.P.S. v. R.G.P., 2008-1349 (La. App. 3 Cir. 6/3/09); 11 So. 3d 633 (refusing to follow preference of thirteen-year-old triplets who wanted to remain with their father and grandmother because their mother was moving to Arizona, even though the father had a drug problem and criminal problems involving carnal knowledge of a fifteen-year-old).

672. Mulkey v. Mulkey, 2012-2709, p. 16 (La. 5/7/13); 118 So. 3d 357, 368 (testimony of mature fourteen-year-old child convinced the court to change custody to child’s father).

673. See In re C.M.M., 42,238, p. 18 (La. App. 2 Cir. 5/9/07); 957 So. 2d 330, 340 (in a termination of parental rights case, no reversible error when trial court refused to question the children); Bourque v. Bourque, 03-1254, p. 5 (La. App. 5 Cir. 3/30/04); 870 So. 2d 1088, 1091–92 (not error for trial court to refuse to question eleven-year-old because the child was very anxious and stressed to choose one parent over the other).


675. Watermeier, 462 So. 2d at 1273.

676. Id. at 1275.
competency examination by asking questions and registering appropriate but only necessary objections. If the judge determines that the child is not a competent witness as outlined above, he shall immediately terminate the interview.

However, if the judge determines that the child is competent, he may continue the interview in the presence of the attorneys as observers only. They shall not participate by asking questions, or cross-examining or registering objections, as we deem this would upset, distract and possibly intimidate the child to a degree that would undermine his willingness to give any useful information. 677

The Watermeier court further explained that this procedure need not be followed if the parties agree to an alternate procedure. 678 In other words, the trial court “may examine the child . . . on or off the record, and with or without parents or counsel being present” as long as the parties agree. 679 Failure to follow this procedure without the consent of the parties is reversible error unless the party challenging has suffered no prejudice. 680 Furthermore, excluding testimony from a child without first conducting a Watermeier hearing can also be reversible error. 681 However, if the child is older, at least one court has concluded that a parent’s due process rights could be violated if they were not permitted to hear the child’s testimony. For example, in Fuge v. Uiterwyk, the mother was sequestered during her fourteen and sixteen-year-old sons’ testimony. 682 There, the court concluded that the children, who the court described as “bright and capable young men,” needed no protection from the presence of their parents during questioning, and on balance, the trial court’s sequestration order violated the mother’s due process rights. 683

678. Id.
679. Id.
680. See, e.g., In re Custody of Landry, 95-0141, p. 8 (La. App. 1 Cir. 10/6/95); 662 So. 2d 169, 173 (interviewing the children without the attorneys present and without a record was reversible error). But see Osborne v. McCoy, 485 So. 2d 150, 153 (La. Ct. App. 2 Cir. 1986) (failing to make a record of the child’s testimony was not reversible error because of the lack of prejudice to the challenger).
681. See Raney v. Wren, 98-0869, pp. 9–10 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 60 (failure to examine the child’s competence when the record contains evidence that the child was competent is error).
682. Fuge v. Uiterwyk, 94-1815, p. 6 (La. App. 4 Cir. 3/29/95); 653 So. 2d 707, 712.
683. Id. But see Lyons v. Lyons, 571 So. 2d 220, 221 (La. Ct. App. 3 Cir. 1990) (testimony of fourteen-year-old child allowed, and parent rightfully excluded from
The level of competency, under a literal reading of the factor, suggests that the child must be of "sufficient age." Courts, however, have made clear that a person's age alone is not the test of their competency, but whether that person has "proper understanding." The test of proper understanding comes from both the Louisiana Code of Evidence as well as Title 13 under "Competency of Witnesses." Article 601 of the Louisiana Code of Evidence provides: "Every person of proper understanding is competent to be a witness except as otherwise provided by legislation." Title 13 of the Louisiana Revised Statutes, "Courts and Judicial Procedure," likewise provides: "The competent witness in any civil proceeding in court or before a person having authority to receive evidence shall be a person of proper understanding.

As a result, no specific age has been deemed a "sufficient age." Competency and maturity, not age, are the true determining factors. Courts have permitted children as young as seven years old to testify, and have rejected the testimony of five- and six-year-olds as being of "tender age" and "not capable" to express a reasonable preference. Between the ages of eight and twelve, cases conflict and hinge on the understanding and maturity of the child. Some states give greater weight to a child's preference if the child is over the age of twelve, but Louisiana has no definable age-based rule. In most cases, though, the preference of a child courtroom during child's testimony.

685. LA CODE EVID. ANN. art. 601 (2019).
688. See Osborne v. McCoy, 485 So. 2d 150, 153 (La. Ct. App. 2 Cir. 1986); see also Rodgers v. Rodgers, 26,093, p. 5 (La. App. 2 Cir. 9/21/94); 643 So. 2d 764, 767 (eight-year-old allowed to testify if Watermeier was followed); Raney v. Wren, 98-0869, pp. 9–10 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 60 (decision to exclude competent nine-year-old's testimony was error).
689. See, e.g., In re S.I.G., 39,704 (La. App. 2 Cir. 3/2/05); 895 So. 2d 773 (children ages five and three); Alfonso v. Cooper, 2014-0145 (La. App. 4 Cir. 7/16/14); 146 So. 3d 796 (six-year-old); Bowden v. Brown, 48,268 (La. App. 2 Cir. 5/15/13); 114 So. 3d 1194 (five- and seven-year-olds); Dykes v. Dykes, 488 So. 2d 368, 371 (La. Ct. App. 3 Cir. 1986) (five-year-old); In re Fox, 504 So. 2d 101 (La. Ct. App. 2 Cir. 1987) (six-year-old).
690. See, e.g., Henagen v. Hensgens, 94-1200 (La. App. 3 Cir. 3/15/95); 653 So. 2d 48 (eight-year-old); Richardson v. Richardson, 2009-609 (La. App. 3 Cir. 11/18/09); 25 So. 3d 203 (seven- and four-year-olds).
691. Prior Louisiana law contained a provision with particularized rules for determining the competency of children under the age of twelve to testify in criminal cases, but that was repealed in favor of a general test of "proper understanding." See LA STAT. ANN. § 15:469, repealed by Act No. 515, 1988 La. Acts 1085.
over the age of twelve will be considered, even though it will not always be followed.\textsuperscript{692} Courts recognize, however, that the preference of a mature teenager can be given great weight in a determination of custody.\textsuperscript{693}

Additionally, several criminal cases exist that apply “proper understanding” in the context of children and perform a fact-based inquiry to determine whether the child is competent to testify.\textsuperscript{694} Children as young as four have been permitted to testify in a criminal case.\textsuperscript{695} While no reported civil case has allowed a child that young to testify as to his preference regarding custody, the tests are substantially similar, so reliance on criminal cases may be appropriate.

L. FACTOR 12: THE WILLINGNESS AND ABILITY OF EACH PARTY TO FACILITATE AND ENCOURAGE A CLOSE AND CONTINUING RELATIONSHIP BETWEEN THE CHILD AND THE OTHER PARTY

This factor can be considered one of the most important factors because when joint custody is ordered, which is most common, the law seeks to maintain continuing and frequent contact with both parents.\textsuperscript{696} Therefore, the parent that is willing to encourage a close and continuing relationship with the child and the other parent will have the upper hand in a custody determination. In 2018, this factor was amended to make clear that one party need not be willing or able to facilitate a close relationship with the child and the other party when “objectively

\begin{footnotesize}
\footnote{692. \textit{See}, e.g., Jones v. Jones, 46,315, p. 7 (La. App. 2 Cir. 4/13/11); 63 So. 3d 1074, 1078 (twelve years old; court did not agree with preference); Sebren v. Sebren, 46,076, p. 6 (La. App. 2 Cir. 12/15/10); 56 So. 3d 1032, 1034 (twelve years old; court followed his preference); Bandy v. Bandy, 07-849 (La. App. 3 Cir. 12/5/07); 971 So. 2d 456 (twelve years old; court followed his preference); Stroud v. Stroud, 43,003, p. 10 (La. App. 2 Cir. 12/14/07); 973 So. 2d 865, 871 (twelve, almost thirteen; court did not agree with preference).}

\footnote{693. \textit{See} Wages v. Wages, 39,819, p. 8 (La. App. 2 Cir. 3/24/05); 899 So. 2d 662, 667 (sixteen-year-old); Mulkey v. Mulkey, 2012-2709, pp. 15–16 (La. 5/7/13); 118 So. 3d 357, 367–68 (fourteen-year-old); Fuge v. Uiterwyk, 94-1815 (La. App. 4 Cir. 3/29/95); 653 So. 2d 707 (fourteen- and sixteen-year-olds).}

\footnote{694. \textit{See}, e.g., State v. Pierce, 11-320, p. 17 (La. App. 5 Cir. 12/29/11); 80 So. 3d 1267, 1278 (seven-year-old); State v. Linson, 94-0061, pp. 6–7 (La. App. 1 Cir. 4/7/95); 654 So. 2d 440, 444 (seven- and eight-year-olds); State v. Doss, 522 So. 2d 1274, 1279 (La. Ct. App. 5 Cir. 1988), \textit{writ denied}, 530 So. 2d 563 (La. 1988) (six- and eight-year-olds).}

\footnote{695. \textit{See} State v. Arnaud, 412 So. 2d 1013, 1018 (La. 1982) (the four-year-old child of a rape victim was found to be competent to testify); \textit{Doss}, 522 So. 2d at 1279 (affirming trial court’s decision that children, ages eight and six, were competent to testify in aggravated rape proceeding and not in violation of any statute or precedent).}

\footnote{696. \textit{See} LA. STAT. ANN. § 9:335 (2019).}
substantial evidence of specific abuse, reckless, or illegal conduct has caused one party to have reasonable concerns for the child’s safety or well-being while in the care of the other party.”

Issues of parental alienation, explored above under factor seven and related to the moral fitness of the parent as it affects the child, are present in this factor as well.

For example, in Orrill v. Orrill, the court believed that the mother created a “fear” in her son surrounding his father’s drinking and showed her unwillingness to facilitate a close relationship between the child and his father by unnecessarily involving the police when the son was staying with his father.

The court believed her actions amounted to “parental alienation” and named the father as the domiciliary parent, with custodial time with the mother only on the weekends.

In England v. England, the mother orchestrated situations to fabricate mistreatment by the father and consistently sent state workers to check on the father when the children were present.

The court awarded the father sole custody and the mother supervised visitation until she sought counseling by a mental health professional.

Even without terming the actions “parental alienation,” courts will recognize a parent’s efforts to undermine the parent-child relationship when considering this factor in custody determinations.

Courts have considered not only the parent’s willingness to facilitate a close relationship with the other parent but the willingness of other persons in the parent’s life to do so as well. In McAlister v. McAlister, even though the court recognized the mother’s constant need to discredit the father, it also relied on the fact that the mother lived with her father (the child’s grandfather), who “loathed” the child’s father, when it granted custody to the child’s father.

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698. See supra Section IX.G.
700. Id. at pp. 3, 12, 15; 5 So. 3d at 281, 286, 288; see also Guidry v. Guidry, 2007-1272, pp. 6–8 (La. App. 3 Cir. 3/5/08); 979 So. 2d 603, 607–09 (father and son’s negative attitude toward the mother necessitated that daughter’s custody remain with mother).
701. England v. England, 2017-0493, pp. 5, 8 (La. App. 4 Cir. 3/2/18); 238 So. 3d 1064, 1068, 1070.
702. Id. at p. 6; 238 So. 3d at 1069.
703. See Verret v. Verret, 34,982, pp. 15–16 (La. App. 2 Cir. 5/9/01); 786 So. 2d 944, 953.
Under this factor, courts may also consider “a party’s willingness to make travel arrangements and facilitate electronic communications” for the child to maintain a close relationship with the other parent. For example, courts have looked favorably on a parent’s willingness to live closer to the other parent to assure a child’s continuing relationship with the parent. In *Steinebach v. Steinebach*, the mother was willing to stay in Louisiana, rather than move to Arizona with her parents, after the father moved to Florida, to avoid the need to transport the child a greater distance. The court found that this factor favored the mother in her decided willingness to facilitate a relationship between the child and his father.


Distance is a consideration that focuses on the daily welfare of the child and the practicalities of the child’s relationship with each parent post-divorce. The legislature, under prior law, highlighted the importance of this factor when it enacted a special provision that eliminated the presumption of joint custody if one parent moved out of state. As the presumption was repealed in the revision, so too was the special rule, but this factor remained to assist in not only the type of custody but the allocation of physical custody as well.

When the parties live a sufficient distance from one another, equal sharing of time is not feasible. Joint custody mandates “frequent and continuing contact” with both parents but suggests that “to the extent it is feasible and in the best interest of the child” the parents should share equal physical custody. As a matter of practicality, distance will play a significant role when allocating physical custody. When the parties live across state lines or at a distance that will involve significant travel time for the child, the court disfavors an equal sharing of time.

For example, when one parent lived in Texas and the other in Louisiana, the court explained that the distance between the parties’ residences disfavored an equal sharing of time; rather,

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706. *Steinebach v. Steinebach*, 2007-38, p. 8 (La. App. 3 Cir. 5/2/07); 957 So. 2d 291, 297.
707. *Id.*
708. See *LA. CIV. CODE ANN.* art. 134 cmt. (h) (2019).
having one domiciliary parent with reasonable weekend and holiday time would be in the child’s best interest.\footnote{See Goldberg v. Goldberg, 2010-0452, 2010 WL 3903687, at *9–10 (La. Ct. App. 3 Cir. Oct. 6, 2010).} Additionally, in \textit{Elliot v. Elliot}, the parents shared joint custody with the father as domiciliary parent, and the mother moved to Texas, at a distance about five hours away from the children.\footnote{Elliot v. Elliot, 2010-0755, p. 3 (La. App. 1 Cir. 9/10/10); 49 So. 3d 407, 409–10.} The father alleged a change of circumstances to modify her custodial time because it would involve up to twelve hours of travel for the children in a forty-eight-hour window of time.\footnote{Id. at p. 9; 49 So. 3d at 413.} Recognizing that an interstate move is not a per se change of circumstance to warrant a modification of custody,\footnote{See Bonne carrere v. Bonne carrere, 2009-1647, p. 7 (La. App. 1 Cir. 4/14/10); 37 So. 3d 1038, 1044.} the court nonetheless found that the facts warranted a reduction in the mother’s custodial time because of the significant distance between the parties and its effects on the children’s extra-curricular activities.\footnote{Elliot, 2010-0755, pp. 13–14; 49 So. 3d at 415–16; see also Doyle v. Doyle, 465 So. 2d 167 (La. Ct. App. 3 Cir. 1985); Lachney v. Lachney, 446 So. 2d 923 (La. Ct. App. 3 Cir. 1983).}

\section*{N. Factor 14: The Responsibility for the Care and Rearing of the Child Previously Exercised by Each Party}

The consideration of care and rearing previously exercised by each party is relatively new, coming into the Civil Code in the revision of 1993. While the factor is a relatively recent addition to the Code, Louisiana courts have considered it in the past.\footnote{See Edwards v. Edwards, 556 So. 2d 207, 209 (La. Ct. App. 2 Cir. 1990); Quinn v. Quinn, 412 So. 2d 649, 654–55 (La. Ct. App. 2 Cir. 1982); Nale v. Nale, 409 So. 2d 1289, 1302 (La. Ct. App. 2 Cir. 1982).} This factor, in particular, is relied on heavily when determining which party should be the domiciliary parent, an intuitive concept as that parent has already been caring for the child and is likely the decision maker for the child. In fact, one court suggested that a change in domiciliary status from a parent who has been the caregiver of the child since birth could “greatly disrupt [the child] emotionally, developmentally, and academically, which would
absolutely not be in the [the child’s] best interest.”

The comments to article 134 of the Civil Code provide a list of duties to assist a court in determining which party bears the responsibility for the child:

(1) preparing and planning meals for the child; (2) bathing, grooming, and dressing him; (3) purchasing, cleaning, and caring for his clothes; (4) obtaining and providing medical care, including nursing and trips to physicians; (5) arranging for social interaction among the child’s peers after school, e.g. transporting the child to friends’ houses or to girl or boy scout meetings; (6) arranging alternative care, e.g. baby-sitting, day-care, etc.; (7) putting the child to bed at night, attending to the child in the middle of the night, waking the child in the morning; (8) disciplining him, including teaching him general manners and toilet training; (9) obtaining and providing education (religious, cultural, or social) for the child; and (10) teaching him elementary skills, e.g. reading, writing and arithmetic.

In a traditional household, this factor will generally favor the mother, and when the child is of a young age, courts still consider the natural, maternal bond that exists with the child. Although clearly a maternal preference rule no longer exists, the realities of this factor, when the mother stays at home with the child, will favor the mother. Even when the mother works outside of the home, if she is the parent with the primary responsibility for a young child, as long as she is still in the position to do so, this factor will favor the mother.

The court performed an analysis of primary caregiving in the case of Cortez v. Cortez, which involved the custody of a one-year-old child. The majority awarded joint custody with domiciliary status to the father, even though he had been on duty for the

716. In re Marriage of Blanch, 2010-1686, pp. 19–20 (La. App. 4 Cir. 9/28/11); 76 So. 3d 557, 570 (child had been in the care of the mother since birth for seven and a half years).
719. See Chauvin v. Chauvin, 2010-1055, p. 12 (La. App. 1 Cir. 10/29/10); 49 So. 3d 565, 574–75.
National Guard during six months of the child's first year of life.\textsuperscript{721} The mother, while periodically caring for the child, had relied on the father's relatives during his absence and had feigned an illness, which led to serious credibility problems with the court.\textsuperscript{722} The majority found that the mother avoided primary caregiving for the child.\textsuperscript{723} The majority was met with a strong dissent, which challenged factually the mother's alleged abdication of responsibility, noting that for most of the first year of the child's life, the mother was caring for the child.\textsuperscript{724} The dissent discounted any credibility determination because it was not pertinent to the best interest of the child.\textsuperscript{725} As for every factor, the particular facts generate the outcome, and the trial court is vested with a great deal of discretion in evaluating each witness and each factor.

\textbf{N. APPLICATION OF THE BEST INTEREST OF THE CHILD FACTORS}

The article 134 factors are not exclusive and serve as a guide for the court in determining the best interest of the child.\textsuperscript{726} The inquiry is fact-intensive and requires a court to weigh and balance factors to reach the paramount goal of a decision that meets the best interest of the child.\textsuperscript{727} The plain language of article 134 illustrates that "the court is not bound to make a mechanical evaluation of all factors listed", rather, "[e]ach case should be

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{722} Id. at *4–6.
\item \textsuperscript{723} Id. at *6–7.
\item \textsuperscript{724} Id. at *9–13 (Hughes, J., dissenting).
\item \textsuperscript{725} Id. at *9.
\item \textsuperscript{726} LA. CIV. CODE ANN. art. 134 cmts. (a)–(c) (2019). Comment (a) provides that "the factors are simply provided as a guide . . . in making the fundamental finding as to what disposition is in the best interest of the child." LA. CIV. CODE ANN. art. 134 cmt. (a) (2019). Comment (b) provides that the list of factors provided in Article 134 is “nonexclusive, and the determination as to the weight to be given each factor is left to the discretion of the trial court.” LA. CIV. CODE ANN. art. 134 cmt. (b) (2019). Comment (c) states that “[t]he illustrative nature of the listing of factors contained in [article 134] gives the court freedom to consider additional factors.” LA. CIV. CODE ANN. art. 134 cmt. (c) (2019).
\item \textsuperscript{727} See Stephens v. Stephens, 2002-0402, p. 4 (La. App. 1 Cir. 6/21/02); 822 So. 2d 770, 774; Martello v. Martello, 2006-0594, p. 5 (La. App. 1 Cir. 3/23/07); 960 So. 2d 186, 191; Bergeron v. Bergeron, 44,210, p. 11 (La. App. 2 Cir. 9/18/09); 6 So. 3d 948, 955 (overruled on other grounds); Semmes v. Semmes, 45,006, p. 5 (La. App. 2 Cir. 12/16/09); 27 So. 3d 1024, 1029; McCorvey v. McCorvey, 2005-2577, p. 18 (La. App. 3 Cir. 11/2/05); 916 So. 2d 357, 370; Ellinwood v. Breaux, 32,730, p. 2 (La. App. 2 Cir. 3/1/00); 753 So. 2d 977, 979.
\end{itemize}
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decided on its facts in light of these factors.”

Courts should consider the totality of the circumstances in each case, and absent a clear showing of abuse of discretion, an award of custody by a trial court should not be disturbed.

In Turner v. Turner, the Louisiana Supreme Court discussed the nonexclusive nature of the article 134 factors. The court explained that while the factors provide guidance to courts, “other factors” fall within the scope of the article to meet the child’s best interest.

The “other factors” that impacted the court’s decision involved the parents’ unwillingness and inability to share the responsibility of child-rearing that, in the court’s opinion, would serve only to stunt the children’s development. The court denied joint custody, recognizing that “[t]he trial judge sits as a sort of fiduciary on behalf of the child, and must pursue actively that course of conduct which will be of greatest benefit to the child. . . .” and “as a lookout for the child, the court is obligated to consider additional factors.” Post-Turner, courts continue to recognize that the factors are intended to encompass all aspects of the child’s life, both physical and emotional, and that a fundamental role of the trial judge is to ensure the best interest of the child.

728. Breaux v. Breaux, 96-214, p. 4 (La. App. 3 Cir. 7/17/96); 677 So. 2d 1106, 1108.

729. Theriot v. Huval, 413 So. 2d 337, 340 (La. Ct. App. 3 Cir. 1982) (citing Stephenson v. Stephenson, 404 So. 2d 963 (La. 1981)); Mayeux v. Mayeux, 93-1603, p. 3 (La. App. 3 Cir. 6/19/94); 640 So. 2d 686, 687 (citing State in the Interest of Sylvester, 525 So. 2d 604 (La. Ct. App. 3 Cir. 1988)); In re L.M.M., 17-345, p. 15 (La. App. 5 Cir. 10/25/17); 230 So. 3d 301, 310 (citing Stephens v. Stephens, 02-402 (La. App. 1 Cir. 6/21/02); 822 So. 2d 770, 774); Henry v. Sullivan, 2016-0584, p. 10 (La. App. 1 Cir. 7/12/17); 223 So. 3d 1263, 1271 (citing Martello v. Martello, 2006-0594, p. 5 (La. App. 1 Cir. 3/23/07); 960 So. 2d 186, 191–92).


731. Turner, 455 So. 2d at 1380.

732. Id. (“Based on the extensive history of the litigation in this matter . . . it is clear that the parties are unable to settle their differences amicably, or to insulate the children from their battles.”); see also Goldman v. Logue, 461 So. 2d 469, 473 (La. Ct. App. 5 Cir. 1984) (emphasizing that parents could not put aside their differences and cooperate in matters affecting the well-being of their child).

733. Turner, 455 So. 2d at 1379–80; see also McManus v. McManus, 2013-699, p. 8 (La. App. 3 Cir. 12/11/13); 127 So. 3d 1093, 1098.

734. McManus, 2013-699, pp. 8–9; 127 So. 3d at 1098; Gautreau v. Gautreau, 96-1548, p. 6 (La. App. 3 Cir. 6/18/97); 697 So. 2d 1339, 1345; Breaux, 96-214, pp. 3–4; 677 So. 2d at 1108; see also Krotoski v. Krotoski, 454 So. 2d 374, 376 (La. Ct. App. 4 Cir. 1984) (in determining that it would be in the best interest of the child to reside with her mother, the court considered the fact that the child was approaching puberty, and
O. EXCEPTIONS TO IMMEDIATE APPLICATION OF THE BEST INTEREST OF THE CHILD FACTORS

When article 134 was amended in 2018, paragraph B was added, which forms an exception to immediate application of the best interest of the child factors. Before reaching a best interest analysis, paragraph B requires the application of the Post-Separation Family Violence Relief Act (PSFVRA)\(^{735}\) or a Revised Statutes section that provides for restrictions on visitation\(^{736}\) when there exists either (1) a history of committing family violence as defined by the PSFVRA; or (2) domestic abuse, which includes sexual abuse, as defined by the Domestic Abuse Assistance Act and related criminal laws.\(^{737}\) These restrictions are mandated even if the party did not seek relief under the applicable domestic violence statutes available to the party.\(^{738}\)

The PSFVRA provides a “presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children.”\(^{739}\) It also contains a provision if both parents have a “history of perpetrating family violence” and two provisions on restricted visitation until a treatment program is completed by the parent.\(^{740}\) Section 341 on visitation likewise restricts visitation when a court finds “that a parent has subjected his or her child to physical abuse, or sexual abuse or exploitation, or has permitted such abuse or exploitation.\(^{741}\) While these restrictions on custody and visitation applied before the addition of paragraph B to article 134, the direct reference in the Code was likely intended to alert lawyers and judges alike of the mandate.

X. PSYCHOLOGICAL PARENT, DE FACTO PARENT, OR IN LOCO PARENTIS

The doctrines of psychological parent, de facto parent, or in loco parentis provide needed assistance when considering a custody dispute between a parent and a nonparent who has

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\(^{737}\) LA. CIV. CODE ANN. art. 134(B) (2019).

\(^{738}\) Even before the enactment of this section, at least one court recognized that pleading domestic violence would implicate the Act, even if the Act was not specifically pled. See Melancon v. Russel, 18-48, pp. 6–7 (La. App. 5 Cir. 10/17/18); 258 So. 3d 955, 960.


\(^{740}\) Id.

functioned as a parent in the child’s life. Louisiana has yet to formally adopt, either legislatively or jurisprudentially, these doctrines per se, but as the nature of the family unit has changed, so too has the need to incorporate principles embodied in these doctrines to better provide for the best interest of a child. In particular, same-sex unions when one parent is not filiated to the child, either biologically or through adoption, obviate the need for a deeper consideration of the effect on a child when a person who has functioned as a parent is removed from the child’s life. Although few in number, courts in Louisiana have applied current law in a way that protects parental autonomy but expands the definition of “substantial harm” when a parent-figure is the nonparent seeking custody.

In two cases from the fifth circuit, one that involved grandparent custody and the other a same-sex partner seeking custody, the court examined the law of other states on the issue of psychological, de facto, or in loco parentage. In Ferrand v. Ferrand, the court considered a custody dispute between the biological mother, Paula, and her former partner, Vincent. The couple conceived twins through artificial insemination during their relationship. After the breakdown of their relationship, Vincent sought custody of the minor children, Caitlin and Vincent, II. The trial court denied his petition because Vincent, as neither the children's biological parent nor the legal parent, failed

742. See generally Tracie F. v. Francisco D., 15-224 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781; Ferrand v. Ferrand, 16-7 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909.

743. Ferrand, 16-7, p. 1; 221 So. 3d at 913.

744. Id.

745. Id. at p. 4; 221 So. 3d at 916. Vincent and Paula’s relationship began seven years before they decided to have children. Vincent paid for Paula to undergo in vitro fertilization treatment, which resulted in Paula’s pregnancy with twins. Vincent was present at the hospital when the children were born; he and Paula both shared the same last name and wore wedding bands. The couple represented themselves as a couple to the hospital staff. Vincent signed the birth certificate as the children’s father. Vincent was an active caregiver of the children, sharing child rearing duties with Paula, and known as “Daddy” to the two children. Id. at pp. 4–5; 221 So. 3d at 916.

746. When the children were four years old, Paula began a relationship with a former boyfriend, who she eventually married. During the two-year time frame that Paula dated her soon-to-be husband, Vincent was the children’s primary caregiver. Vincent testified that during that period, Caitlin slept at Paula’s apartment six times and Vincent II only four times. Vincent also testified that during that time Paula provided virtually no support for the children and that she essentially “walked away.” And, Paula had two children from a previous relationship who were living with the father as well. Id. at pp. 6–7; 221 So. 3d at 916–17.

747. Ferrand, 16-7, p. 3; 221 So. 3d at 914.
to meet the burden of proof required under Louisiana Civil Code article 133—that granting sole custody to Paula would result in substantial harm to the children. Vincent appealed.

On appeal, mindful of the burden on a nonparent seeking to remove custody from a parent, the fifth circuit began with the paramount, constitutionally-protected right of parents to the “companionship, care, custody, and management” of their child. The court then espoused, “[T]hat right is not unconditional”; rather, each case must be viewed in light of its own facts, considering the “overarching and overriding concern for the best interest of the child as well as the parent’s concomitant rights and responsibilities.”

As article 133 governed the analysis, the nonparent, Vincent, was required to prove that an award of custody to the natural parent, Paula, would cause substantial harm to the children; upon a finding of substantial harm, the court would then determine if an award of custody to Vincent was required to serve the children’s best interests. Traditionally, substantial harm “includes parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include ‘any other circumstances, such as prolonged separation of the child from its natural parents, that would cause the child to suffer substantial harm.’” Under the dual-pronged analysis, the best interest of the child factors are not

748. Ferrand v. Ferrand, 16-7, pp. 8–9 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 918. During the custody hearing, the court heard testimony from Dr. Marianne Walsh, an expert in psychology retained by Vincent to evaluate the then nine-year-old twins. Id. at p. 7; 221 So. 3d at 917. Dr. Walsh testified that in her opinion the children had a “secure bond” with their father, Vincent. Id. She further testified that without regular contact with their father, the children would suffer “emotional problems” and that “[t]his healthy relationship with their father is crucial to their psychological and emotional well-being. And his constant daily presence in their lives is also vital to their well-being.” Id. at p. 8; 221 So. 3d at 918. Despite this testimony from Dr. Walsh, the trial judge found that Vincent failed to prove that Paula was “unable, unfit, neglectful, abusive, unwilling, or that she abandoned her rights’ to justify the court’s interference with Paula’s constitutional rights to parent her biological children.” Id. The judge concluded that Vincent failed to meet his burden of proving by clear and convincing evidence that substantial harm would result to the children if custody remained with Paula. Id. at pp. 8–9; 221 So. 3d at 918.

749. Ferrand, 16-7, p. 9; 221 So. 3d at 919.

750. Id. at p. 10; 221 So. 3d at 919; see also McCormic v. Rider, 2009-2584, p. 3 (La. 2/12/10); 27 So. 3d 277, 279.

751. See Black v. Simms, 08-1465, p. 5 (La. App. 3 Cir. 6/10/09); 12 So. 3d 1140, 1143; see also Duplessy v. Duplessy, 12-69, pp. 5–6 (La. App. 5 Cir. 6/28/12); 102 So. 3d 209, 212–13.

752. Ramirez v. Ramirez, 13-166, p. 16 (La. App. 5 Cir. 8/27/13); 124 So. 3d 8, 17.
considered until after substantial harm has been found.\textsuperscript{753}

The fifth circuit questioned the efficacy of that approach, recognizing that the “overarching inquiry” in any custody dispute is the child’s best interest.\textsuperscript{754} As the Louisiana Supreme Court has yet to consider a case factually analogous to Vincent’s, in which the nonparent has \textit{parented} the child in a non-traditional family unit since the child’s birth, the court undertook an analysis of other southern states.\textsuperscript{755}

In all states, the nonparent seeking custody or visitation bears the burden of proof, and as always, the best interest of the child is paramount.\textsuperscript{756} Several southern states have applied one or more of the doctrines to recognize the bonds formed between legal nonparents and children.\textsuperscript{757} The common thread among the

\textsuperscript{753} See Duplessy v. Duplessy, 12-69, p. 6 (La. App. 5 Cir. 6/28/12); 102 So. 3d 209, 213; see also Gill v. Bennett, 2011-886 (La. App. 3 Cir. 12/7/11); 82 So. 3d 383; Leblanc v. Guillory, 2010-164 (La. App. 3 Cir. 5/5/10); 38 So. 3d 490.

\textsuperscript{754} Tracie F. v. Francisco D., 2015-1812, p. 2 (La. 3/15/16); 188 So. 3d 231, 235; see also LA CIV CODE art. 134 (rev. 1992); LA CIV CODE art. 131(A) (rev. 1992); Act No. 718, 1979 La. Acts 1962–64.

\textsuperscript{755} Ferrand v. Ferrand, 16-7, p. 13 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 922. The court also noted the drastically changing dynamics of American families. Id. at p. 12; 221 So. 3d at 921. “Same-sex couples are raising more than two million children in the United States.” Garrett Cain, “Don’t Talk to [Legal] Strangers”: Louisiana’s Parentage Policy and the Burdens It Places on Same-Sex Parents and Their Children, 16 LOY. J. PUB. INT. L. 167, 169 (2014). And since the landmark case of Obergefell v. Hodges wherein the United States Supreme Court held that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015). Inherent in the liberty interest of the individual is the decision to start a family.

\textsuperscript{756} See generally Troxel v. Granville, 530 U.S. 57 (2000).

\textsuperscript{757} Ferrand, 16-7, p. 15; 221 So. 3d at 923. Kentucky and Oklahoma distinguished a traditional nonparent (a grandparent or stepparent) from a nonparent who the natural parent intended to be a second parent to the child. See Ramey v. Sutton, 362 P.3d 217, 221–22 (Okla. 2015) (holding that a biological mother’s former same-sex partner had standing to seek custody and visitation under the Uniform Custody Jurisdiction and Enforcement Act, where the couple had not had the opportunity to take advantage of the legal protections of marriage before their relationship ended; the nonparent partner had been intimately involved in the conception, birth, and parenting of the child at the biological mother’s request; and the biological mother and the nonparent partner had made a conscious decision to have a child and co-parent as a family); see also Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010) (finding that a mother waived her superior right as natural parent to sole custody of a child in favor of a joint custody arrangement with her same-sex nonparent partner, and thus the nonparent partner was entitled to shared custody of the child following dissolution of the relationship between the mother and her partner, where the mother and the partner had jointly decided to start a family; a sperm donor had been selected based
doctrines is the nonparent assuming caretaking responsibilities that are typical of a natural parent. As such, severing the bond with the nonparent acting as a parent should not be at the expense of the child’s well-being.758

Although Louisiana has yet to adopt a doctrine, the fifth circuit pointed out that the Louisiana Supreme Court recognized the concept of a “psychological parent” in the context of an adoption proceeding.759 In In re J.M.P., the Court explained that “[t]he best interests of the child’ must draw its meaning from the evolving body of knowledge concerning child health, psychology and welfare that marks the progress of a maturing society.”760 The court further noted, “Whether any adult becomes the psychological parent of a child is based on day-to-day interaction, companionship, and shared experiences . . . neither the biological relation nor the fact of legal adoption is any guarantee that an adult will become the psychological parent of a child.”761 Ultimately, the fifth circuit vacated the judgment that denied custody to Vincent and ordered a mental health evaluation of the parties.762

Just one year later, the fourth circuit in In re C.A.C considered a similar case involving a same-sex couple in a custody dispute.763 Two women in a long-term relationship started a family using in vitro fertilization and parented the child for seven years before their relationship dissolved.764 The biological mother refused to
grant the non-biological mother rights of custody over the child, and the lawsuit ensued. The trial court awarded joint custody, and the biological mother appealed.\textsuperscript{765}

The fourth circuit, citing the \textit{Ferrand} decision, recognized that a parent’s constitutional right is “neither absolute nor perpetual,” and that even though a nonparent bears a heavy burden of proof, it is nonetheless attainable.\textsuperscript{766} Proof of substantial harm along with the best interest analysis adequately protects the parent’s rights but is limited because of its application to a traditional family. The court explained: “The ‘substantial harm’ envisioned in article 133 is the threat of abuse or neglect of the child by an unfit parent and is inapplicable under the facts and circumstances of this case.”\textsuperscript{767} Rather, the court noted the expansive meaning of “substantial harm,” finding it “more inclusive,” “not precise,” and akin to “detrimental” in the jurisprudence.\textsuperscript{768}

While article 133 may have been passed to protect the rights of parents in traditional families, the court recognized that the demographics of our society have changed, and the law must react to the factual circumstances present before it. While article 133 presupposes that the third party seeking custody will be less likely to have a parent-child bond than the natural parent, in a same-sex relationship, the third party may be more “like a co-parent from the child’s point of view than in situations [involving] a grandparent or other extended family members.”\textsuperscript{769} Thus, separation from the nonparent who in words and actions lived as the child’s parent would cause substantial harm.\textsuperscript{770} The fourth circuit therefore affirmed the award of joint custody between the parent and the nonparent.\textsuperscript{771}

Neither the court in \textit{Ferrand} nor the court in \textit{In re C.A.C.} found the need to adopt the psychological, de facto, or \textit{in loco parentis} doctrines by name to reach its result. Those doctrines, in
theory, provided the underpinnings to allow “substantial harm” to be interpreted to include separation from a person who acted in all respects as the parent. In both cases, the nonparent acted as the primary caregiver—feeding, clothing, and caring for the child as though the child was biologically her own.

In fact, the law recognizes that biology is not dispositive of parentage. Louisiana presumes the husband of the mother is the father of the children born or conceived during the marriage, regardless of biology, and after the passage of time, that presumption becomes irrebuttable, even if another man is proven to be the father. Further, a husband who consents to his wife’s use of donor sperm to conceive a child cannot later disavow that child, who will not be biologically related to the father. Both parents—heterosexual or homosexual, biological or non-biological—who consent to have a child and raise that child in a family unit with two parents contributing to one household, should enjoy custody of that child in the event of a separation, provided it serves the child’s best interest.

The Louisiana Supreme Court has repeatedly emphasized that the “paramount goal and primary consideration in all custody determinations is the best interest of the child.” Along with the changing nature of the family must be an expanded understanding of the law to best promote the child’s best interest. Even without, as of yet, an express acceptance of the psychological, de facto, or in loco parentis doctrines, the law can be interpreted to protect children who will suffer solely for the sake of biology.

XI. VISITATION

Louisiana’s law on visitation is found in articles 136 and 137 of the Civil Code, with more specific provisions found in Title 9 of the Revised Statutes, the Children’s Code, and other specialized acts. Visitation is a term of art that should be used
only when a parent or nonparent does not have custody. Joint custodians share physical custodial time, even if the child lives primarily with one custodian. To say that parents share joint custody and the non-domiciliary parent enjoys visitation with the child is technically incorrect. When parents or nonparents enjoy custody, visitation could apply, if permitted by law, to a non-custodian.

The current law of parental visitation had its genesis in the Louisiana Supreme Court case Maxwell v. LeBlanc. The Maxwell case concerned the visitation rights of the father of an acknowledged child. The mother and father lived together but never married, and after they separated, the child remained with her mother. The father paid weekly child support payments and continued to visit the child multiple times per week. When the mother remarried, she rejected the child support payments and denied the father visitation rights. He filed suit but was denied visitation by the trial and appellate courts, in part because of the child’s illegitimacy. In a comprehensive opinion, the Louisiana Supreme Court reversed the lower courts, recognizing visitation as a species of custody, which emanates from the natural right that parents enjoy with respect to their children. The court explained that without forfeiting the right of access by conduct or risk of harm to the child, a parent of a child should enjoy visitation with his child.

In 1988, the law of visitation entered the Civil Code, and in the comprehensive revision of 1993, current article 136 was enacted. The first paragraph of article 136 provided the law on parental visitation, the second paragraph provided the law on nonparent visitation, and the third introduced two Revised Statutes on visitation, which in some cases supersede the

780. Id.
781. Id.
782. Id.
783. Id.
784. Maxwell, 434 So. 2d at 376–77.
785. Id. at 377. The Maxwell court set forth factors for the court to consider in an award of visitation, which are today included in Louisiana Civil Code article 134. Id. at 378.
786. See Act No. 817, 1988 La. Acts 2104 (enacting article 146.1, which was redesignated as article 132).
provisions of the article.\textsuperscript{788} The structure of the article is similar today, although grandparents are now treated separately as a subset of nonparents.\textsuperscript{789} Even though the provisions are found in the Title on Divorce, they are applied to situations outside of marriage as well.\textsuperscript{790} Each provision of the article and the Revised Statutes are discussed in the sections following.

\textbf{A. PARENTAL VISITATION}

The law of parental visitation is found in the first paragraph of article 136, which provides that parents who are not granted custody of a child are entitled to reasonable visitation with the child unless the court conducts a hearing and finds that visitation is not in the child’s best interest.\textsuperscript{791} The Louisiana Supreme Court in Maxwell explained, “The right of visitation for a non-custodial parent is a natural right with respect to his children, and this right is enforceable in a civil action when the custodial parent denies visitation access.”\textsuperscript{792} The right is constitutionally protected but is subservient to the child’s best interest after a hearing on the

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\textsuperscript{788}. Act No. 261, 1993 La. Acts 610. Article 136, as originally enacted, provided:
A. A parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child.
B. Under extraordinary circumstances, a relative, by blood or affinity, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. In determining the best interest of the child, the court shall consider:
   (1) The length and quality of the prior relationship between the child and the relative.
   (2) Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
   (3) The preference of the child if he is determined to be of sufficient maturity to express a preference.
   (4) The willingness of the relative to encourage a close relationship between the child and his parent or parents.
   (5) The mental and physical health of the child and the relative.
C. In the event of a conflict between this Article and R.S. 9:344 or 345, the provisions of the statute shall supersede those of this Article.

\textit{Id.}

\textsuperscript{789}. See La. CIV. CODE ANN. art. 136 (2019).
\textsuperscript{790}. See, e.g., State ex rel. Satchfield v. Guillot, 2002-0150 (La. App. 3 Cir. 6/26/02); 820 So. 2d 1255; La. STAT. ANN. § 9:344(B) (2019).
\textsuperscript{791}. La. CIV. CODE ANN. art. 136(A) (2019). The law restates the test as established by the Louisiana Supreme Court in Maxwell v. Leblanc, 434 So. 2d 375, 376 (La. 1983).
\textsuperscript{792}. Maxwell, 434 So. 2d at 376; see also Evans v. Terrell, 27,615, p. 6 (La. App. 2 Cir. 12/6/95); 665 So. 2d 648, 652; Oglesby v. Oglesby, 25,974, p. 6 (La. App. 2 Cir. 8/17/94); 641 So. 2d 1027; 1031; Roshto v. Roshto, 39 So. 2d 344, 345 (La. 1949); Johnson v. Johnson, 39 So. 2d 340, 342–43 (La. 1949); Pierce v. Pierce, 35 So. 2d 22, 23 (La. 1948); Jacquet v. Disimone, 143 So. 710, 711 (La. 1932).
issue.\textsuperscript{793} The parental right of visitation is not limitless.\textsuperscript{794} The trial court has great discretion in determining whether visitation by a noncustodial parent would be in the best interest of the child.\textsuperscript{795} Because each analysis is fact-intensive, decisions regarding visitation are made on a case-by-case basis.\textsuperscript{796} Absent conclusive evidence that visitation by the noncustodial parent would endanger the child’s physical, mental, moral or emotional health, the parent is entitled to reasonable visitation rights.\textsuperscript{797} The party seeking to restrict a parent’s access to the child bears the burden of proof.\textsuperscript{798} A decision at the trial court level will not be disturbed absent an abuse of discretion.\textsuperscript{799} Courts may deny visitation altogether or restrict visitation by time or by access. A denial or termination of a parent's visitation rights will only be warranted if the parent has forfeited his right of access to the child or if the exercise of visitation would be harmful to the child.\textsuperscript{800} Because of the strict standard to deny a parent visitation, courts will often limit (rather than deny) visitation.

\textsuperscript{793} Maxwell v. Leblanc, 434 So. 2d 375, 377 (La. 1983).

\textsuperscript{794} Tracie F. v. Francisco D., 15-224, p. 57 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 815, aff’d but criticized, 2015-1812 (La. 3/15/16); 188 So. 3d 231; Leeper v. Leeper, 44,777, p. 6 (La. App. 2 Cir. 9/23/09); 21 So. 3d 1006, 1010; Hawthorne v. Hawthorne, 96-89, p. 22 (La. App. 3 Cir. 5/22/96); 676 So. 2d 619, 630; Pendergrass v. Pendergrass, 94-1165, 94-1629, p. 6 (La. App. 4 Cir. 1/26/96); 667 So. 2d 1213, 1216; Duvalle v. Duvalle, 27,271, p. 7 (La. App. 2 Cir. 8/23/95); 660 So. 2d 152, 157.

\textsuperscript{795} Dearmon v. Dearmon, 96-222, p. 3 (La. App. 3 Cir. 11/13/96); 682 So. 2d 1006, 1007; Fountain v. Fountain, 93-2176, p. 3 (La. App. 1 Cir. 10/7/94); 644 So. 2d 733, 737; Steagall v. Steagall, 442 So. 2d 732, 735 (La. Ct. App. 1 Cir. 1983).

\textsuperscript{796} Leeper, 44,777, p. 6; 21 So. 3d at 1010; Hawthorne, 96-89, p. 22; 676 So. 2d at 630.

\textsuperscript{797} Palazzolo v. Mire, 2008-0075, p. 53 (La. App. 4 Cir. 1/7/09); 10 So. 3d 748, 778; see also Becnel v. Becnel, 98-593, p. 4 (La. App. 5 Cir. 3/25/99); 732 So. 2d 589, 592; Adkins v. Adkins, 29,088, p. 5 (La. App. 2 Cir. 1/31/97); 687 So. 2d 1109, 1113.

\textsuperscript{798} Percle v. Noll, 93-1272 (La. App. 1 Cir. 3/11/94); 634 So. 2d 498, 502.

\textsuperscript{799} Smith v. Smith, 44,663, p. 9 (La. App. 2 Cir. 8/19/09); 16 So. 3d 643, 649; Fountain, 93-2176, p. 3; 644 So. 2d at 737; Steagall, 442 So. 2d at 735.

\textsuperscript{800} Maxwell, 434 So. 2d at 377; see also Leeper, 44,777, p. 9; 21 So. 3d at 1011 (court refused to force the child to visit his mother in prison and found it was best for him to continue his relationship with her through mail correspondence); C.F.C. v. J.D.C., 539 So. 2d 47, 49 (La. Ct. App. 4 Cir. 1988) (circumstances suggested the father more likely than not had sexually abused his children, warranting a forfeiture of his visitation rights); Franz v. Franz, 230 So. 2d 450, 452 (La. Ct. App. 4 Cir. 1970) (mother was an alcoholic who was not getting help). But see Roshto v. Roshto, 39 So. 2d 344, 344–45 (La. 1949) (father did not forfeit his right to visitation because he was away on military duty and was then denied access to the child); Jacquet v. Disimone, 143 So. 710, 711 (La. 1932) (divorce judgment in favor of mother did not divest father of fatherhood, and thus, father was still entitled to visitation under reasonable regulations).
visitation to meet the best interest of the child. Limitations can take many forms depending on the unique factual circumstances and may include supervised visitation,\textsuperscript{801} limits on contact with others who associate with the parent,\textsuperscript{802} denial of overnight visitation,\textsuperscript{803} or other limits on time. Drug abuse by a parent, even after rehabilitation, will often result in restrictions on visitation.\textsuperscript{804} Sexual abuse by a parent or by others associated with the parent will likewise result in restrictions on visitation.\textsuperscript{805} Even without abuse, limitations may be warranted if the parent has not been a

\textsuperscript{801} See England v. England, 2017-0493, p. 8 (La. App. 4 Cir. 3/2/18); 238 So. 3d 1064, 1070 (ordering supervised visitation because mother was fabricating stories of abuse against father); Coleman v. Coleman, 47,080, p. 11 (La. App. 2 Cir. 2/29/12); 87 So. 3d 246, 254 (ordering supervised visitation because of father's past drug abuse and personality disorders); Dooley v. Dooley, 10-785, p. 10 (La. App. 3 Cir. 2/2/11); 55 So. 3d 985, 991 (ordering supervised visitation due to actions of second spouse); Bandy v. Bandy, 07-849 (La. App. 3 Cir. 12/5/07); 971 So. 2d 456 (ordering supervised visitation due to father's drug use and testimony of twelve-year-old child that he was afraid of his father); Bradford v. Bradford, 30,128, p. 4 (La. App. 2 Cir. 12/23/97); 704 So. 2d 440, 442 (holding that supervised visitation was warranted between the father and daughter, who suffered from sexual abuse, because the daughter expressed fear of continuing unsupervised visitation with her father); Percle v. Noll, 93-1272 (La. App. 1 Cir. 3/11/94); 634 So. 2d 498, 502 (ordering supervised visitation because mother had hidden the children from their father for several years).

\textsuperscript{802} See Sorrells v. Sorrells, 2015-500, p. 16 (La. App. 3 Cir. 11/4/15); 178 So. 3d 288, 297 (trial court required that the children should not have contact with the mother's new husband when they were with her because of his prior sexual abuse crime; the court relied on visitation principles even though the parents were granted joint custody). Compare Becnel v. Becnel, 98-593, p. 8 (La. App. 5 Cir. 3/25/99); 732 So. 2d 589, 595 (restriction on stepmother not being in presence of children was lifted because no allegations of harm were present; the court relied on visitation principles even though the parents were granted joint custody), with Coleman, 47,080, p. 12; 87 So. 3d at 255 (child ordered to not be in the presence of mother's adult child because of his drug and alcohol abuse and criminal history).

\textsuperscript{803} See generally Noe v. Noe, 93-1316 (La. App. 3 Cir. 5/4/94); 640 So. 2d 537 (refusing to reinstate unsupervised and overnight visitation to a father because he admitted to molesting his two older daughters from a previous marriage as well as two other minors).

\textsuperscript{804} Coleman, 47,080, p. 11; 87 So. 3d at 254 (ordering supervised visitation because of father's past drug abuse and personality disorders); Teague v. Teague, 44,005, p. 22 (La. App. 2 Cir. 11/25/08); 999 So. 2d 86, 98 (prohibiting father from living in the same home as his children or from being alone with the children due to his chronic drug abuse).

\textsuperscript{805} Noe, 93-1316; 640 So. 2d 537 (refusing to reinstate unsupervised and overnight visitation to a father because he admitted to molesting his two older daughters from a previous marriage as well as two other minors); Thompson v. Thompson, 559 So. 2d 4, 6 (La. Ct. App. 1 Cir. 1990) (refusing to allow mother's current husband to be present during visitation because he committed sexual misconduct against his own daughter). \textit{But} see Bourque v. Bouillion, 95-909, p. 5 (La. App. 3 Cir. 10/18/95); 663 So. 2d 491, 494 (finding error in suspending father's visitation privileges due to allegations of sexual abuse without any proof of allegations).
part of the child’s life or the parent’s lifestyle is not in the child’s best interest. Courts may order a parent to attend therapy before lifting limitations on visitation. In older cases, restrictions on visitation were imposed due to a parent’s extramarital relationships. Today, the fact that a parent is living outside of marriage with another person will be less likely to result in restrictions on visitation; however, if exposure to the other person would be undesirable for the child’s best interest, then restrictions would be warranted.

Although the preference of the child does not control the analysis, it is certainly considered. For example, in Bandy v. Bandy the court found that it was in the best interest of the child that the father’s visits be reduced and supervised. The twelve-year-old son testified that he was afraid of his father, knew he was a drug addict and did not want to be a part of the chaos at his father’s home. Furthermore, in Fuge v. Uiterwyk, the three teenaged sons testified in a post-divorce proceeding that their father beat them with a broomstick, drove his boat and automobile while drinking alcohol, and ridiculed their mother. Their testimony led the appellate court to reverse the trial court’s order that the children must visit their father in Florida.

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806. Palacios v. Palacios, 608 So. 2d 243, 244 (La. Ct. App. 5 Cir. 1992) (limiting visitation by noncustodial father to only be allowed in the presence of the child’s maternal grandfather because the father had not developed a relationship with his four-year-old son); Reed v. Hargroder, 525 So. 2d 661, 663 (La. Ct. App. 3 Cir. 1988) (father’s visitation could be restricted to the residence of the child’s paternal grandparents because of the father’s lifestyle and past emotional issues); Gordy v. Langner, 502 So. 2d 583, 591 (La. Ct. App. 3 Cir. 1987) (mother’s visitation was subject to restrictions because of her disruptive behavior and poor parenting skills).

807. See, e.g., England v. England, 2017-0493, pp. 9–10 (La. App. 4 Cir. 3/2/18); 238 So. 3d 1064, 1071 (ordering supervised visitation until mother sought professional therapy, but the court was not permitted to name a specific therapist).

808. See, e.g., Larroquette v. Larroquette, 293 So. 2d 628, 629–30 (La. Ct. App. 4 Cir. 1974) (concluding that the father’s visitation privileges were allowed but only in places outside of his home, and overnight visits were not allowed because father had a concubine); Shipp v. Shipp, 165 So. 189, 191 (La. 1935) (holding that the father would be allowed visitation if he could show that the safety, welfare, and well-being of the children would not be in jeopardy due to his extramarital relationship).


810. See generally Bandy v. Bandy, 07-849 (La. App. 3 Cir. 12/5/07); 971 So. 2d 456.

811. Id. at p. 13; 971 So. 2d at 464 (child felt unsafe and afraid of his father and testified that he did not want to be around his father’s drug use, and father spoke negatively about child’s mother); see also Lawson, 311 So. 2d at 628 (children desired visitation with their mother but only when her abusive partner was not around).

812. Fuge v. Uiterwyk, 94-1815, p. 7 (La. App. 4 Cir. 3/29/95); 653 So. 2d 707, 712.

813. Id. at p. 9; 653 So. 2d at 714 (testimony of children was entitled deference in light of teacher’s testimony that children were highly intelligent and honest).
As an aside, because the term *visitation* has been used to describe one parent’s physical custodial time when the parents have been awarded joint custody, courts have relied on the jurisprudence interpreting visitation when awarding joint custody. In an award of joint custody, restrictions on one parent’s physical custodial time may be necessary, but these restrictions should not be termed “supervised visitation” or “restricted visitation” as the term *visitation* should be reserved to situations when a parent is not awarded custody.

1. **Mandatory Limits on Parental Visitation**

   Louisiana law also provides mandatory limitations on visitation in specific instances. The court is given no discretion to award visitation when the circumstances are so egregious that a child’s best interest will never be served by permitting visitation with the person. The first mandate is found in Civil Code article 137, which denies a parent visitation rights in the case of felony rape or the death of the other parent due to criminal conduct. Paragraph A provides that “if the child was conceived through the commission of felony rape, the parent who committed the felony rape shall be denied visitation rights and contact with the child.” Paragraph B provides that a relative seeking visitation rights or contact with the child shall not be allowed those rights “if the court determines . . . that the intentional criminal conduct of the relative resulted in the death of the parent of the child.”

   The second mandate is found in Louisiana Revised Statutes § 9:341 and provides that “[w]henever the court finds by a preponderance of the evidence that a parent has subjected his or

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814. See, e.g., Sorrells v. Sorrells, 2015-500 (La. App. 3 Cir. 11/4/15); 178 So. 3d 288; Coleman v. Coleman, 47,080 (La. App. 2 Cir. 2/29/12); 87 So. 3d 246; Becnel v. Becnel, 98-593 (La. App. 5 Cir. 3/25/99); 732 So. 2d 589.
815. See LA. CIV. CODE ANN. art. 136(A) (2019).
816. LA. CIV. CODE ANN. art. 137 (2019).
817. LA. CIV. CODE ANN. art. 137(A) (2019).
818. LA. CIV. CODE ANN. art. 137(B) (2019). The Louisiana Children’s Code provides for the termination of parental rights in certain situations that involve criminal conduct: “(1) conviction of murder of the child’s other parent; (2) unjustified intentional killing of the child’s other parent; and (3) conviction of a sex offense as defined in R.S. 15:541 by the natural parent which resulted in the conception of the child.” LA. CHILD. CODE ANN. art. 1015(1)–(3) (2019). The Louisiana Children’s Code also permits the custodial mother of a child conceived through rape to petition the court to terminate the parental rights of the rapist upon clear and convincing evidence that the parent committed the rape, even if there is no conviction for the offense. LA. CHILD. CODE ANN. arts. 1004, 1015 (2019); see also La. Att’y Gen. Op. No. 17-0032 (2017).
her child to physical abuse, or sexual abuse or exploitation, or has permitted such abuse or exploitation of the child, the court shall prohibit visitation." Only when the parent can prove that visitation will not cause “physical, emotional, or psychological damage to the child” can the court allow visitation. Then, safeguards must be put into place to “minimize any risk of harm to the child.”

In *Hollingsworth v. Semerad*, the father abused the stepmother, inflicted bruises on the child, and abused alcohol. The trial court ordered supervised visitation with the father but allowed the supervisor to be a friend or relative of the father. Relying on § 9:341, the appellate court amended the order and required a third-party supervisor that was not a friend or relative of the father because it was in the child’s best interest. Moreover, in *W.M.E. v. E.J.E.*, in the face of evidence that the father had sexually abused the daughter, the court terminated his visitation with his daughter altogether. The court also suspended visitation with his son even though there was no evidence that the son was sexually abused. Recognizing that no mandatory law required termination of visitation with a child who was not abused, the court explained that parents are only entitled to visitation if it is in the child’s best interest; in this case, visitation with his son was not in the child’s best interest.

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821. *Id.* The abusive parent is to pay all costs. And, if the court authorizes restricted visitation, the parent with restricted visitation rights must not remove the child from the jurisdiction of the court absent court approval and a showing of good cause. LA. STAT. ANN. § 9:341(B)–(C) (2019).


823. *Id.* at pp. 6–7; 799 So. 2d at 661.

824. *Id.* at pp. 15–16; 799 So. 2d at 665. *But see Evans v. Terrell*, 27,615, p. 7 (La. App. 2 Cir. 12/6/95); 665 So. 2d 648, 652 (allowing supervised visitation because there was no definitive finding that the mother abused the child despite unexplained bruises on the child’s body); *Landry v. Thomas*, Nos. 2011-CW-1571, 2011-CW-0587, 2011-CW-1852, 2011 WL 6780138, at *5–6 (La. Ct. App. 1 Cir. Dec. 21, 2011) (allowing supervised visitation with the father due to insufficient evidence of sexual abuse).

825. *W.M.E. v. E.J.E.*, 619 So. 2d 707, 709–10 (La. Ct. App. 3 Cir. 1993) (recognizing that termination was mandatory under the law and applying Louisiana Civil Code article 133, the predecessor to Louisiana Revised Statutes § 9:341).

826. *Id.* at 710.

827. *Id.*
The third mandate, the Post-Separation Family Violence Relief Act (PSFVRA), is found in Title 9, sections 361 through 369 of the Revised Statutes. The PSFVRA provides immediate remedies to parents and children that have suffered family violence by suspending an abusive parent’s access to a child pending completion of a program designed to inhibit further abuse. The act was designed to protect victims of family violence “when domestic disputes arise in the course of separation and divorce.” The legislature created the PSFVRA because findings show that issues of family violence do not end when the spouses separate or divorce. To the contrary, the violence often escalates, and the abuse may continue in the form of visitation and custody disputes. The Act serves specifically to address “the issues of child custody and visitation and how they are affected by family violence during legal separation and divorce.”

Courts may award relief under the PSFVRA in domestic abuse cases even if not specifically requested in the pleadings, and if a history of family violence is proven, the application of the PSFVRA is mandated. The Act defines family violence generally as physical or sexual abuse committed by one parent against the other parent or the children, not including acts of self-defense. In determining whether there is a history of family violence courts should consider “the entire chronicle of the family . . . [s]uch factors as the number, frequency, and severity of the incidents will be relevant as well as whether the violence occurred in the presence of the children, and to what extent there existed provocation for

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829. Slayton v. Slayton, 05-1529, p. 3 (La. App. 3 Cir. 5/3/06); 929 So. 2d 865, 868.
831. Id.
832. State ex rel. S.D.K., 04-218, p. 5 (La. App. 5 Cir. 5/26/04); 875 So. 2d 887, 890.
833. Melancon v. Russel, 18-48, pp. 6–7 (La. App. 5 Cir. 10/17/18); 258 So. 3d 955, 960 (trial court applied the PSFVRA because of the allegations of violence in the pleadings, even though the Act, specifically, was not pled); Dufresne v. Dufresne, 08-215, pp. 8, 11 (La. App. 5 Cir. 9/16/08); 992 So. 2d 579, 586–87 (trial court awarded relief under the PSFVRA even though wife’s initial allegations did not include domestic violence; based on the evidence adduced at the fault hearing, the wife moved to amend her pleadings, which was granted).
834. Lewis v. Lewis, 34,031, p. 3 (La. App. 2 Cir. 11/3/00); 771 So. 2d 856, 859.
835. LA. STAT. ANN. § 9:362(4) (2019). Any offense against the person as defined in the Criminal Code of Louisiana can also be a basis of “family violence.” See Hollingsworth v. Semerad, 33,264, pp. 10–11 (La. App. 2 Cir. 10/31/01); 799 So. 2d 658, 663 (finding that acts against stepmother did not trigger the PSFVRA when child did not live with father).
any violent act."\textsuperscript{836}

Section 363 of the Act prevents a spouse or parent from being ordered to participate in mediation if that spouse, parent, or child has been the victim of family violence.\textsuperscript{837} Section 364 of the Act provides for “a presumption that no parent who has a history of perpetrating family violence . . . shall be awarded sole or joint custody of children.”\textsuperscript{838} A history of perpetrating family violence can be based on one incident of family violence that resulted in serious bodily injury or more than one incident of family violence.\textsuperscript{839} The PSFVRA will not apply in cases with only one incident of family violence that does not result in serious bodily injury.\textsuperscript{840} The presumption can be overcome by showing by a preponderance of the evidence that the parent has successfully completed a court-monitored domestic abuse intervention program,\textsuperscript{841} is not abusing drugs or alcohol, and that the best interest of the child requires that parent’s participation in the child’s life.\textsuperscript{842}

The Act also provides that when “both parents have a history

\textsuperscript{836}. Smith v. Smith, 44,663, pp. 9–10 (La. App. 2 Cir. 8/19/09); 16 So. 3d 643, 650; see also Michelli v. Michelli, 93-2128, p.10 (La. App. 1 Cir. 5/5/95); 655 So. 2d 1342, 1349; Morrison v. Morrison, 97-0295, p. 3 (La. App. 1 Cir. 9/19/97); 699 So. 2d 1124, 1126.

\textsuperscript{837}. LA. STAT. ANN. § 9:363 (2019) (applying in any separation, divorce, child custody, visitation, child support, alimony, or community property proceeding).

\textsuperscript{838}. LA. STAT. ANN. § 9:364(A) (2019).

\textsuperscript{839}. Id.; see also, e.g., Dufresne v. Dufresne, 08-215, p. 7 (La. App. 5 Cir. 9/16/08); 992 So. 2d 579, 585 (multiple acts of domestic violence during the marriage). But see Smith, 44,663, p. 6; 16 So. 3d at 648 (minor incidences that were provoked by other parent or for which the parent sought counseling were not enough to invoke the PSFVRA).

\textsuperscript{840}. Petsch v. Petsch, 2001-0491, p. 3 (La. App. 1 Cir. 6/22/01); 809 So. 2d 222, 224 (finding that getting pushed out of the car did not inflict serious bodily injury).

\textsuperscript{841}. Section 362 of the Act states:

Court-monitored domestic abuse intervention program” means a program, comprised of a minimum of twenty-six in-person sessions, that follows a model designed specifically for perpetrators of domestic abuse. The offender’s progress in the program shall be monitored by the court. The provider of the program shall have all of the following:

(a) Experience in working directly with perpetrators and victims of domestic abuse.

(b) Experience in facilitating batterer intervention groups.

(c) Training in the causes and dynamics of domestic violence, characteristics of batterers, victim safety, and sensitivity of victims.

LA. STAT. ANN. § 9:362(3) (2019); see also D.O.H. v. T.L.H., 2001-174, pp. 5–6 (La. App. 3 Cir. 10/31/01); 799 So. 2d 714, 718 (finding six sessions of anger management training with a clinical psychologist met the prerequisite for overcoming the presumption against custody).

\textsuperscript{842}. LA. STAT. ANN. § 9:364(B) (2019).
of perpetrating family violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence."\textsuperscript{843} In \textit{Morrison v. Morrison}, the court found that, although both spouses had a history of family violence, the wife was less likely to perpetuate violence, so sole custody would be awarded to her under the condition that she participate in and complete a treatment program.\textsuperscript{844} The husband was granted supervised visitation, but only after he completed a treatment program as well.\textsuperscript{845}

If the court finds that a parent has a history of perpetrating family violence, and custody is therefore denied, the court should allow supervised visitation on the condition that the parent completes a court-monitored domestic abuse intervention program.\textsuperscript{846} Unsupervised visitation is only allowed if the violent parent can show that he has completed a treatment program, is not abusing alcohol and drugs, poses no danger to the child, and that visitation is in the best interest of the child.\textsuperscript{847}

The Act contains a specific provision dealing with sexual abuse. If a court finds, by clear and convincing evidence, that a parent has sexually abused his child, visitation and contact shall be prohibited until the court finds by a preponderance of the evidence that the abusive parent has participated and successfully completed a treatment program designed for such sexual abusers, and that supervised visitation is in the child’s best interest.\textsuperscript{848} When the PSFVRA was originally passed, the allegations of sexual abuse had to be proven by the lower preponderance of the evidence standard. The Louisiana Supreme Court found the provision unconstitutional because the lower burden of proof violated the

\textsuperscript{844} \textit{Morrison v. Morrison}, 97-0295, pp. 4–5 (La. App. 1 Cir. 9/19/97); 699 So. 2d 1124, 1127; see also Hicks v. Hicks, 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261.
\textsuperscript{845} \textit{Morrison}, 97-0295, p. 5; 699 So. 2d at 1127.
\textsuperscript{847} \textit{La. Stat. Ann.} § 9:364(C) (2019); see also \textit{Morrison}, 97-0295, p. 5; 699 So. 2d at 1127 (determining that father was not eligible for supervised visitation because he had not completed the requisite treatment program).
\textsuperscript{848} \textit{La. Stat. Ann.} §§ 9:341(B), 9:364(F) (2019). A contradictory hearing must be held before visitation can be allowed. \textit{La. Stat. Ann.} § 9:341(B) (2019); see also \textit{C.L.S. v. G.J.S.}, 2005-1419, pp. 33–36 (La. App. 4 Cir. 2007); 953 So. 2d 1025, 1041–42 (finding that the mother had the burden of proof of clear and convincing evidence that the child was sexually abused and the father was the perpetrator of the abuse, and determining that a lack of physical evidence did not mean that the daughter did not suffer sexual abuse because there was other strong evidence including the sexualized behavior exhibited by the young child).
parent’s due process rights as a result of the parent’s total loss of contact with the child.\textsuperscript{849} The statute was thereafter amended to raise the standard to clear and convincing.\textsuperscript{850} Today, the clear and convincing standard of proof under the PSFVRA is greater than the standard articulated in § 9:341, as noted above, which requires proof by a preponderance when a parent subjects his child to physical or sexual abuse. Undoubtedly, in the context of sexual abuse, the standards are different. Although section 341 has not been challenged on constitutional grounds, at least one court refused to extend the reasoning of the Louisiana Supreme Court to the standard in section 341, creating a disparity between the statutes when sexual abuse of a child is at issue in a custody proceeding.\textsuperscript{851}

The Act also contains a specific provision outlining visitation with an incarcerated parent. Section 364.1 provides that if a court authorizes visitation with an incarcerated parent, that order shall include “restrictions, conditions, and safeguards as are necessary to protect the mental and physical health of the child and minimize the risk of harm to the child.”\textsuperscript{852} The statute provides a host of factors that a court must consider before ordering supervised visitation with an incarcerated parent.\textsuperscript{853}

Under the PSFVRA, a court may appoint a mental health

\textsuperscript{849} In re A.C., 93-1125, p. 2 (La. 10/17/94); 643 So. 2d 743, 745.
\textsuperscript{851} Bourque v. Bouillion, 95-909, pp. 4–5 (La. App. 3 Cir. 10/18/95); 663 So. 2d 491, 494 (declining to extend the holding of In re A.C. because the father only lost unsupervised visitation, rather than a total loss of access to the child).
\textsuperscript{852} LA. STAT. ANN. § 9:364.1(A) (2019).
\textsuperscript{853} See LA. STAT. ANN. § 9:364.1(B) (2019).

(1) The length and quality of the prior relationship between the child and the parent; (2) whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the parent; (3) the preference of the child if he is determined to be of sufficient maturity to express a preference; (4) the willingness of the relative to encourage a close relationship between the child and his parent or parents, including the willingness of the child’s custodial parent, caretaker, or legal guardian to voluntarily take the child to the incarcerated parent’s place of incarceration for supervised visitation; (5) the mental and physical health of the child and parent; (6) the length of time that the child lived with the parent prior to the parent’s incarceration; (7) the desirability of maintaining the continuity of the relationship between the child and the incarcerated parent; (8) the costs of travel and other expenses incurred by visitation at the place of incarceration, and who will bear the responsibility for such costs; (9) the effect upon the child of supervised visitation in the place of incarceration and the feasibility, if any, of alternative or additional use of technology pursuant to R.S. 9:357; (10) other testimony or evidence and the court may consider applicable.

\textit{Id.} These factors are not exclusive. See Loya v. Loya, 17-555, p. 7 (La. App. 5 Cir. 2/21/18); 239 So. 3d 1048, 1053 (denying contact with father in prison because not in the best interest of the child).
professional with “current and demonstrable training and experience working with perpetrators and victims of family violence” to conduct an evaluation.\textsuperscript{854} Further, all child visitation orders and judgments issued under the PSFVRA must contain an injunction and a Uniform Abuse Prevention Order.\textsuperscript{855} Violations of the injunctions are punishable as contempt of court and will result in termination of all court-ordered visitation.\textsuperscript{856} All court costs, attorney’s fees, evaluation fees, medical and psychological care for the abused spouse or children, and expert witness fees must be paid by the family violence perpetrator.\textsuperscript{857}

The provisions of the PSFVRA do not affect the remedies provided in the Domestic Abuse Assistance Act, the Louisiana Criminal Code, or the Children’s Code.\textsuperscript{858} However, any case under the Domestic Abuse Assistance Act may also impose the remedies available in the PSFVRA.\textsuperscript{859} Finally, public funds allocated to programs involved in providing for the victims of domestic violence must not be used to assist the perpetrator of the family violence.\textsuperscript{860}

**B. NONPARENT VISITATION**

Nonparent visitation requires a distinctly different analysis than parental visitation. As the parent’s interest in the care, custody, and control of his child “is perhaps the oldest of the fundamental liberty interests recognized by this Court,” a nonparent’s request to visit with a child must tread lightly on these

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    \item \textsuperscript{854} LA. STAT. ANN. § 9:365 (2019).
    \item \textsuperscript{855} LA. STAT. ANN. § 9:366(A) (2019).
    \item \textsuperscript{856} LA. STAT. ANN. § 9:366(B) (2019).
    \item \textsuperscript{857} LA. STAT. ANN. § 9:367 (2019). These provisions were found to be constitutional. In re A.C., 1993-1125 (La. 1/27/94); 643 So. 2d 719.
    \item \textsuperscript{858} LA. STAT. ANN. § 9:368 (2019).
    \item \textsuperscript{859} Id. Section 2131 of the Domestic Abuse Assistance Act states the purpose: [The Domestic Abuse Assistance Act was created in recognition of] the complex legal and social problems created by domestic violence. . . . The legislature further finds that previous societal attitudes have been reflected in the policies and practices of law enforcement agencies and prosecutors which have resulted in different treatment of crimes occurring between family members . . . . It is the intent of the legislature to provide a civil remedy for domestic violence which will afford the victim immediate and easily accessible protection. LA. STAT. ANN. § 46:2131 (2019). Section 2132(4) defines “family members” as spouses, former spouses, parents and children, stepparents, stepchildren, foster parents, and foster children. LA. STAT. ANN. § 46:2132(4) (2019); see also Buchanan v. Langston, 36,520, p. 6 (La. App. 2 Cir. 9/18/02); 827 So. 2d 1186, 1190 (holding that the PSFVRA provides similar relief as the Domestic Abuse Assistance Act and Louisiana Children’s Code art. 1570(F)).
    \item \textsuperscript{860} LA. STAT. ANN. § 9:369 (2019).
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constitutionally protected interests. The Constitution has long protected parents in their ability to decide with whom their child should associate, which at times can be at odds with family members close to the child who wish to visit with the child. State statutes address these family dynamics under the backdrop of primal parental rights.

1. **STATUTORY SCHEME**

The basis of nonparent visitation is found in article 136, which was added in 1993. Originally, article 136 required all nonparents to prove “extraordinary circumstances” to receive visitation with a child. And then, as in all custody determinations, visitation had to be reasonable and in the best interest of the child. The Code provided guidance to determine the child’s best interest, which included several factors:

1. The length and quality of the prior relationship between the child and the relative.
2. Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
3. The preference of the child if he is determined to be of sufficient maturity to express a preference.
4. The willingness of the relative to encourage a close relationship between the child and his parent or parents.
5. The mental and physical health of the child and the relative.

In 2012, article 136 was amended to carve out a specific provision for grandparent visitation. After the amendment, grandparents could obtain reasonable visitation, without having to prove extraordinary circumstances, if visitation was in the best interest of the child. Before making this determination, the

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862. Act No. 261, 1993 La. Acts 610. Originally, the only nonparents that could seek visitation were relatives by blood or affinity. See id. In 1995, former stepparents and step-grandparents were added to the list. Act No. 176, 1995 La. Acts 539.
864. Id.
866. In the 2012 revision, the law provided:
A grandparent not granted custody of a child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. Before making this determination, the court shall hold a contradictory hearing as provided for in R.S. 9:345 in order to determine whether the court should appoint an attorney to
court was required to hold a contradictory hearing to determine whether to appoint an attorney for the child.867

Because grandparents were removed from the general nonparent visitation provision of the article, the general provision on nonparents was amended to apply to “any other relative, by blood or affinity, or a former stepparent or step-grandparent.”868 These nonparents still had to prove “extraordinary circumstances” to be awarded visitation, and a finding that a parent abuses a controlled dangerous substance was (and still is), by law, an extraordinary circumstance.869 The five factors used to analyze the child's best interest remained the same.

In 2014, article 136 was amended again to remove the phrases “not granted custody” from both provisions on nonparent visitation.870 In other words, nonparents need not be denied custody to have visitation with a child. Although the language was likely used, as it is for parental visitation, to make clear that visitation can only be awarded to a person who does not have custody, the court in Francis v. Francis interpreted the phrase to mean “having been denied custody” and therefore dismissed the grandparents’ request for visitation because they had never been denied custody.871 Francis was overruled by the amendment to article 136.

This statutory scheme is complicated by § 9:344. Section 344 was enacted in 1993, along with article 136, to provide specific circumstances when grandparents or siblings can receive visitation of a child. In 1993, because grandparents and siblings fell into the general category of nonparents under article 136, they

represent the child.

Act No. 763, 2012 La. Acts 3110. In the 2018 revision, the word “reasonable” was no longer used to describe the “visitation,” but the best interest of the child is still paramount. See LA. CIV. CODE ANN. art. 136(B)(1) (2019).

867. LA. CIV. CODE art. 136(B) (rev. 2012).
868. LA. CIV. CODE art. 136(C) (rev. 2012).
869. Id.
871. See generally Francis v. Francis, 2011-2116 (La. App. 1 Cir. 6/13/12); 97 So. 3d 1091. In Francis, the father's rights were terminated, and the child was adopted by the mother's new husband. Id. at p. 3; 97 So. 3d at 1093. Because the mother and the adoptive father were the child's new parents, the court concluded that there had been no custody dispute in which a court determined that the parents should not be awarded custody, and the custody was awarded to a nonparent under article 133. Id. at p. 7; 97 So. 3d at 1096. As a result, the court concluded that the grandparents did not have the right of action for visitation since they did not meet the requirement of having been denied custody. Id.
had to prove extraordinary circumstances to be allowed visitation.\textsuperscript{872} Section 344 was passed at the same time to provide for situations when extraordinary circumstances are present as a matter of law.\textsuperscript{873} In other words, grandparents and siblings are relieved of proving extraordinary circumstances when they can proceed under § 9:344.

Under § 9:344, grandparents can request visitation without proving extraordinary circumstances when a child’s parents are married and one parent dies, is interdicted, or is incarcerated.\textsuperscript{874} The grandparent must be the parent of the deceased, interdicted, or incarcerated parent and need only show that visitation is in the best interest of the child.\textsuperscript{875} The absence of the parent from the child’s life due to death, interdiction, or incarceration certainly seems to be a circumstance where involvement by the parent’s ascendants may benefit the child.

If the parents are not married but are living together, and one of them dies or is incarcerated, then, again, the grandparents can seek visitation without proving extraordinary circumstances.\textsuperscript{876} Stated otherwise, grandparents can seek visitation upon the death of their child, even if their child was unmarried, provided the parents were living together. The law also permits the siblings of the child to seek visitation when the child’s parents are married and one of the parents dies or is incarcerated.\textsuperscript{877} In 1999, a new provision was added to allow grandparents and siblings to seek visitation of the child when the child’s married parents are legally separated or living apart for a period of six months, even without

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\textsuperscript{872} LA. CIV. CODE art. 136 (rev. 1993).
\textsuperscript{873} See Act No. 261, 1993 La. Acts 610; see also Janway v. Jones, 47-203, p. 6 (La. App. 2 Cir. 3/30/12); 88 So. 3d 713, 717 (finding that the legislature made it less difficult for grandparents who do not have to show extraordinary circumstances under § 9:344); Galjour v. Harris, 2000-2696, p. 7 (La. App. 1 Cir. 3/28/01); 795 So. 2d 350, 355 (explaining that the grandparent is relieved of showing extraordinary circumstances when the parent is proceeding under § 9:344); Wood v. Wood, 2002-0860, p. 8 (La. App. 1 Cir. 9/27/02); 985 So. 2d 568, 573 (finding that “the legislature made the determination, rather than the court, that the death, incarceration, or interdiction of a parent qualified as ‘extraordinary circumstances’”).
\textsuperscript{874} LA. STAT. ANN. § 9:344(A) (2019); see also Fontenot v. Granger, 2007-1588, p. 3 (La. App. 3 Cir. 6/4/08); 985 So. 2d 859, 861 (applying article 136(B), rather than § 9:344(A), to a request for grandparent visitation because the parties were divorced before the death of the parent). Incarceration was added as an extraordinary circumstance in 1999. See Act No. 1352, 1999 La. Acts 3633.
\textsuperscript{875} LA. STAT. ANN. § 9:344(A) (2019).
\textsuperscript{876} LA. STAT. ANN. § 9:344(B) (2019).
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a divorce, death, interdiction or incarceration. 878

In 2012, when the Code was amended to remove grandparents from the ambit of “extraordinary circumstances” altogether, only the last paragraph of section 344 was amended. The provision added in 1999 was amended to remove the reference to “legal separation” (applying only when the child’s parents lived apart for six months) and to add that “extraordinary circumstances” must be shown by the grandparents or siblings before visitation can be awarded. 879 The amendment also required the court to consider the article 136(D) factors when determining the child’s best interest. 880

Curiously, the 2012 amendments to section 344 were made in the same Act that eliminated the requirement that grandparents prove extraordinary circumstances to receive visitation of their grandchild. 881 If grandparents need only show best interest to receive visitation, then why retain the law that provides them with extraordinary circumstances? Stated otherwise, if proof of extraordinary circumstances is no longer needed for grandparents to obtain visitation of their grandchildren, then why not remove the provisions in section 344 that apply to grandparents? While the provisions that apply to siblings of the child are still necessary, it appears that those affecting grandparents are not.

Is there some advantage to relying on § 9:344, rather than article 136(B)? Article 136(B) requires a contradictory hearing to determine whether an attorney should be appointed for the child before the grandparent can be awarded visitation. Because grandparents who rely on § 9:344 need not request a contradictory hearing to receive visitation with the child, is visitation easier to receive by proceeding under § 9:344? A best interest analysis must be conducted regardless and, with or without a contradictory hearing, the primary custodians (likely parents) would receive notice and an opportunity to be heard. No court has considered the issue.

Were the provisions of § 9:344 retained due to concerns over the constitutionality of the amendment to article 136? Article

879. Act No. 763, 2012 La. Acts 3110. Extraordinary circumstances expressly included a determination by a court that the parent is abusing a dangerous controlled substance. Id.
880. Id.
881. Id.
136(B) only requires a grandparent to prove the best interest of the child before an award of visitation can be made. Under Troxel, the Supreme Court struck down a statute that required only a showing of best interest. The Louisiana statute is limited to allow grandparents only to receive visitation without showing extraordinary circumstances. Is this limitation alone sufficient to protect the parents' fundamental right to make decisions regarding their children? Only one court has considered the issue and found the amendment to be constitutional as applied to the facts of that case.

Revisions were made to article 136 in 2018 that placed some restrictions on grandparent visitation and may have provided answers to some of the questions raised above. Now, grandparents can only seek visitation based on a simple best interest analysis when: (1) the parents are unmarried and not living together as though they are married; or (2) the parents are married but have filed for divorce. If the parents are married and have not filed for divorce or are unmarried but living together, then § 9:344 applies, which has its own limitations and applies generally when a parent dies, is interdicted, or is incarcerated.

Are these revisions enough to guard against a constitutional challenge? Do couples who co-parent without a traditional living arrangement or simply file for divorce have less of a fundamental right to make decisions regarding their children than those who are married or living together? At this point, these questions will be left to the judiciary. Regardless of the recent revisions, the statutory scheme for nonparent visitation is in need of a cleanup. The law, in its entirety, should be placed in the Civil Code and streamlined for greater ease of understanding.

2. CONSTITUTIONALITY

The United States Supreme Court in Troxel v. Granville set forth the framework that states must follow to adequately protect a parent’s liberty interest when deciding on visitation by a nonparent. Brad Troxel and Tommie Granville had two

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882. Troxel v. Granville, 530 U.S. 57, 67 (2000). The statute also allowed any person at any time to petition for visitation of the child. Id.
883. See McGovern v. McGovern, 15-737, p. 7 (La. App. 5 Cir. 3/30/16); 189 So. 3d 503, 507–08.
884. LA. CIV. CODE ANN. art. 136(B) (2019).
885. LA. CIV. CODE ANN. art. 136(E) (2019); see also LA. STAT. ANN. § 9:344 (2019).
daughters.\footnote{887} After the couple ended their relationship, Brad moved in with his parents, who were involved in the care of their granddaughters.\footnote{888} Brad died tragically, but his parents maintained regular contact with the young girls.\footnote{889} Approximately six months after Brad’s death, Tommie limited contact with the Troxels to one day each month.\footnote{890} The Troxels then filed a petition for visitation under the Washington statute, which provided: “Any person may petition the court for visitation rights at any time, including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.”\footnote{891} After the Washington Supreme Court found that the statute unconstitutionally infringed on the mother’s right to rear her children, the Troxels appealed.\footnote{892}

In a plurality opinion authored by Justice O’Connor, the Court held that the Washington statute infringed on the fundamental rights of parents to make decisions regarding the care, custody, and control of their children.\footnote{893} Cognizant of the special relationship grandparents and other relatives have with a child, the Court was troubled that “any person” could petition the court for visitation with the child “at any time.”\footnote{894} It found the statute to be “breathtakingly broad,” without any presumption of validity or weight given to the parent’s estimation of what would be in the child’s best interest.\footnote{895}

The Court took issue with the fact that the Troxels had not alleged that the children’s mother was unfit.\footnote{896} Without a challenge to the parent’s fitness, the law provides a presumption that the parent will act in the best interest of the child.\footnote{897} Furthermore, the Court noted that the mother never intended or

\footnotesize{\begin{itemize}
  \item[888] Id.
  \item[889] Id.
  \item[890] Id.
  \item[891] Id.
  \item[892] Troxel, 530 U.S. at 63.
  \item[893] Id. at 67, 72.
  \item[894] Id. at 67.
  \item[895] Id.
  \item[896] Id. at 68.
  \item[897] Troxel, 530 U.S. at 68–69. The Court also took issue with the fact that at the trial level, the burden was wrongly placed on Granville to disprove why the visitation was not in her children’s best interest because “the court’s presumption failed to provide any protection for Granville’s fundamental constitutional right to make decisions concerning rearing her own daughters.” Id. at 69–70.
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sought to completely restrict the Troxels from visiting their grandchildren; she only sought to shorten the visitation.\textsuperscript{898} The Court saw no reason for the State to “inject itself into the private realm of the family” to question a fit mother’s decision.\textsuperscript{899} It therefore affirmed that the grant of visitation to the Troxels “was an unconstitutional infringement on Granville’s fundamental right to make decisions concerning the care, custody, and control of her two daughters.”\textsuperscript{900}

Even before the United States Supreme Court’s ruling in \textit{Troxel}, the constitutionality of Louisiana’s statutes on visitation was questioned. In \textit{Reinhardt v. Reinhardt}, a mother sought to terminate the visitation rights of her children’s paternal relatives, arguing that article 136(B) infringed on her fundamental rights as a parent.\textsuperscript{901} It was not clear what paternal relatives were seeking visitation, but these relatives bore the burden of proving extraordinary circumstances and the best interest of the child.\textsuperscript{902} The court applied strict scrutiny and found compelling reasons for the State to protect children from divorced families, which was met by a narrowly drawn statute that furthered visitation with extended family under restrictive circumstances.\textsuperscript{903} By requiring the nonparent to prove extraordinary circumstances and the best interest of the child, the statute was narrowly drawn. Because no automatic grant of visitation was allowed and the court conducted an appropriate balancing of interests, the provision was constitutional.\textsuperscript{904}

The first Louisiana case, post-\textit{Troxel}, to consider the constitutionality of § 9:344 was \textit{Galjour v. Harris}.\textsuperscript{905} The court compared § 9:344 to the Washington statute at issue in \textit{Troxel} and

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\item \textsuperscript{898} \textit{Troxel v. Granville}, 530 U.S. 57, 71 (2000). The mother told the Troxels that they would be permitted to visit their grandchildren for one short visit per month, as well as special holidays. \textit{Id.}
\item \textsuperscript{899} \textit{Id.} at 68.
\item \textsuperscript{900} \textit{Id.} at 68, 72. The Court did not consider “whether the Due Process Clause requires all nonparent visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.” \textit{Id.} at 73.
\item \textsuperscript{901} \textit{Reinhardt v. Reinhardt}, 97-1889, p. 2 (La. App. 1 Cir. 9/25/98); 720 So. 2d 78, 79.
\item \textsuperscript{902} \textit{Id.} at pp. 4–5; 720 So. 2d at 80.
\item \textsuperscript{903} \textit{Id.}
\item \textsuperscript{904} \textit{Id.} (holding that article 136(B) was “narrowly drawn to further visitation with the extended family, but only under set, restrictive circumstances”).
\item \textsuperscript{905} \textit{See generally Galjour v. Harris}, 2000-2696 (La. App. 1 Cir. 3/28/01); 795 So. 2d 350.
\end{itemize}
found the Louisiana statute to be “more narrowly drawn.”\textsuperscript{906} The court focused on the nonparent having to prove extraordinary circumstances, which could be in the nature of a death, interdiction or incarceration of the parent, as well as having to show reasonableness and best interest of the child.\textsuperscript{907} A balance must be struck between state interests and constitutional protections afforded to the parent, the court explained, and the statute met that balance.\textsuperscript{908} Further, as applied to the facts of the case, the court was satisfied that the trial court went to great lengths to accede to the conditions on visitation imposed by the parent.\textsuperscript{909} Given the length and quality of the relationship between the grandparents and the child, the court affirmed the award of visitation.\textsuperscript{910}

After the \textit{Galjour} decision, during the 2001 Legislative Session, the Louisiana State Legislature passed a House Concurrent Resolution to further study the effects of \textit{Troxel} to ensure that Louisiana’s laws adequately protect the fundamental rights of parents.\textsuperscript{911} The legislature requested that the Law Institute make specific recommendations for revisions to state laws to ensure their constitutionality.\textsuperscript{912} In the 2003 Legislative Session, the legislature passed House Concurrent Resolution 38, which reported that, according to the Law Institute, Louisiana’s statutes on visitation were constitutional on their face, but may be unconstitutional as applied to a particular litigant.\textsuperscript{913}

Litigants continue to challenge the constitutionality of Louisiana’s statutes both facially and as applied to the facts of each case. Although no court has struck down a visitation statute on its face, courts have scrutinized the awards of visitation to ensure that primary parental rights are protected.\textsuperscript{914} For example, in \textit{Barry v.}
McDaniel, the court awarded visitation to grandparents after the death of their daughter, even though the parents articulated several instances when the grandparents ignored their requests, for example, to refrain from discussing her mother’s illness and death, follow bedtime routines, and call them during a visitation.915 The appellate court nonetheless affirmed the visitation schedule,916 noting that the trial court made specific rulings to give deference to the parents’ preferences while allowing the child to continue her relationship with her grandparents.917 The concurring opinion in Barry rightfully cautioned that the decision “comes perilously close to being an unconstitutional application of grandparents’ rights.”918

Each case rises and falls on its own set of facts, but as visitation time increases with a nonparent, the potential for infringement on the parent’s right to make decisions for the child increases as well. Now, after the revisions of 2012 and 2018, grandparents in some cases need not show extraordinary circumstances before an award of visitation is possible.919 Grandparents must still prove that the visitation is reasonable and in the best interest of the child, but without the additional hurdle of extraordinary circumstances, the statute is subject to further scrutiny. To date, facial challenges and as applied challenges to both article 136(B) and § 9:344 continue, and visitation awards to grandparents are still being affirmed.920

915. Barry v. McDaniel, 2005-2455, pp. 13–14 (La. App. 1 Cir. 3/24/06); 934 So. 2d 69, 78–79. The grandparents were proceeding under Louisiana Revised Statutes § 9:344. Id. at p. 2; 934 So. 2d at 71.

916. The visitation schedule ordered by the trial court consisted of one weekend per month and one week over the summer. Id. at p. 4; 934 So. 2d at 72. The order also outlined certain details regarding the visitation arrangement. Id.

917. Id. at p. 13; 934 So. 2d at 78.

918. Barry, 2005-2455, p. 1; 934 So. 2d at 79 (Whipple, J., concurring).

919. See supra Section XI.B.1.

920. See McGovern v. McGovern, 15-737 (La. App. 5 Cir. 3/30/16); 189 So. 3d 503 (affirming award of grandparent visitation without directly considering constitutionality of amended article 136(B)); Rogers v. Pastureau, 2012-2008 (La. App. 1 Cir. 4/26/13); 117 So. 3d 517 (affirming award of grandparent visitation and finding § 9:344 constitutional).
3. APPLICATION

Louisiana courts recognize the protection afforded to parents when a nonparent seeks visitation and apply the presumption that fit parents act in the best interest of their children. While the presumption is strong, “there is no mandate that this presumption is not able to be overcome.”\textsuperscript{921} It is the burden of the party seeking visitation to prove: (1) extraordinary circumstances, if needed, to justify visitation; (2) that the amount of visitation is reasonable;\textsuperscript{922} and (3) that visitation is in the child’s best interest, despite a parental preference against visitation.\textsuperscript{923} Article 136(D) lists factors the court must consider when evaluating whether visitation is in the best interest of the child.\textsuperscript{924}

First, as to extraordinary circumstances that are not provided by law,\textsuperscript{925} courts look for “a highly unusual set of facts that are not commonly associated with a particular thing or event.”\textsuperscript{926} Extraordinary circumstances have been found following the death or incarceration of a parent, even when § 9:344 does not apply.\textsuperscript{927} Extraordinary circumstances were also found when a step-grandparent acted as the child’s primary caregiver, provided for the child financially, and stepped in as the mother of the child when the biological mother of the child was absent.\textsuperscript{928} In addition, when a grandparent was present in the delivery room, lived with the child while the parents lived with others, and remained the primary caregiver of the child, the court found those circumstances

\textsuperscript{921} Broussard-Scher v. Legendre, 2010-1164, p. 11 (La. App. 3 Cir. 3/23/11); 60 So. 3d 1290, 1298.

\textsuperscript{922} Note that the term “reasonable” was eliminated from the grandparent visitation provision in Louisiana Civil Code article 136(B) in the 2018 revision. \textit{Compare} LA. CIV. CODE ANN. art. 136(B) (2019), with Act No. 763, 2012 La. Acts 3110. “Reasonable visitation” still appears in the provision on parental visitation, however. LA. CIV. CODE ANN. art. 136(A) (2019).

\textsuperscript{923} See LA. CIV. CODE ANN. art. 136 (2019); LA. STAT. ANN. § 9:344 (2019).

\textsuperscript{924} See LA. CIV. CODE ANN. art. 136(D) (2019).

\textsuperscript{925} See, e.g., LA. STAT. ANN. § 9:344 (2019); Fontenot v. Granger, 2007-1588, p. 7 (La. App. 3 Cir. 6/4/08); 985 So. 2d 859, 863; Stracener v. Joubert, 2005-1121, p. 6 (La. App. 3 Cir. 3/1/06); 924 So. 2d 430, 435; Ray v. Ray, 94-1478, p. 3 (La. App. 3 Cir. 5/3/95); 657 So. 2d 171, 173.

\textsuperscript{926} Huber v. Midkiff, 2002-0664, p. 2 (La. 2/7/03); 838 So. 2d 771, 778 (Weimer, J., concurring); \textit{Broussard-Scher}, 2010-1164, p. 8; 60 So. 3d at 1296.

\textsuperscript{927} See \textit{Fontenot}, 2007-1588, p. 7; 985 So. 2d at 863 (finding extraordinary circumstances as a result of death); \textit{Stracener}, 2005-1121, p. 6; 924 So. 2d at 435 (finding extraordinary circumstances as a result of death); Lindsey v. House, 29,790, p. 4 (La. App. 2 Cir. 9/24/97); 699 So. 2d 1190, 1192 (finding extraordinary circumstances as a result of incarceration).

\textsuperscript{928} Henry v. Henry, 97-0366, p. 4 (La. App. 1 Cir. 11/7/97); 704 So. 2d 793, 796.
Courts have failed to find extraordinary circumstances when the circumstances are not unique enough to justify interference with a parent’s right to make decisions regarding their child. For example, in *State ex rel. Satchfield v. Guillot*, even though the grandparents played a central role in the child’s early life, after the remarriage of the father and issues surrounding the actions of the grandparents, the father opposed visitation with his parents. The court found insufficient circumstances to overcome the will of a fit parent and determined that a lack of visitation with the grandparents would not be detrimental to the child. In addition, in *Sterling v. Shirley*, a fourth cousin was denied visitation even though she was the trustee over a trust for the child and wanted the child to maintain a relationship with the relatives of her deceased father. Because the mother could independently choose to continue those relationships and the fourth cousin was a distant relative, the court did not find extraordinary circumstances.

If a court determines that extraordinary circumstances are present, either by way of unusual facts or application of § 9:344, the court must consider the factors set forth in article 136(D). The first factor considers “the length and quality of the prior relationship between the child and the relative.” In *Ray v. Ray*, the court relied on the fact that the mother and child previously lived with the great-grandfather, and that the great-grandfather made an effort to keep in contact with the child but was prevented from doing so by the child’s mother. In *Garner v. Thomas*, the court considered the “intense babysitting and nurtur[ing] of the children” as evidence supporting the first factor.

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929. Broussard-Scher v. Legendre, 2010-1164, p. 9 (La. App. 3 Cir. 3/23/11); 60 So. 3d 1290, 1296.
930. See *State ex rel. Satchfield v. Guillot*, 2002-0150, p. 14 (La. App. 3 Cir. 6/26/02); 820 So. 2d 1255, 1265; Shaw v. Dupuy, 2006-0546, p. 8 (La. App. 1 Cir. 2/9/07); 961 So. 2d 5, 9; Flack v. Dickson, 2003-5, p. 6 (La. App. 3 Cir. 4/30/03); 843 So. 2d 1261, 1265.
931. *Satchfield*, 2002-0150, pp. 2–3; 820 So. 2d at 1257.
932. Id. at p. 14; 820 So. 2d at 1265.
933. Sterling v. Shirley, 2002-0915, p.4 (La. App. 3 Cir. 12/11/02); 832 So. 2d 1179, 1182.
934. Id.
937. Garner v. Thomas, 2008-1448, p. 17 (La. App. 4 Cir. 5/28/09); 13 So. 3d 784, 793; see also McGovern v. McGovern, 15-737, p. 8 (La. App. 5 Cir. 3/30/16); 189 So. 3d 503, 508 (discussing visitation and holding that the trial court did not abuse its
Under the second factor, courts must consider “whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.” This factor favors a mentoring figure in the child’s life and has been relied on to ensure that a child has a connection to an absent parent’s family members. In Ray, the child’s father was deceased and the great-grandfather and aunt were the child’s only connection to the father; this factor favored visitation. If, on the other hand, the needs of the child are being met, such that the relative requesting visitation cannot specifically provide any unmet needs, then this factor will weigh against visitation.

The third factor concerns the preference of the child, and the fourth concerns the “willingness of the relative to encourage a relationship between the child and his parent or parents.” In the scheme of primary parental rights, interference in the child’s relationship with the parent could alone thwart any claim for nonparent visitation. For example, in Henry v. Henry, while the step-grandmother established extraordinary circumstances to justify a request for visitation, this factor proved to be the most problematic for her and ultimately resulted in a denial of visitation. The step-grandmother interfered in the mother’s new marriage and portrayed herself in public documents as the child’s mother. As her relationship with the child’s mother deteriorated and the litigation began, she spoke to the child about the dispute, which upset the mother.

Additionally, in Janway v. Jones, the grandparents interfered

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938. LA. CIV. CODE ANN. art. 136(D)(2) (2019).
940. Id.
941. See Henry v. Henry, 97-0366, pp. 5–6 (La. App. 1 Cir. 11/7/97); 704 So. 2d 793, 797 (finding that the second factor did not support visitation by a step-grandmother who acted as a primary caregiver for a part of the child’s life because she was not meeting any unmet need); see also Lindsey v. House, 29,790, p. 4 (La. App. 2 Cir. 9/24/97); 699 So. 2d 1190, 1192 (finding that the child needs to be familiar with two sides of the family).
942. LA. CIV. CODE ANN. art. 136(D)(3) (2019). Courts have not considered the preference of the child because of his young age. See Henry, 97-0366, p. 6; 704 So. 2d at 797; McMillin v. McMillin, 2008-502, p. 5 (La. App. 3 Cir. 3/25/09); 6 So. 3d 414, 418. However, the general principles that apply under Louisiana Civil Code article 134 would apply in a visitation context.
944. Henry, 97-0366, p. 6; 704 So. 2d at 797.
945. Id. at p. 6; 704 So. 2d at 797–98.
946. Id. at p. 7; 704 So. 2d at 798.
with the relationship between the child and her father. The grandparents emailed the child’s teacher disparaging the child’s father, called the father’s place of employment and attempted to have him fired, and took things from the child’s father’s home without permission. Because the evidence suggested “that the grandparents [were] attempting to interfere and sabotage the relationship that [the father] had with his daughter,” the court denied visitation.

The final factor considered by courts is the “mental and physical health of the child and the relative.” This factor is typically satisfied, absent evidence suggesting otherwise. For health to be an issue, the ailments must not merely exist but must have an effect on the best interest of the child. In Henry, attempts were made to call into question the mental health of the child and the relative, but the court determined that “this did not constitute ‘problems’ such that the best interest of the child had been, or would be, affected.” In Ray, the court noted that the great-grandfather was sixty-seven years old but was in excellent health.

Not only must the factors weigh in favor of visitation, but the visitation must be reasonable. In Stracener v. Joubert, the mother objected to the amount of visitation with the child’s paternal grandparents. The court considered the joint custody arrangement that the parents had agreed to before the father’s death, which included less time than the grant of visitation to the grandparents. Considering the parent’s constitutional right to privacy in child rearing and the excessive amount of visitation awarded to the grandparents, the court found the visitation to be unreasonable and significantly reduced the schedule of visitation set forth by the trial court.

947. Janway v. Jones, 47,203, p. 10 (La. App. 2 Cir. 3/30/12); 88 So. 3d 713, 719.
948. Id. at pp. 2–3; 88 So. 3d at 715.
949. Compare id. at p. 10; 88 So. 3d at 719, with Rogers v. Pastureau, 2012-2008, p. 19 (La. App. 1 Cir. 4/26/13); 117 So. 3d 517, 530 (awarding visitation and noting that the grandparents did not ever interfere or disregard the rights of the parents).
951. Henry v. Henry, 97-0366, p. 7 (La. App. 1 Cir. 11/7/97); 704 So. 2d 793, 798.
952. Id.
954. See generally Stracener v. Joubert, 2005-1121 (La. App. 3 Cir. 3/1/06); 924 So. 2d 430.
955. Id. at p. 7; 924 So. 2d at 436.
956. Id. at p. 8; 924 So. 2d at 436; see also McMillin v. McMillin, 2008-502, p. 8 (La.
XII. MODIFICATION OF CUSTODY AND VISITATION

Custody and visitation of a child are always subject to modification to meet the child’s best interest. As a result, no judgment awarding custody or visitation bars a subsequent action to modify. Further, a court maintains continuing jurisdiction to modify prior awards. Allowing modifications ensures that the law’s overriding principle—the best interest of the child—is met.

Modifications of custody, even when warranted on the facts, may nevertheless be difficult for the child, as change is not always easy. Because custody is never final, and modifications may be difficult, the law requires the proponent of change to prove: (1) a material change of circumstance affecting the welfare of the child since the original custody decree was entered; and (2) a change of custody is in the best interest of the child. In Louisiana, this two-pronged test is elevated when the original custody order was entered after a court considered evidence of parental fitness. In that case, the proponent of change must prove “that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree,” or “by clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child.”

To determine which standard applies, courts analyze whether the initial award of custody was made pursuant to a considered decree or a consent decree (also referred to as stipulated decree). A considered decree is “an award of permanent custody in which the trial court receive[d] evidence of parental fitness to exercise care, custody, and control of the children.” The considered decree occurs when the court awards custody because the parents cannot

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958. Kleiser, 619 So. 2d at 179 (citing Benoit v. Lestremau, 603 So. 2d 269 (La. Ct. App. 5 Cir. 1992)).
959. Dupuy v. Dupuy, 2000-2744, p. 5 (La. App. 1 Cir. 3/28/01); 808 So. 2d 562, 565.
960. Falgout v. Dealers Truck Equip. Co., 98-3150, p. 9 (La. 10/19/99); 748 So. 2d 399, 406.
961. Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 3d 731, 738.
963. Evans, 97-0541, pp. 12–13; 708 So. 3d at 738.
agree on custody or when their agreement is not in the best interest of the child.\textsuperscript{964} A consent or stipulated decree, on the other hand, occurs when the parents of the children consent to a custodial arrangement or the award is entered by default, and no evidence of parental fitness is presented to the court.\textsuperscript{965} A plan agreed on by the parents is preferred over a court-ordered plan, but in either case, the best interest of the child is paramount.\textsuperscript{966}

The Louisiana Supreme Court recognizes the inherent power courts have when making any modification of custody. In 1986, in \textit{Bergeron v. Bergeron}, the court noted:

The child has at stake an interest of transcending value in a custody modification suit—his best interest and welfare—which may be irreparably damaged not only by a mistaken change in custody but also by the effects of an attempted or threatened change of custody on grounds that are less than imperative. The consequences to the mental and emotional well being and future development of the child from an erroneous judgment, unjustified litigation, threat of litigation, or continued interparental conflict are usually more serious than similar consequences in an ordinary civil case.\textsuperscript{967}

Because of the discretion afforded a trial court, findings “will not be set aside on appeal unless they are manifestly erroneous or clearly wrong.”\textsuperscript{968} The heightened abuse of discretion rule applies.\textsuperscript{969}

Once the burden of proof for modification is satisfied, the parent or nonparent must still meet the burden of proof for the award of custody requested.\textsuperscript{970} For example, evidence can be sufficient to show a material change of circumstance since the entry of a consent order but insufficient to meet the clear and

\textsuperscript{964} LA. CIV. CODE ANN. art. 132 (2019).
\textsuperscript{965} Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 3d 731, 738; Odom v. Odom, 606 So. 2d 862, 866 (La. Ct. App. 2 Cir. 1992) (finding that the \textit{Bergeron} standard does not apply when a prior award of custody was uncontested, but not consented to, by a parent).
\textsuperscript{966} Haik v. Haik, 94-563, p. 9 (La. App. 5 Cir. 12/14/94); 648 So. 2d 1015, 1020.
\textsuperscript{967} Bergeron v. Bergeron, 492 So. 2d 1193, 1200 (La. 1986).
\textsuperscript{968} Caples v. Caples, 47,491, p. 10 (La. App. 2 Cir. 7/25/12); 103 So. 3d 437, 443.
\textsuperscript{969} McCormic v. Rider, 2009-2584, p. 4 (La. 2/12/10); 27 So. 3d 277, 280; Atkins v. Atkins, 47,563, p. 4 (La. App. 2 Cir. 9/26/12); 106 So. 3d 614, 616; Glover v. Tooley, 25,988, p. 5 (La. App. 2 Cir. 8/17/94); 641 So. 2d 1032, 1035.
\textsuperscript{970} Molony v. Harris, 2010-1316, pp. 9–10 (La. App. 4 Cir. 2/23/11); 60 So. 3d 70, 77; White v. Kimry, 37,408, pp. 4–5 (La. App. 2 Cir. 5/14/03); 847 So. 2d 157, 160.
convincing standard of proof for an award of sole custody.\textsuperscript{971} Likewise, a nonparent who seeks a modification to request custody must also prove substantial harm to the child.\textsuperscript{972}

Modification of visitation is treated differently than a modification of custody. Courts have concluded that, because a change in visitation is not as substantial as a change in physical custody, the proponent of change need only prove that modification is in the child’s best interest.\textsuperscript{973} No showing of a material change of circumstance or the elevated \textit{Bergeron} standard is necessary.

\section*{A. Considered Decrees}

When a court awards custody after considering evidence of parental fitness, the party who seeks to modify the decree must meet a heightened standard, referred to as the \textit{Bergeron} standard. Rather than simply require a material change of circumstance that meets the child’s best interest, the \textit{Bergeron} standard requires the proponent to demonstrate that “continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree,” or “by clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child.”\textsuperscript{974} The standard is disjunctive. The first prong permits change due to deleterious effects on the child in the present custody arrangement, while the second prong permits change under a weighing analysis when a parent can show by the heightened clear

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\textsuperscript{971} See Molony v. Harris, 2010-1316, pp. 16–17 (La. App. 4 Cir. 2/23/11); 60 So. 3d 70, 81 (reversing the trial court’s award of sole custody to the father because, although he was able to show a sufficient change of circumstances since the consent decree, he was not able to show highly probable evidence that sole custody was in the best interest of the child); White v. Kimry, 37,408, p. 12 (La. App. 2 Cir. 5/14/03); 847 So. 2d 157, 164.

\textsuperscript{972} See also Tracie F. v. Francisco D., 15-224, p. 27 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 798 (noting that a custody action brought by a nonparent may only arise when a threat of substantial harm looms).

\textsuperscript{973} See Moore v. Moore, 47,947, p. 17 (La. App. 2 Cir. 3/6/13); 111 So. 3d 1120, 1129; Piccione v. Piccione, 2009-300, p. 3 (La. App. 3 Cir. 10/7/09); 20 So. 3d 576, 578; Acklin v. Acklin, 29,193, p. 3 (La. App. 2 Cir. 2/26/97); 690 So. 2d 869, 871; Bennett v. Bennett, 95-152 (La. App. 2 Cir. 5/1/96); 657 So. 2d 413; Reynier v. Reynier, 545 So. 2d 665, 665 (La. Ct. App. 5 Cir. 1989).

\textsuperscript{974} Mulkey v. Mulkey, 2012-2709, p. 11 (La. 5/7/13); 118 So. 3d 357, 365; Bergeron v. Bergeron, 492 So. 2d 1193, 1200 (La. 1986). To prove a matter by clear and convincing evidence, one must demonstrate that the existence of a disputed fact is highly probable, or much more probable than its nonexistence. State ex rel. Manuel v. Manuel, 619 So. 2d 871, 875 (La. Ct. App. 3 Cir. 1993).
and convincing evidentiary standard that the child’s best interest warrants the change.\textsuperscript{975}

Before considering the modification request, a court must determine whether the Bergeron standard applies. The burden lies with the party who claims that Bergeron applies to show that the court considered the prior custody award.\textsuperscript{976} Introducing the transcript of the prior proceeding can satisfy that burden.\textsuperscript{977} If the record is silent on the issue of whether custody was litigated, the court presumes that the award was uncontested, and Bergeron does not apply.\textsuperscript{978} If the record fails to contain a transcript of the hearing, the court endeavors to determine the context of the hearing, but in the absence of any evidence, Bergeron does not apply.\textsuperscript{979} If the hearing takes place for a period of time, but the parties agree in a consent judgment, Bergeron may apply.\textsuperscript{980} Finally, even if evidence of parental fitness was taken, some courts have concluded that an interim order is not subject to Bergeron because the order is not a “final, considered decree” given after the trial court has examined all of the pertinent evidence.\textsuperscript{981}

For example, in Howze v. Howze, the transcript from the trial, which did include evidence of parental fitness, was not contained in the appellate record.\textsuperscript{982} However, the minutes and the language of the judgment, which included statements like “after conclusion of the trial,” allowed the appellate court to infer that both parties

\textsuperscript{975} See Mulkey v. Mulkey, 2012-2709, p. 5 (La. 5/7/13); 118 So. 3d 357, 361.
\textsuperscript{976} Ogelsby v. Ogelsby, 25,974, p. 4 (La. App. 2 Cir. 8/17/94); 641 So. 2d 1027, 1030; Odom v. Odom, 606 So. 2d 862, 865 (La. Ct. App. 2 Cir. 1992).
\textsuperscript{977} See, e.g., Odom, 606 So. 2d at 865.
\textsuperscript{978} Ogelsby, 25,974, p. 4; 641 So. 2d at 1030 (finding that Bergeron did not apply when judgment referred to “evidence adduced and stipulations” but also mentioned coming to trial “by consent”); Tennessee v. Campbell, 28,823, p. 7 (La. App. 2 Cir. 10/30/96); 682 So. 2d 1274, 1278 (finding that Bergeron did not apply when the record failed to contain a transcript of the initial hearing); see also Norris v. Norris, 604 So. 2d 107 (La. Ct. App. 2 Cir. 1992); Odom, 606 So. 2d at 865; Stevens v. Stevens, 340 So. 2d 584, 587 (La. Ct. App. 1 Cir. 1976).
\textsuperscript{979} See, e.g., Howze v. Howze, 2017-0358, p. 5 (La. App. 1 Cir. 9/28/17); 232 So. 3d 606, 609; Poole v. Poole, 41,220, p. 4 (La. App. 2 Cir. 3/22/06); 926 So. 2d 60, 63; Tennessee, 28,823, pp. 7–8; 682 So. 2d at 1278.
\textsuperscript{980} See, e.g., Cherry v. Cherry, 2004-0002, pp. 6–7 (La. App. 4 Cir. 2/2/05); 894 So. 2d 1208, 1213 (three days of trial before consent determined to be a considered decree); Long v. Long, 28,763, pp. 4–5 (La. App. 2 Cir. 12/11/96); 684 So. 2d 1099, 1101 (finding Bergeron applied where trial started but recessed and over two weeks, contentious discussions continued).
\textsuperscript{981} McManus v. McManus, 2013-699, p. 10 (La. App. 3 Cir. 12/11/13); 127 So. 3d 1093.
\textsuperscript{982} Howze, 2017-0358, p. 5; 232 So. 3d at 609.
put on testimony and evidence and to conclude that the judgment was a considered decree.\textsuperscript{983} The heavy burden of \textit{Bergeron} applied.\textsuperscript{984}

When a considered decree has been entered, the \textit{Bergeron} standard applies to changes in both legal and physical custody.\textsuperscript{985} It can likewise apply in disputes between parents and nonparents.\textsuperscript{986} In other words, requests for a change in the domiciliary status of a parent or nonparent will require application of the \textit{Bergeron} standard even though joint custody remains the same.\textsuperscript{987} When visitation, rather than custody, is at issue, courts may “tweak” visitation schedules even though the evidence does not satisfy the \textit{Bergeron} standard.\textsuperscript{988} Courts should not apply the flexible standard for visitation, however, if the modification contemplates changes in physical or legal custody, even though the litigants may refer to the nondomiciliary’s physical custodial time as “visitation.”\textsuperscript{989}

The \textit{Bergeron} standard is difficult to meet and is designed to prevent disruption of considered custody arrangements.\textsuperscript{990} Due to the heavy burden, courts can be reluctant to find that modification is justified. Because of the fact-driven nature of a modification request, it would be difficult to capture the multitude of changes

\begin{itemize}
  \item \textsuperscript{983} Howze v. Howze, 2017-0358, p. 5 (La. App. 1 Cir. 9/28/17); 232 So. 3d 606, 609.
  \item \textsuperscript{984} Id.
  \item \textsuperscript{985} Melton v. Johnson, No. 2018-CU-0403, 2018 WL 657104, at *4 (La. Ct. App. 1 Cir. Dec. 12, 2018); Granger v. Granger, 2009-272, pp. 4–5 (La. App. 3 Cir. 11/10/09); 25 So. 3d 162, 165; Howze, 2017-0358, p. 8; 232 So. 3d at 610–11; see also Davenport v. Manning, 95-2349, p. 4 (La. App. 4 Cir. 6/5/96); 675 So. 2d 1230, 1232.
  \item \textsuperscript{986} See, e.g., Sheppard v. Hood, 605 So. 2d 708, 712 (La. Ct. App. 2 Cir. 1992) (finding that mother who was seeking a change of custody from grandparents was unable to prove \textit{Bergeron}; even though she enjoyed the paramount parental right to custody, that right was already protected in the initial determination of custody); see also Bragg v. Home, 33,857 (La. App. 2 Cir. 6/21/00); 764 So. 2d 1177; Noe v. Noe, 93-1316 (La. App. 3 Cir. 5/4/94); 640 So. 2d 537; Miller v. Andrasko, 93-0520, p. 6 (La. App. 1 Cir. 3/11/94); 640 So. 2d 368, 371.
  \item \textsuperscript{987} Silbernagel v. Silbernagel, 10-267, pp. 10–11 (La. App. 5 Cir. 5/10/11); 65 So. 3d 724, 730 (changing domiciliary parent from co-domiciliaries to father because the drive between the parties’ homes on the highway placed the child in danger and his growing maturity amounted to a material change in the circumstances since the original decree, and it would have been deleterious to the child to continue this custody plan).
  \item \textsuperscript{988} See \textit{Howze}, 2017-0358, p. 7; 232 So. 3d at 609–10; see also Mason v. Mason, 2016-287, p. 15 (La. App. 3 Cir. 10/5/16); 203 So. 3d 519, 529; Brantley v. Kaler, 43,418, pp. 6–7 (La. App. 2 Cir. 6/4/08); 986 So. 2d 188, 191.
  \item \textsuperscript{989} See \textit{Howze}, 2017-0358, p. 8; 232 So. 3d at 611; DeSoto v. DeSoto, 2004-1248, p. 3 (La. App. 3 Cir. 2/2/05); 893 So. 2d 175, 177.
  \item \textsuperscript{990} AEB v. JBE, 99-2668, p. 7 (La. 11/30/99); 752 So. 2d 756, 761.
\end{itemize}
that could justify a modification under any standard. Situations that have justified a change in custody under Bergeron have included a child coming of school age, the deterioration of communication, excessive punishment, poor living conditions, and abuse, just to name a few.

The child’s preference as to which parent should have custody, in and of itself, is generally not enough to justify a change under Bergeron. Nor is the remarriage of the noncustodial parent or the stability of that parent’s new household a compelling reason to uproot a child from his present environment. Further, the custodial parent’s romantic relationships alone do not justify a change under Bergeron unless there is proof of other factors that have a detrimental or direct effect on the welfare of the child. Whether a fact alone or with others satisfies the heavy Bergeron standard is an extremely fact-intensive analysis that is left within the province of the trier of fact, only to be reversed on an abuse of discretion.

For stipulated judgments, can the parties agree to the Bergeron standard for future modifications? Even though the parties are stipulating to custody—and the lower standard would apply in a modification request—some courts have concluded that

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991. See, e.g., Melton v. Johnson, No. 2018-CU-0403, 2018 WL 657104 (La. Ct. App. 1 Cir. Dec. 12, 2018); Freeman v. Johnson, 51,550, p. 14 (La. App. 2 Cir. 6/21/17); 225 So. 3d 524, 532–33; see also Shaffer v. Shaffer, 2000-1251, p. 5 (La. App. 1 Cir. 9/13/00); 808 So. 2d 354, 357 (finding coming of school age to be a material change of circumstances to modify a stipulated judgment).

992. See, e.g., Welborne v. Welborne, 29,479, p. 7 (La. App. 2 Cir. 5/7/97); 694 So. 2d 578, 583 (changing custody from joint to sole in mother because of daughter’s “strained relationship” with her father); see also Hughes v. Talton, 14-17, p. 11 (La. App. 5 Cir. 10/15/14); 181 So. 3d 10, 16.

993. See, e.g., Ard v. Ard, 628 So. 2d 1221, 1223 (La. Ct. App. 3 Cir. 1993) (changing custody from father to mother because father of children with psychological problems made them sniff their wet sheets after bed-wetting, lay face-down on the floor after unruly behavior, and stand on their toes, whipping them if they lost their balance).

994. See, e.g., Hull v. Hull, 542 So. 2d 205, 207 (La. Ct. App. 3 Cir. 1989) (changing custody from mother to father due in part to the crowded living conditions in the home).

995. See, e.g., Kiefer v. Yellon, 94-218, pp. 6–7 (La. App. 5 Cir. 11/16/94); 646 So. 2d 1073, 1076 (sexual abuse); Lawrence v. Lawrence, 50,799, p. 4 (La. App. 2 Cir. 5/25/16); 197 So. 3d 198, 201 (physical force).


no public policy consideration is undermined by allowing the parties to freely contract into the Bergeron standard.\footnote{999} “In fact, . . . their agreement is supported by the very policies which underlie the Bergeron burden of proof—protection against harm done to children by custody litigation and threats thereof, changes in custody, continued parental conflict, and erroneous judgments.”\footnote{1000} On the other hand, some courts have concluded that allowing the Bergeron standard to apply to a consent judgment when the evidence has not been evaluated by the judge would “erode the definition of considered decree and the policy reasons for the rule as examined by the Bergeron court.”\footnote{1001} The Louisiana Supreme Court has yet to decide.

\textbf{B. CONSENT (OR STIPULATED) DECREES}

When the original custody decree is a stipulated decree—the parties consented to the custodial arrangement and no evidence of parental fitness was taken—the party seeking a modification need not prove the heightened Bergeron standard, but rather must prove that: (1) a material change of circumstances has occurred since the original custody decree was entered; and (2) the proposed modification is in the best interest of the child.\footnote{1002} This standard is often referred to as the Evans standard, based on the Louisiana Supreme Court case Evans v. Lungrin.\footnote{1003}

Ultimately, if there is no material or significant change in circumstances, no modification of custody can be made.\footnote{1004} Likewise, if the proposed modification is not in the best interest of the child, no modification may occur. From a policy standpoint, the heavy burden of proof from Bergeron is inapplicable because no court has reviewed the facts and made a determination of custody.\footnote{1005} Some courts conclude that a material change is not necessary for the court to alter the days of physical custodial time

\footnote{999} Adams v. Adams, 39,424, pp. 6–7 (La. App. 2 Cir. 4/6/05); 899 So. 2d 726, 730; Long v. Long, 28,763 (La. App. 2 Cir. 12/11/96); 684 So. 2d 1099.

\footnote{1000} Adams, 39,424, p. 7; 899 So. 2d at 730.

\footnote{1001} Rodriguez v. Wyatt, 11-82, p. 12 (La. App. 5 Cir. 12/12/11); 102 So. 3d 109, 116 (citation and internal quotation marks omitted).

\footnote{1002} Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 2d 731, 738.

\footnote{1003} See generally Evans, 97-0541; 708 So. 2d 731.

\footnote{1004} Kingston v. Kingston, 2011-1629, pp. 6–7 (La. App. 1 Cir. 12/21/11); 80 So. 3d 774, 778; Bonnecarre v. Bonnecarre, 2009-1647, p. 7 (La. App. 1 Cir. 4/14/10); 37 So. 3d 1038, 1044; Bingham v. Bingham, 42,140, p. 3 (La. App. 2 Cir. 4/4/07); 954 So. 2d 842, 844.

\footnote{1005} See generally Evans, 97-0541; 708 So. 2d 731.
from the original stipulated judgment.\textsuperscript{1006}

A myriad of factual circumstances can amount to a material change.\textsuperscript{1007} When custody is uncontested by default because the parent did not make an appearance, a material change must be proven, rather than the heightened \textit{Bergeron} standard.\textsuperscript{1008} While the change that precipitates a request must occur after the last custody order was rendered, some courts recognize that evidence of actions prior to the last custody order may be admissible to show effects on the child in the best interest analysis, even though they may not be used to establish a material change.\textsuperscript{1009}

\textbf{C. Parent Seeking Modification of Custody Awarded to a Nonparent}

When a parent seeks to modify custody that has been awarded to a nonparent, courts have struggled with the appropriate legal standard to apply given the parent's primary right to custody. In 2016, the Louisiana Supreme Court settled a split among the circuits, concluding that, in an action by a parent to modify a stipulated custody arrangement in favor of a nonparent, the parent bears the burden of proof and must show a material change of circumstance since the original custody decree was entered and the proposed modification is in the best interest of the child.\textsuperscript{1010}

Various schools of thought existed in the appellate courts

\textsuperscript{1006} Gerace v. Gerace, 2005-1300, pp. 3–4 (La. App. 3 Cir. 4/5/06); 927 So. 2d 622, 624 (concluding that time spent with each parent in a joint custody award need only be in the best interest of the child). \textit{But see} Cetodal v. Cetodal, 2005-1524, p. 7 (La. App. 1 Cir. 11/4/05); 927 So. 2d 433, 437 (finding that both a material change and best interest must be shown to modify physical custodial time).

\textsuperscript{1007} \textit{See, e.g.}, Lawrence v. Lawrence, 50,799, p. 4 (La. App. 2 Cir. 5/25/16); 197 So. 3d 198, 201 (inability of parents to work together under the existing agreement was enough to amount to a material change); Odom v. Odom, 606 So. 2d 862, 866 (La. Ct. App. 2 Cir. 1992) (evidence of one parent not allowing the children to have any contact with the other parent was found to constitute a material change of circumstances); Bagwell v. Bagwell, 48,913, p. 7 (La. App. 2 Cir. 1/15/14); 132 So. 3d 426, 431 (relocation of the parent amounted to a material change of circumstance).

\textsuperscript{1008} \textit{See, e.g.}, Odom, 606 So. 2d at 864 (finding that \textit{Bergeron} did not apply to mother who was represented by curator ad hoc when custody was initially rendered because the custody was not contested by the curator).

\textsuperscript{1009} \textit{See} Bowden v. Brown, 48,268, p. 12 (La. App. 2 Cir. 5/15/13); 114 So. 3d 1194, 1202 (finding that facts predating a stipulated judgment of custody by married parents to the maternal grandmother were relevant in a subsequent modification request); Touchet v. Touchet, 36,881 (La. App. 2 Cir. 1/29/03); 836 So. 2d 1149 (finding that mother's prior criminal conduct affected her ability to encourage the child's relationship with the father).

\textsuperscript{1010} \textit{See generally} Tracie F. v. Francisco D., 2015-1812 (La. 3/15/16); 188 So. 3d 231.
when a parent sought custody from a nonparent. Some circuits placed the burden of proof on the parent to demonstrate first that the parent’s rehabilitation eliminates the “substantial harm” to the child that existed when the nonparents were initially granted custody (the standard under article 133), and second, that there has been a material change in the adequate and stable environment in which the child is living with the nonparents.  

Yet others, while still placing the burden of proof on the parent seeking to modify, required the parent to prove only a material change of circumstances that met the best interest of the child.  

Still, others rejected the idea that the parent bears any burden of proving a material change of circumstance or that a change is in the best interest if the child, finding that parental primacy would otherwise be violated.  

Rather, the burden of proof was placed on the nonparent to retain custody: once the parent sought to modify custody in the nonparent, the nonparent had to show that a custody award to the parent would continue to result in substantial harm to the child.

The Louisiana Supreme Court concluded that the established Evans standard for modification applied to parents, which both preserved the parental rights of primacy and followed Civil Code article 131 and its interpretive jurisprudence. The parent must show both a material change of circumstance since the original custody order and that modification is in the best interest of the child. Although in dicta, the Louisiana Supreme Court made clear that its analysis would apply whether the parent had given up full rights of custody or had retained some rights of custody (i.e., a nondomiciliary parent in a joint custody arrangement).

XIII. RELOCATING A CHILD’S RESIDENCE

The process in Louisiana for relocating the principal residence of a child is found in a comprehensive statute. Historically, prior

1011. Jones v. Coleman, 44,543, p. 19 (La. App. 2 Cir. 7/15/09); 18 So. 3d 153, 164.
1012. Tracie F. v. Francisco D., 2015-1812, p. 12 (La. 3/15/16); 188 So. 3d 231, 241 (citing Dalme v. Dalme, 09-524 (La. App. 3 Cir. 10/14/09); 21 So. 3d 477, 479–80).
1013. Cutts v. Cutts, 2006-33, p. 5 (La. App. 3 Cir. 5/24/06); 931 So. 2d 470; Tennessee v. Campbell, 28,823, p. 10 (La. App. 2 Cir. 10/30/96); 682 So. 2d 1274, 1279; see also Mills v. Wilkerson, 34,694, p. 5 (La. App. 2 Cir. 3/26/01); 785 So. 2d 69, 73.
1014. Cutts, 2006-33, p. 5; 931 So. 2d at 470; Tennessee, 28,823, p. 10; 682 So. 2d at 1279; see also Mills, 34,694, p. 5; 785 So. 2d at 73.
1015. Tracie F., 2015-1812, p. 19; 188 So. 3d at 245.
1016. Id. at p. 20; 188 So. 3d at 245.
1017. Id. at pp. 21–22; 188 So. 3d at 246.
to the 1997 enactment of a statute, Louisiana courts, like many state courts, struggled with what was then termed post-custody “removal.” The foundation of Louisiana’s relocation statute can be traced back to jurisprudence from as early as the 1950s and 1960s. During this time, courts questioned their jurisdiction to modify previous custody judgments after the parent awarded custody removed the child from the state and from the court’s jurisdiction. At first, courts exercised their discretion and generally allowed parents to remove their children from Louisiana post-custody order, provided the removing parent was the custodial parent and had a justifiable reason for the removal.

In fact, prior to 1968, removal was only prohibited on one occasion and only because the custodial parent failed to provide any reason for wanting to remove the minor children from Louisiana.

Regardless, removal determinations were complicated. Courts were faced with balancing the right of custodial parents to travel freely and relocate against the right of the noncustodial parents to conveniently exercise physical custody and visitation, while ensuring the best interest and welfare of the children. Ultimately, those rights conflicted. To illustrate, the second circuit, in *Broomfield v. Broomfield*, permitted the custodial mother to remove the children from Louisiana, finding removal to another state for better employment opportunities a good and sufficient reason for relocation. The court further indicated that any impairment the relocation had on the noncustodial parent’s visitation rights was “subordinate to the rights of the custodial parent to be reasonably unrestricted in selecting a place of residence for economic and justifiable personal reasons.” Based on that rationale, courts focused primarily on the rights of the

1019. *See* *Pattison*, 208 So. 2d at 396.
1020. *See id.*
1021. *See id.* The fourth circuit reversed the lower court that had required the custodial parent, who moved to New York with her children, to return to Louisiana or be held in contempt. *Id.* The fourth circuit held that where the mother moved to New York to live with her new husband in such a “highly mobile society,” she could not be “confined to a certain geographical area.” *Id.*
1022. *Pattison*, 208 So. 2d at 396 (citing *Sachse*, 150 So. 2d 772).
1023. *Broomfield v. Broomfield*, 283 So. 2d 839, 840–41 (La. Ct. App. 2 Cir. 1973) (holding that a court may allow the custodial parent to move from Louisiana to another state where the custodian has a good reason for living in the other state and such course is consistent with the welfare of the child).
1024. *Id.* at 841.
custodial parents while incidentally considering the effects removal had on the children.

By the mid-1970s, Louisiana courts began recognizing the correlation between relocation and modification of custody, so focus began to shift to the interests of the children. For example, in Lloyd v. Lloyd, after the custodial mother removed the children to Florida, the noncustodial father challenged the relocation by seeking to change the court-ordered custody from geographically unrestricted to geographically restricted. The second circuit found such a "serious change in custodial care" akin to a custody modification that would change custody from one parent to the other. Acknowledging the link between removal and modification of custody for the first time in Louisiana, the second circuit found that such a change warranted application of the burden that applied to modify custody arrangements. To prevail, the father had to prove that changes in the conditions of custody were in the child’s best interest.

Courts continued to consider relocation, and by 1993, the first circuit in Hertzak v. Hertzak articulated a test for removal cases, which was later codified in the relocation statute. Proper removal required the custodial parent to show: (1) a good faith reason for the move; and (2) that the move was in the best interest of the child. When applying the test in Hertzak, because there was no proof that relocation was not in the best interest of the children, the court permitted the custodial parent’s relocation to Texas even though the father’s rights necessarily would be impaired. Going forward, the focus in relocation cases shifted to the best interest of the child, rather than the best interest of the custodial parent.

1025. Lloyd v. Lloyd, 313 So. 2d 854, 857 (La. Ct. App. 2 Cir. 1975). The mother was awarded custody of their two daughters and the father was awarded custody of the son. Id.
1026. Id.
1027. Id. At the time, the standard that applied to a custody modification was two-fold. The court required the father to prove (1) a deleterious situation, and (2) that change in the conditions of custody would be in the best interest of the child. See id. at 857.
1028. Lloyd, 313 So. 2d at 857.
1030. Hertzak, 616 So. 2d at 729.
1031. Id. at 730.
1032. Pittman v. Pittman, 94-952, pp. 5–8 (La. App. 5 Cir. 3/15/95); 653 So. 2d 1211, 1213–14 (denying the mother’s relocation request because even though her new
In 1997, Louisiana became the first state to enact a relocation statute based on the American Academy of Matrimonial Lawyers’ Proposed Model Relocation Act. In Senate Bill 1508, Senator Arthur Lentini proposed guidelines for parents seeking to move their children within or outside of the state of Louisiana after a custody or visitation order was in place. At its inception, Louisiana’s relocation statute sought to establish a comprehensive procedure to assist recently divorced parents awarded custody of their children who later decided to move or relocate to a different state, often in the midst of the noncustodial parent’s objections.

The relocation statute, then entitled “Moving the Child’s Residence Within or Outside of the State,” applied to parents with primary custody or equal physical custody and to an intended move out of state or an in-state move 150 miles from the domicile of the primary custodian. The relocation of the child’s residence had to be for a period of sixty days or more, which was not temporary.

The statute provided due process to the other parent in the form of notice and an opportunity to be heard. The parent seeking relocation had to provide notice by mail to the other parent of his intent to move, which included reasons for the move and the various details surrounding the new residence. To prevent relocation, the other parent could object within twenty days of

husband’s prospects of a job were good and sufficient reason for the move, the relocation was nonetheless not in the best interest of the children, based on testimony by the court appointed child psychologist).


1036. Id.

1037. Act No. 1173, 1997 La. Acts 2258; LA. STAT. ANN. § 9:355.1 (rev. 1997). “Equal physical custody” was defined as “parents share equal parental authority of the child absent a court order to the contrary,” and “parent entitled to primary custody” was defined as “a parent designated by a court order as the sole custodian or primary or domiciliary custodian within a joint custody arrangement.” Id. The statute also applied to any parent in the absence of a court order or agreement between the parties. LA. STAT. ANN. § 9:355.1(3) (rev. 1997).

1038. LA. STAT. ANN. § 9:355.1 (rev. 1997). If there was no custody order, then the move had to be 150 miles from the domicile of the other parent. Id.


receipt of the notice by initiating a summary proceeding.\textsuperscript{1041} The statute adopted the burden first articulated in the jurisprudence, which required the relocating parent to prove that relocation was made in good faith and in the best interest of the child.\textsuperscript{1042} A host of factors provided guidance to the court in making relocation decisions.\textsuperscript{1043}

In 2003, the statute was amended to carve out a provision for parents with equal physical custody. To relocate, a parent with equal physical custody was required to obtain court authorization after a contradictory hearing or the written consent of the other parent with equal physical custody.\textsuperscript{1044} All other custodians could relocate if the other parent failed to timely object to the relocation.\textsuperscript{1045} Further, the amendment increased the time to object from twenty days after receiving notice to thirty days after receiving notice.\textsuperscript{1046}

In 2008, the law was amended again to require all parents to obtain court authorization after a contradictory hearing or the written consent of the other parent before relocating.\textsuperscript{1047} The onus to object no longer rested with the non-relocating parent; rather, the parent seeking relocation had to affirmatively seek court approval or the written consent of the other parent.\textsuperscript{1048}

The legislature comprehensively amended the statute in 2012, changing its title to “Relocating a Child's Residence,” reducing the geographic threshold to seventy-five miles, reverting back to the bifurcated treatment of equal physical custodians versus other custodians, and expanding the notice requirements to any person recognized as a parent and any other person awarded custody or visitation under a court order, among others.\textsuperscript{1049} The revision comment explains that the geographic threshold decreased “in recognition of the likelihood that weekday visitation and the general ability to participate in the child’s daily life [was]
substantially affected by a distance of more than 75 miles.”

For the first time, the law requires notice to persons without custody orders, such as parents established by filiation or avowal actions, presumptions, or formal acknowledgments, or those with orders of visitation. The amendment broadened the scope of the statute by removing the term parents and replacing it with persons, acknowledging the nonparent influence in custody.

The bifurcated treatment of objections remained, with equal physical custodians protected by mandatory, express consent or a contradictory court hearing before relocation is permitted, while all others must timely object within thirty days of notice to prevent relocation. Any objection must be made in writing to the relocating parent, who will then initiate a summary proceeding with the court. Parents and nonparents who have been awarded custody enjoy the right to object to the relocation, while nonparents who enjoy visitation cannot object to the relocation but can seek a revised visitation schedule. The burden of proof remained the same as did the expansive factors that a court must consider in a hearing to oppose relocation. Finally, the revision explained that a proposed relocation is not automatically a basis for a custody modification, but actual relocation or any change in the child’s principal residence, even one below the geographical threshold, may constitute a change of circumstances warranting modification. Speculation on the negative impact a move may have on children, however, will generally be insufficient to seek a modification.

1050. LA. STAT. ANN. § 9:355.2 cmt. (a) (2019). A number of other states have lower thresholds. Id. (listing Alabama, Maine, and Oregon, which have a sixty-mile distance, and Florida, which has a fifty-mile distance).

1051. LA. STAT. ANN. § 9:355.4 & cmt. (c) (2019).


1059. LA. STAT. ANN. § 9:355.17 (2019); see also Masters v. Masters, 33,438, p. 6 (La. App. 2 Cir. 4/5/00); 756 So. 2d 1196, 1200 (finding that the trial court erred in modifying custody because the mother only expressed her intent to move; court did not give the mother the opportunity to remain in Louisiana).

1060. Hensgens v. Hensgens, 94-1200, pp. 8–9 (La. App. 3 Cir. 3/15/95); 653 So. 2d 48, 53 (evidence that mother’s move would negatively impact the children was pure
A. APPLICATION

The relocation statute applies when there is a custody or visitation order issued on or after August 15, 1997, or a custody or visitation order issued before August 15, 1997, if the “order does not expressly govern the relocation of the child.”1061 A proposed relocation triggers application of the statute when one of the following exists: (1) intent to establish principal residence outside of the state; (2) intent to establish principal residence within the state at least seventy-five miles from the domicile of the other parent, absent a custody order; (3) intent to establish principal residence within the state at least seventy-five miles from the principal residence of the child at the time of the custody order, if one exists; or (4) intent to establish principal residence within the state at least seventy-five miles from anyone entitled to object, absent a principal residence or where there is shared equal physical custody.1062 The statute does not apply when the parties have entered into an express written agreement for the child’s relocation,1063 violence or abuse is present,1064 or the move is within a distance shorter than the geographic threshold.1065 The straight-line or “as the crow flies” method of measurement is the most uniform method to measure distances and has been applied in at least one relocation case.1066

In the same way that the former relocation statutory language only applied to restrict the movement of the custodial or domiciliary parent, leaving the non-custodian and nondomiciliary parent free to relocate at will,1067 the relocation statute only applies to restrict the movement of the person with legal decision-making authority over the child.1068 The relocation statute is first triggered

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1062. Id.
1065. See Major v. Major, 2002-2131, p. 6 (La. App. 1 Cir. 2/14/03); 849 So. 2d 547, 551.
1066. Holley v. Holley, 17-325, p. 14 (La. App. 5 Cir. 11/20/17); 232 So. 3d 717, 727.
1067. Cocus, supra note 1033, at 87.
1068. LA. STAT. ANN. § 9:355.3 cmt. (a) (2019). The Comment indicates that, generally, the person with legal decision-making authority over the child is the sole custodian, domiciliary parent, natural tutor, both parents if married, or both persons with shared equal physical custody. Id.; see also In re J.E.T., 2016-0384, p. 18 (La. App. [2016]).
where there is a proposed or manifested intent to relocate, even if the party entitled to object resides out of state. In Bullock v. Bullock, the mother and primary custodian of the minor children who wished to move from Louisiana to Alabama argued that the relocation statute did not apply because the father resided outside of Louisiana, in Mississippi. The fourth circuit, after examining the text of the statute, concluded that the relocation statute applied even though neither parent was a resident of Louisiana. The court explained that relocation is triggered when there is “a change in the principal residence of a child for a period of sixty days or more” regardless of the parties’ geographic locations. Although the statute has been amended since Bullock, relocation is still defined as a “change in the principal residence of a child for a period of sixty days or more,” and any out of state move triggers application of the statute.

Once the relocation statute is triggered and an objection is made, the analysis by the court is fact-driven. The Louisiana Supreme Court has explained that the burden is heavy on the parent seeking relocation, and the guiding fundamental principle in any relocation analysis is the best interest of the child. The statute requires the court to consider the twelve listed factors when conducting its analysis. The court is free to weigh some factors more heavily than others. While the court must consider the twelve factors, the court is “not required to expressly analyze each factor in its oral or written reasons for judgment.” However, appellate review is easier when the trial court articulates reasons for its decision. Because the trial court is in the best position to judge the credibility of the witnesses and consider the wide array of facts, the trial court’s factual determinations are entitled to

1 Cir. 10/31/16); 211 So. 3d 575, 587.
1070. Id. at p. 2; 706 So. 2d at 672.
1071. Id.; see also Nelson v. Land, 2001-1073, p. 2 (La. App. 1 Cir. 11/9/01); 818 So. 2d 91, 92 (applying the relocation statute when a domiciliary parent sought to relocate from Louisiana to New York and the nondomiciliary parent resided in California).
1074. Curole v. Curole, 2002-1891, pp. 4–5 (La. 10/15/02); 828 So. 2d 1094, 1096.
1076. Gathen v. Gathen, 2010-2312, p. 10 (La. 5/10/11); 66 So. 3d 1, 8.
1077. Id. at p. 12; 66 So. 3d at 9.
1078. Id. at p. 13; 66 So. 3d at 10. The court noted that either party could have requested that the findings of facts and reasons be in writing. Id. at p. 12; 66 So. 3d at 9.
great weight and will not be overturned absent an abuse of discretion.\textsuperscript{1079} Any error of law is subject to \textit{de novo} review.\textsuperscript{1080}

\textbf{XIV. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT}

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was passed in Louisiana in 2006\textsuperscript{1081} to supplant the Uniform Child Custody Jurisdiction Act (UCCJA) that was passed in 1978.\textsuperscript{1082} The former UCCJA was designed to avoid jurisdictional competition and conflict among states and to promote cooperation and the exchange of information among states.\textsuperscript{1083} Jurisprudence decided under the UCCJA remains relevant after the Act was amended and reenacted as the UCCJEA. All fifty states have enacted the UCCJEA, and it applies to both domestic and international cases.\textsuperscript{1084} The Act has provided for uniformity and predictability with the best interest of the child at its center.

The Louisiana Code of Civil Procedure confers subject matter jurisdiction over a proceeding to obtain the legal custody of a minor who is in the state.\textsuperscript{1085} The UCCJEA provides a more specific, second tier of analysis for jurisdiction when the parties or the child reside in separate states.\textsuperscript{1086} Jurisdiction under the UCCJEA must be proper at the time the petition is filed, whether that petition requests initial custody or a modification of custody.\textsuperscript{1087} The UCCJEA sets forth explicit rules for initial jurisdiction, jurisdiction to modify, and temporary emergency jurisdiction.\textsuperscript{1088}

\begin{itemize}
\item\textsuperscript{1079} Gathen v. Gathen, 2010-2312, p. 13 (La. 5/10/11); 66 So. 3d 1, 9; Hernandez v. Jenkins, 2012-2756, p. 9 (La. 6/21/13); 122 So. 3d 524, 529.
\item\textsuperscript{1080} See Smith v. Smith, 44,663, p. 18 (La. App. 2 Cir. 8/19/09); 16 So. 3d 643, 654 (applying \textit{de novo} review because the trial court committed legal error when it applied the factors in article 136 rather than the relocation factors).
\item\textsuperscript{1081} See LA. STAT. ANN. § 13:1801 (2019).
\item\textsuperscript{1082} See LA. STAT. ANN. § 13:1700 \textit{et seq.} (1978, as amended).
\item\textsuperscript{1084} LA. STAT. ANN. § 13:1805 (2019); Guzman v. Sartin, 2009-1677, p. 4 (La. App. 1 Cir. 12/23/09); 31 So. 3d 426, 429.
\item\textsuperscript{1085} LA. CODE CIV. PROC. ANN. art. 10(5) (2019).
\item\textsuperscript{1086} Albitar v. Albitar, 16-167, p. 18 (La. App. 5 Cir. 6/30/16); 197 So. 3d 332, 345.
\item\textsuperscript{1087} See Wootten v. Wootten, 49,001, p. 7 (La. App. 2 Cir. 5/14/14); 138 So. 3d 1253, 1257.
\item\textsuperscript{1088} See LA. STAT. ANN. §§ 13:1801--1842 (2019).
\end{itemize}
These distinctions are the starting point for any custody or visitation dispute that crosses the Louisiana state line.

**A. INITIAL JURISDICTION**

The UCCJEA provides four grounds, in preferential order, for a Louisiana court to exercise jurisdiction in an initial child custody determination: (1) Louisiana is or was the child’s home state; (2) the child and a parent have a significant connection with Louisiana and there is substantial evidence relating to the child in Louisiana; (3) other courts decline to exercise jurisdiction because Louisiana is the appropriate forum; and (4) no other court will exercise jurisdiction, so Louisiana will do so by default. These limitations on a court exercising jurisdiction further the UCCJEA’s purposes, which include “avoiding jurisdictional competition, assuring that custody litigation takes place in the state with which the child and his family have the ‘closest connection’ and where relevant evidence is located, promoting a stable home environment, deterring abductions, and encouraging cooperation among the courts of different states.”

First, a Louisiana court may exercise initial jurisdiction over a child custody proceeding if it is the “home state” of the child on the date the action is commenced. “Home state” is defined as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.” A proceeding commences on the date the action is filed, rather than the date service of process is made on the defendant. Further, if the state was the child’s home state within the last six months but the child is absent from the state and a parent or a person acting as a parent still lives in the state, home state jurisdiction still applies. In other words, for the first six months, if the child is absent from his home state but a parent still remains in the state,
that state maintains its classification as the child’s home state. Once the child is absent from his home state with a parent for a period of six months, the new state will become the child’s home state. The law also provides that Louisiana can be the child’s home state if it had been the child’s home state within twelve months before the proceeding, and the child is absent from the state due to a forced emergency evacuation.\footnote{1095}

Home state is the preferred choice of jurisdiction in a custody action because the court is usually in the best position to exercise “continuity of control” over the child and access evidence involving the child.\footnote{1096} As a result, other state courts should defer to the home state. For example, in Sergeant v. DeRung, the court concluded that Louisiana lacked jurisdiction to make an initial child custody determination because the eleven-month-old child was born in Minnesota and had resided there since his birth, with the exception of a seventeen day period.\footnote{1097} The child’s father argued that because the child was conceived in Louisiana, had visited Louisiana, and because he filed the petition when the child was only four months old, Louisiana could exercise jurisdiction.\footnote{1098} The court disagreed, finding the home state of the child to be Minnesota.\footnote{1099} Given that Minnesota had not declined to exercise jurisdiction, the Louisiana court lacked subject matter jurisdiction over the action.\footnote{1100}

Louisiana courts will exercise home state jurisdiction even if the person caring for the child is not the parent, provided that person is “acting as a parent.”\footnote{1101} In State ex. rel. A.U.M., the court found Louisiana to be the home state of the child because the child was living in Louisiana under the care of his mother’s adult

\footnote{1095. LA. STAT. ANN. § 13:1813(A)(1) (2019).}
\footnote{1096. \textit{See} Cancienne v. Cancienne, 02-378, p. 4 (La. App. 5 Cir. 10/29/02); 831 So. 2d 484, 486; \textit{see also} Devillier v. Smith, 95-0846, p. 3 (La. App. 1 Cir. 11/09/95); 665 So. 2d 71, 73.}
\footnote{1097. Sergeant v. DeRung, 2016-1203, pp. 6–7 (La. App. 4 Cir. 3/8/17); 213 So. 3d 423, 427.}
\footnote{1098. \textit{Id.} at pp. 1, 6–7; 213 So. 3d at 424, 427.}
\footnote{1099. \textit{Id.} at p. 6; 213 So. 3d at 427.}
\footnote{1100. \textit{Id.} at pp. 6–7; 213 So. 3d at 427. \textit{But see} Hero v. Hero, 97-2799, p. 2 (La. App. 4 Cir. 5/27/98); 714 So. 2d 868, 870 (finding that Louisiana was the child’s home state even though the child was living in Wisconsin with the mother because the child had just been removed from Louisiana when the grandparents’ visitation petition was filed); State ex rel. A.U.M., 46,082, p. 5 (La. App. 2 Cir. 2/16/11); 62 So. 3d 185, 189 (finding that Louisiana was the child’s home state).}
\footnote{1101. \textit{See} LA. STAT. ANN. § 13:1802(7)(a), (13) (2019) (defining person acting as a parent).}
cousin.\textsuperscript{1102} Even though the adult cousin was not a biological parent, she fit the definition of a “person acting as a parent” because the incarcerated mother placed the child in her cousin’s care upon her incarceration.\textsuperscript{1103}

Second, Louisiana courts may acquire jurisdiction to make an initial child custody determination when there is no home state of the child,\textsuperscript{1104} the child and at least one parent or person acting as parent has a significant connection (other than mere presence) in Louisiana, and there is substantial evidence concerning the child’s care, protection, training, and personal relationships in Louisiana.\textsuperscript{1105} Referred to as the “significant connection/substantial evidence test,” jurisdiction can be conferred based on the relationships the child and the parents have with a state. When a home state of the child exists, however, jurisdiction is appropriately left with the home state unless that state declines.\textsuperscript{1106}

When a court assumes jurisdiction because of its connection to the parties, the interests of the child, not merely the convenience of the parties, should be of paramount concern. In \textit{Amin v. Bakhaty}, the mother moved from Egypt to Louisiana with the child and within one month filed a petition for custody.\textsuperscript{1107} The child’s only connection with Louisiana was the presence of the mother’s family.\textsuperscript{1108} Even though no other state had home state jurisdiction, the court could not assume jurisdiction based on significant connections because even though there were contacts with Louisiana, they were not “sufficient maximum contacts,” which were essential for jurisdiction.\textsuperscript{1109}

\textsuperscript{1102} State ex rel. A.U.M., 46,082, pp. 2, 5 (La. App. 2 Cir. 2/16/11); 62 So. 3d 185, 187, 189.
\textsuperscript{1103} Id.
\textsuperscript{1104} LA. STAT. ANN. § 13:1813 (2019). Jurisdiction is also available if the court of the home state declines to exercise jurisdiction on the ground that Louisiana is a more appropriate forum. Although, technically, this amounts to deferral jurisdiction under § 1813(3), it also appears in the significant connection/substantial evidence provision conferring jurisdiction. See id.
\textsuperscript{1106} See Stelluto v. Stelluto, 2005-0074, pp. 1–4 (La. 6/29/05); 914 So. 2d 34, 42–44 (Weimer, J., dissenting) (disagreeing with majority that permitted jurisdiction in Louisiana due to significant connections even though California was the child’s home state).
\textsuperscript{1107} Amin v. Bakhaty, 2000-2710, p. 2 (La. App. 1 Cir. 5/11/01); 812 So. 2d 12, 17.
\textsuperscript{1108} Id. at p. 16; 812 So. 2d at 27–28.
\textsuperscript{1109} Id.; see also Martin-Creech v. Armstrong, 42,649, p. 9 (La. App. 2 Cir. 9/12/07); 965 So. 2d 624, 629 (finding that four months in Louisiana was not enough given child’s
The third and fourth bases of jurisdiction are less common. Louisiana can exercise jurisdiction if other courts with jurisdiction decline to hear the matter because Louisiana is the more appropriate forum, or by default when no other state has subject matter jurisdiction over the action.

Finally, Louisiana can exercise jurisdiction temporarily when an emergency arises. A Louisiana court can exercise temporary emergency jurisdiction over a proceeding if the child is present in the jurisdiction, and the child has been abandoned or the child, sibling, or parent is subject to or threatened with abuse. Temporary jurisdiction can become final if no other state has jurisdiction and Louisiana becomes the home state of the child. If a child custody proceeding was initiated in another state, a Louisiana court can allow the litigant to obtain relief from the state having jurisdiction, while the temporary order issued in Louisiana will remain in effect. Once the Louisiana court becomes aware that another state has jurisdiction, it must communicate with the court of that state immediately “to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.”

B. JURISDICTION TO MODIFY

Louisiana Revised Statutes § 13:1815 limits the conditions under which a Louisiana court can modify the decisions of a court in another state. The statute provides that a court in Louisiana cannot modify a child custody determination from another state unless the Louisiana court has either home state or significant

connections in Virginia). But see Gill v. Bennett, 2011-886, p. 4 (La. App. 3 Cir. 12/7/11); 82 So. 3d 383, 387 (finding significant connections when child, child’s mother, and grandmother moved to Louisiana, and father was a long-time resident of Louisiana).


1116. LA. STAT. ANN. § 13:1816(D) (2019); see also, e.g., Brunt v. Abernathy, 2011-705, p. 6 (La. App. 3 Cir. 11/2/11); 79 So. 3d 425, 429 (concluding that temporary jurisdiction applied, but remanding because there was no evidence that the trial court communicated with the court of another state that may have jurisdiction); State ex rel. J.W., 43,163, pp. 10–11 (La. App. 2 Cir. 2/13/08); 975 So. 2d 841, 847 (finding that trial court had emergency jurisdiction to protect the child but was required to determine the appropriate jurisdiction under the UCCJA).

connection jurisdiction and (1) the court of the other state determines that it no longer has “exclusive continuing jurisdiction” or that Louisiana is a more appropriate forum, or (2) the Louisiana court or the court of the other state determines that the child, the parents and any person acting as a parent no longer resides in the other state.\footnote{1118}

For example, in \textit{Otwell v. Otwell}, the court reversed the trial court’s modification of custody because there was no evidence that the Georgia court made any determination that it no longer had continuing jurisdiction or that “Louisiana would be a more convenient forum.”\footnote{1119} The mother argued that, because the children had resided in Louisiana for more than one year, Louisiana was their home state, so the trial court had subject matter jurisdiction to modify custody.\footnote{1120} The court disagreed, pointing out the express terms of the statute and finding that the Georgia court made no determination that Louisiana was a more appropriate forum, so it maintained continuing exclusive jurisdiction.\footnote{1121}

When a child resides in Louisiana for an extended period of time, it is natural for a parent to seek modification of a custody order in Louisiana. But, once a custody order is in place from another jurisdiction, the Louisiana court can only exercise jurisdiction to modify if the court that issued the initial order determines that it no longer has continuing exclusive jurisdiction or that Louisiana is a more appropriate forum.\footnote{1122} The Louisiana court must seek guidance from the other state court unless no parties reside in the other state.\footnote{1123}

A court in Indiana provided that guidance in \textit{Gill v. Bennett}.\footnote{1124} In \textit{Gill}, a child was born out of wedlock in Indiana

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\item \textit{LA. STAT. ANN. § 13:1815 (2019).}
\item \textit{Otwell v. Otwell, 2010-1176, p. 4 (La. App. 3 Cir. 2/9/11); 56 So. 3d 1232, 1235.}
\item \textit{Id. at p. 1; 56 So. 3d at 1233.}
\item \textit{Id. at p. 4; 56 So. 3d at 1235; see also Brunt v. Abernathy, 2011-705, p. 5 (La. App. 3 Cir. 11/2/11); 79 So. 3d 425, 428–29 (refusing to exercise jurisdiction because the court in Oklahoma did not determine that Louisiana was the more appropriate forum); Hughes v. Fabio, 07-1008, p. 7 (La. App. 4 Cir. 3/25/08); 983 So. 2d 946, 951 (refusing to exercise jurisdiction to modify because Massachusetts initially decided custody, the father still lived in Massachusetts, and the child was only living in Louisiana pursuant to a temporary order).}
\item \textit{LA. STAT. ANN. § 13:1815(1) (2019).}
\item \textit{LA. STAT. ANN. § 13:1815(2) (2019).}
\item \textit{See generally Gill v. Bennett, 2011-886 (La. App. 3 Cir. 12/7/11); 82 So. 3d 383.}
\end{itemize}
while the father resided in Louisiana.\textsuperscript{1125} Prior to the father's knowledge of his paternity, the child's maternal grandmother obtained an order of permanent guardianship from an Indiana court.\textsuperscript{1126} Subsequently, after the father's paternity was established, the grandmother, mother, and child moved to Louisiana.\textsuperscript{1127} When the relationship between the parties crumbled, the father sought custody of the child.\textsuperscript{1128} The grandmother objected to jurisdiction in Louisiana due to her order of permanent guardianship in Indiana, which required the father to litigate custody there.\textsuperscript{1129} The Louisiana court disagreed. First, the court recognized that the permanent guardianship order constituted a child custody determination in Indiana, so the Indiana court had continuing exclusive jurisdiction over the custody matter.\textsuperscript{1130} However, the Indiana court declined jurisdiction under the UCCJEA, finding that Louisiana was a more appropriate forum given the residence of the child, mother, grandmother (permanent guardian), and father, who all lived in Louisiana.\textsuperscript{1131} Because the father was a longtime resident of and had substantial connections in Louisiana, Louisiana could assume jurisdiction.\textsuperscript{1132}

XV. \textbf{Uniform International Child Abduction Prevention Act}

On August 15, 2007, the Louisiana State Legislature passed the Uniform International Child Abduction Prevention Act.\textsuperscript{1133} This legislation was prompted by the Uniform Child Abduction Prevention Act (UCAPA), which was drafted in 2006 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and approved for recommendation to the states.\textsuperscript{1134}

\textsuperscript{1125} Gill v. Bennett, 2011-886, p. 1 (La. App. 3 Cir. 12/7/11); 82 So. 3d 383, 385.
\textsuperscript{1126} Id.
\textsuperscript{1127} Id.
\textsuperscript{1128} Id.
\textsuperscript{1129} Id. at p. 2; 82 So. 3d at 386.
\textsuperscript{1130} Gill, 2011-886, pp. 4–5; 82 So. 3d at 387.
\textsuperscript{1131} Id. The court also noted that it conferenced with the Louisiana court, which is appropriate under the UCCJEA. See LA. STAT. ANN. § 13:1810 (2019).
\textsuperscript{1132} Gill, 2011-886, p. 5; 82 So. 3d at 387.
\textsuperscript{1133} Act No. 369, 2007 La. Acts 2065–71 (enacted as LA. STAT. ANN. § 13:1851 et seq. (2019)).
The NCCUSL drafted the Uniform Act to deter domestic and international child abductions by parents or those acting on behalf of a parent either before or after a child custody decree has been entered.\textsuperscript{1135} A study commissioned by the Office of Juvenile Justice and Delinquency Prevention found that over 250,000 children were abducted in one year with 78\% of those children abducted by a family member; approximately one-third of the abductions were international.\textsuperscript{1136} UCAPA “is premised on the general principle that preventing an abduction is in a child’s best interest.”\textsuperscript{1137} The Act therefore allows courts to impose prevention measures when there is a credible risk of abduction of a child.\textsuperscript{1138}

Today, fourteen states and the District of Columbia have enacted their own versions of UCAPA.\textsuperscript{1139} Louisiana was one of the first states to adopt a version of the Act in 2007, but its version is more narrow than the Uniform Act. The Louisiana Act only applies when an abduction occurs “beyond the territorial limits of the United States,” hence its name, “International Child Abduction Prevention Act.”\textsuperscript{1140} The original Senate Bill did not limit the Act to international abductions; amendments were proposed by the House Committee and adopted by the house and the senate to limit its scope to international abductions and to require a court to consider all of the factors as provided in the statute when determining whether a credible risk of abduction exists.\textsuperscript{1141}
Under the Act, the court on its own motion or a party in a child custody determination can order or request, as the case may be, abduction prevention measures if there is a credible risk of abduction of the child.\textsuperscript{1142} To determine whether a credible risk of abduction exists, the Act sets forth several factors to guide courts.\textsuperscript{1143} These include the more obvious risk factors, such as previous abduction attempts, previous threats of abduction, or recent activities that indicate a planned abduction,\textsuperscript{1144} but also the less obvious factors, such as quitting one’s job, closing bank accounts, or lacking “strong familial, financial, emotional, or cultural ties to the United States.”\textsuperscript{1145} If a court determines that a credible risk exists, it can issue an order imposing abduction prevention measures or, in certain cases, a warrant to take custody of the child.\textsuperscript{1146}

The court has vast discretion regarding the extent of the abduction prevention order.\textsuperscript{1147} The order may include travel restrictions, prohibitions of travel, and surrender of the child’s passport, among others.\textsuperscript{1148} If a court finds the need to prevent imminent abduction, it can issue an ex parte warrant to take physical custody of the child.\textsuperscript{1149} If the ex parte warrant is granted, the respondent must be given the “opportunity to be heard at the earliest possible time... but not later than the next judicial day unless a hearing on that day is impossible.”\textsuperscript{1150} If the court finds, after a hearing, that the petitioner sought an ex parte warrant for the purpose of harassment or in bad faith, the court may award the respondent costs and fees.\textsuperscript{1151} Any abduction prevention order will be effective until the time provided by the court in the order, the

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\item 1144. Id.
\item 1145. Id. The court must consider all of the factors and evidence. LA. STAT. ANN. § 13:1857(A) (2019).
\item 1146. LA. STAT. ANN. §§ 13:1858(B), :1859(A) (2019).
\item 1147. See LA. STAT. ANN. § 13:1858(B) (2019).
\item 1148. LA. STAT. ANN. § 13:1858(C) (2019). The court is directed to give due consideration to the custody and visitation rights of the parties and to consider the age of the child, the potential harm to the child, and the difficulties that may ensue if the child is abducted. LA. STAT. ANN. § 13:1858(B) (2019).
\item 1149. LA. STAT. ANN. § 13:1859(A) (2019).
\item 1150. LA. STAT. ANN. § 13:1859(B) (2019).
\item 1151. LA. STAT. ANN. § 13:1859(G) (2019).
\end{itemize}
emancipation of the child, the child’s majority, or the time in any subsequent order by a court with jurisdiction, whichever occurs first.\textsuperscript{1152}

In \textit{Mohsen v. Mohsen}, the only Louisiana decision to apply the Act, the court vacated the trial court’s order to surrender the child’s passport, finding that reliance on only one abduction factor was in error.\textsuperscript{1153} In \textit{Mohsen}, the child’s mother sought international visitation so that the child could spend twelve days with her maternal grandparents in Nicaragua.\textsuperscript{1154} The trial court denied her request\textsuperscript{1155} and ordered surrender of the child’s passport, concluding that Nicaragua was not a signatory to the Hague Convention.\textsuperscript{1156} Until the mother could offer proof that “the United States had recourse in the event of an abduction,” the court would not authorize a visit.\textsuperscript{1157} Because the father feared that the mother might travel with the child to Nicaragua even though the court denied her motion, the court ordered surrender of the child’s passport.\textsuperscript{1158} The first circuit vacated that portion of the trial court’s decision, finding that the Act requires a consideration of all factors to determine “whether there [is] a credible risk of abduction of the child, thereby justifying the surrender of the child’s passport.”\textsuperscript{1159}

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\textsuperscript{1153}. Mohsen v. Mohsen, 2008-1703, pp. 8–9 (La. App. 1 Cir. 12/23/08); 5 So. 3d 218, 224.
\textsuperscript{1154}. Id. at pp. 2–3; 5 So. 3d at 220.
\textsuperscript{1155}. Id. at p. 3; 5 So. 3d at 220. The court denied the mother’s motion for international visitation because she did not provide any evidence in support of her motion; she did not even attend the hearing. Id. at p. 4; 5 So. 3d at 221.
\textsuperscript{1156}. Id. at p. 3; 5 So. 3d at 220.
\textsuperscript{1157}. Mohsen, 2008-1703, p. 7; 5 So. 3d at 223–24.
\textsuperscript{1158}. Id. at pp. 7–8; 5 So. 3d at 224.
\textsuperscript{1159}. Id. at p. 8; 5 So. 3d at 224.
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