

“Shop Manual” Regarding the Basics of Ministerial Practice of Family Law

Judge Edwin H. Byrd, III
District Judge, First Judicial District Court

Venue

- Divorce
 - Either party's domicile or last matrimonial domicile. La. C.C.P. art. 394.
- Original support or custody proceeding
 - Either parent's domicile or last matrimonial domicile. La. C.C.P. art. 74.2 (A).
- Modification of custody
 - Where person awarded custody is domiciled, unless that person is now out of state, in which case the domicile of the person seeking custody; or parish where decree was entered. *Id.* at 74.2 (B).
- Custody venue can be waived, but divorce cannot (La. C.C.P. art. 3941).

Evidence

- In custody matters rules are "guidelines." C.E. 1101 (B)(2). Testimonial privileges apply. Exclusionary rules apply "to the extent promote the purpose of the proceeding."

Curators

- Non-resident or absentee:
 - Attorney appointed to represent non-resident or absentee who has not been served. La. C.C.P. art. 5091(A)(1)(a)
- Appointment of attorney is authorized for adoptions to assist the court. Art. 5091.2.
- Appointment of attorney is mandatory to represent child in disavowal action. La. C.C.P. art. 5091.1.
- Payment: reasonable fee, taxed as court costs.

Summary Proceedings in Family Matters

- Custody
- Visitation
- Child support
- Spousal support
- Use of family home
- Use of community property
- Homologation of judicial partition (La. C.C.P. art. 2592(8))

Contempt

- Direct Contempt
 - Act committed in the view of the judge, or a "contumacious" failure to comply with a subpoena or summons.
 - Must be provided opportunity to establish "defense or mitigation," but can be found guilty without a trial.
- Constructive Contempt
 - Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court; any act intended to obstruct or interfere with orderly administration of justice or impair the dignity of the court or respect for its authority which is not direct contempt. La. C.C.P. art. 224.
 - Constructive contempt proceeding requires trial on guilt and punishment, preceded by written motion and rule to show cause served at least 48 hours before trial.

103 Divorce (See, La. C. Civ. P. art. 1702(F))

- Are already separate for requisite time before filing.
 - Apart greater than 180/365 days prior to when petition is filed.
 - Ordinary process.

102 Divorce

- Separated for requisite time after filing.
 - Apart greater than 180/365 days from service of petition or waiver prior to when Rule is filed.
 - Summary process so no default is available.
 - At 180 or 365 days apart you can file Rule and affidavit; after Rule is filed, execute another affidavit that remained separate and apart.

Ancillary Proceedings

- Essentially, “arising out of divorce” is the test for “same transaction or occurrence” for purposes of *lis pendens* analysis even though incidentals do not have to be brought at time of the divorce petition. See *Gamble v. Gamble*. Example:
 - Divorce without incidentals filed in Caddo; divorce with incidentals filed in Bossier. *Lis Pendens* is proper in Bossier, as Caddo was to hear all actions arising out of the divorce, i.e., incidentals. (Unless divorce is granted, in which case you can file incidentals in another court) (note that per La. C.C.P. art. 435, domestic claims are excepted from *res judicata*).

Summary of La. Civ. C. art. 134 Factors

- Potential for abuse
- Love/affection/emotional support
- Capacity to give love/affection/emotional support
- Capacity to support (\$)
- Length of stable environment
- Continuity of family unit
- Moral fitness as effects welfare of the child
- History of
 - Substance abuse
 - Violence
 - Criminal activity
- Mental and physical health of parents
- Home/school/community history
- Preference of child (if capable)
- Willingness to facilitate relationship with other parent
- Distance
- History of responsibility for the child

Types of Custody

- Legal v. physical
- Joint – presumed unless clear and convincing that not in best interest, there is La. R.S. 9:364 abuse, or there is agreement (and no La. R.S. 9:364 abuse).
- Sole to one parent – only if clear and convincing evidence.
- Shared – equal time: feasible and in best interest of the child, La. R.S. 9:315.9.
(45/55 v. 50/50 percent to get on worksheet B for support).
- Split: each parent has custody of one or more children.

Standard for Custody Modification

- Interim order – without prejudice so can modify without limitation
- Consent judgment – *Evans v. Lungrin*: material change and best interest of child
- Considered decree – *Bergeron v. Bergeron*: current status is “so deleterious...as to justify modification,” but “tweeking” is not as burdensome.

3945 Emergency *Ex Parte* Custody Order (La. C.C.P. art. 3945)

- Immediate and irreparable harm and must explain why no notice.
- Null if no compliance with requirements.
- If granted:
 - Expires at 30 days, but can extend once for 15 days for good cause.
 - Temporary visitation required of no less than 48 hours each 15 days.
- If denied:
 - Hearing within 30 days.

Custody Where There is Domestic Violence

- There is a presumption against joint custody, i.e., a presumption of sole custody for other parent, and only supervised visitation if there is:
 - History of family violence. La. R.S. 9:362. “History” means a single incident with “serious bodily injury,” or more than one incident of family violence. *Simmons v. Simmons*, 26,414 (La. App. 2 Cir. 1/25/95); 649 So.2d 799, 801 **or**
 - Domestic Abuse, La. R.S. 46:2132, which is any “offense against the person” (except defamation or negligent injury).

- To overcome presumption:
 - Domestic abuse program
 - No abuse of alcohol or illegal substances
 - Best interest of the child
- For return to non-supervised visitation:
 - Attend domestic abuse program
 - Court will consider current mental state
 - Best interest of the child

Domiciliary Parent

- Required if joint custody
- Makes major decisions, but subject to Rule to challenge by other parent
- Must confer regarding “health, education, and welfare.” La. R.S. 9:336
- No co-domiciliary parents permitted
- Joint custody implementation order (JCIO) is mandatory absent good cause but simply needs to set forth periods of custody and legal authority of each parent
- Alternative to having a domiciliary parent is parenting coordinator or specified provisions in a JCIO

Relocation of Child

- 75 miles or out of state need to follow procedure, certified mail, etc., except that, although a consideration, failure to follow the procedure is not a procedural bar to relocation. La. R.S. 9:3511.1 – 355.19.

Visitation

- Parent not granted custody “shall” have reasonable visitation. La. Civ. C. art. 136 (if *ex parte* 3945 order, minimum 48 hours per 15 days).

- Parenting Coordinator
 - Can appoint for up to two one-year terms by agreement or good cause.
- Mental Health Evaluations
 - With good cause and hearing. 9:331.
- Parenting Education Programs
 - With good cause and hearing. 9:331.2.

Attorney for the Child

- Allowed, after hearing, in any custody case if in best interest; required where there is abuse and required in disavowal actions.
- Before court ordered grandparent visitation need hearing to determine whether an attorney should be appointed.

Watermeier Interview

- In chambers (or closed courtroom)
- First must establish that child is competent and do this with lawyer participation, then court can interview the child if competent, but lawyers only there to observe
- Parties may consent to have no lawyers present for any or all of this

Child Support – Use of Guidelines and Worksheets (La. R.S. 9:315-320)

- Physical custody determines which worksheet is used; worksheet B if shared physical custody (45-50%); worksheet A if not shared physical custody.

Worksheet A – Non-Shared Custody (not 45/55 to 50/50)

- 1. What is combined monthly gross?
 - Father, \$10,000/month
 - Mother, \$5,000/month
 - Combined, \$15,000/month
- 2. Apply guideline based on combined income and number of children. Per guideline for one child and \$15,000 combined monthly income, \$1,538 per month
- 3. Calculate percentages based only on income; \$10,000 to \$5,000 provides that father is .667 percent.
- 4. Apply those percentages to \$1,538 to determine basic child support obligation: Father = $.667 \times \$1,538 = \$1,025$
- 5. Father owes mother \$1,538 per month in basic child support

Worksheet B – Shared Custody (45/55 to 50/50)

- 1. What is combined monthly gross?
 - Father, \$10,000/month
 - Mother, \$5,000/month
 - Combined, \$15,000/month
- 2. Apply guideline based on combined income and number of children: Per guidelines for one child and \$15,000 combined income, \$1,538 per month
- 3. Multiply $\$1,538 \times 1.5 = \$2,307$
- 4. Calculate percentages based only on income; \$10,000 to \$5,000 provides that father is .667 percent and mother .333 percent
- 5. Apply those percentages to \$2,307 to determine basic child support obligation.
 - a. Father: .667 of \$2,307 (\$1,538)
 - b. Mother: .333 of \$2,307 (\$768)
- 6. Each owe 50%, father \$769; mother \$384
- 7. Subtract mother from father and father owes mother \$385 per month.

Spousal Support – Interim Spousal Support

- Based on need, ability to pay, and standard of living
- Lifestyle maintained as best as income allows
- Shortcut: can compare income for each spouse, minus child support, then $\frac{1}{2}$ of the result goes to the other spouse

Final Spousal Support

- Not at fault
- Based on need and ability to pay
- Maintenance only, not “accustomed to” style of living
- Less than one-third of net income (unless there is abuse). La. C.C. art. 112 (D).

Property Issues – Community Property Basics

- Fruits are community unless reserved. La. C.C. art. 2339
- Presumption of community. La. C.C. art. 2341
- Donation of community to other spouse transforms to separate. La. C.C. art. 2343
- Can transfer separate to community. La. C.C. art. 2343.1
- Personal injury damages are separate (other than economic). La. C.C. art. 2344

Rental Reimbursement

- $\frac{1}{2}$ of rental value of community home is owed by spouse occupying home. Note that interest paid on debt for benefit of separate property is community so no reimbursement, but principal is subject to reimbursement.

Interim Use of Matrimonial Domicile

- Consider relative economic status, needs of children, and best interest 134 factors. La. R.S. 9:374.
- If home is separate property of a spouse, then that parent gets use unless custodial parent petitions for use and satisfies La. R.S. 9:374.
- If home is community, apply La. R.S. 9:374.
- If 102 can remove a parent from home.

9:2801 Process to Partition

- 45 days to file detailed descriptive list (DDL) after motion
- 60 days to traverse other DDL after DDLs are filed
- Classification is summary procedure and valuation is ordinary procedure, but court cant elect to do both in one trial using ordinary procedure
- If failure to timely file DDL, following motion court will accept the timely classification absent good cause, and therefore there will be no summary classification trial but will only have trial on valuation and this by ordinary procedure

Disposal of Community

- Spouse has authority to dispose of community without consent. Accordingly, La. R.S. 9:371 *ex parte* orders issue to prevent disposition pending partition.

Reimbursement

- Process of allocation of benefit to one spouse by the other spouse's separate property that is not a reasonable and necessary expense of the marriage.
- For example, separate property used to satisfy other spouse's separate debt or the value of separate property increases due to labor during marriage.
- Reimbursement can be 100% or 50% of contribution:
 - If use of separate to benefit community, can claim reimbursement of 50% of separate property used
 - If use separate to benefit separate, can claim reimbursement of 100% of separate property used

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (La. R.S. 13:1801 et.seq.)

- Home state is child's location for six months immediately before the proceeding
- Even if Louisiana is not home state, emergency jurisdiction can be exercised in Louisiana for enough time to allow parent to file proceeding in home state (La. R.S. 13:1816)