

# **DIVORCE 101: BASICS FOR THE NON-FAMILY LAW ATTORNEY**

Presented by Taylor Fontenot  
Lafayette Bar Association - CLE By The Hour  
December 21, 2018

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## I. DIVORCE

### A. Jurisdiction and Venue

#### La. C.C.P. Art. 10. Jurisdiction Over Status

A. A court which is otherwise competent under the laws of this state has jurisdiction of the following actions or proceedings only under the following conditions:

...

(7) An action of divorce, if, *at the time of filing*, one or both of the spouses are domiciled in this state.

B. For purposes of Subparagraphs (6) and (7) of Paragraph A of this Article, if a spouse has established and maintained a residence in a parish of this state for a period of six months, there shall be a rebuttable presumption that he has a domicile in this state in the parish of such residence.

#### La. C.C.P. Art. 3941. Court Where Action Brought; Nullity of Judgment of Court of Improper Venue

A. An action for an annulment of marriage or for a divorce shall be brought in a parish where either party is domiciled, or in the parish of the last matrimonial domicile.

B. The venue provided in this Article may not be waived, and a judgment rendered in either of these actions by a court of improper venue is an absolute nullity.

### B. Divorce Under La. C.C. Art. 102<sup>1</sup>

#### La. C.C. Art. 102. Judgment of Divorce; Living Separate and Apart Prior to Rule

Except in the case of a covenant marriage, a divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that the requisite period of time, in accordance with Article 103.1, has elapsed from the service of the petition, or from the execution of written waiver of the service, and that the spouses have lived separate and apart continuously for at least the requisite period of time, in accordance with Article 103.1, prior to the filing of the rule to show cause.

The motion shall be a rule to show cause filed after all such delays have elapsed.

#### La. C.C. Art. 103.1. Judgment of Divorce; Time Periods

The requisite periods of time, in accordance with Articles 102 and 103 shall be as follows:

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<sup>1</sup> For a 102 Divorce Checklist, see [http://www.lasc.org/rules/dist.ct/Title\\_IV/APPENDIX\\_27.0A.pdf](http://www.lasc.org/rules/dist.ct/Title_IV/APPENDIX_27.0A.pdf)

(1) One hundred eighty days where there are no minor children of the marriage.

(2) Three hundred sixty-five days when there are minor children of the marriage at the time the rule to show cause is filed in accordance with Article 102 or a petition is filed in accordance with Article 103.

#### La. C.C. Art. 104. Reconciliation

The cause of action for divorce is extinguished by the reconciliation of the parties.<sup>2</sup>

#### La. C.C.P. Art. 1201. Citation; Waiver; Delay for Service

A. Citation and service thereof are essential in all civil actions except summary and executory proceedings, divorce actions under [Civil Code Article 102](#), and proceedings under the Children's Code. Without them all proceedings are absolutely null

B. The defendant may expressly waive citation and service thereof by any written waiver made part of the record.

C. Service of the citation shall be requested on all named defendants within ninety days of commencement of the action. When a supplemental or amended petition is filed naming any additional defendant, service of citation shall be requested within ninety days of its filing. The defendant may expressly waive the requirements of this Paragraph by any written waiver. The requirement provided by this Paragraph shall be expressly waived by a defendant unless the defendant files, in accordance with the provisions of Article 928, a declinatory exception of insufficiency of service of process specifically alleging the failure to timely request service of citation.

D. If not waived, a request for service of citation upon the defendant shall be considered timely if requested on the defendant within the time period provided by this Article, notwithstanding insufficient or erroneous service.

#### La. C.C.P. Art. 3951. Petition for Divorce

A petition for divorce under [Civil Code Article 102](#) shall contain allegations of jurisdiction and venue and shall be verified by the affidavit of the petitioner.

#### La. C.C.P. Art. 3952. Rule to Show Cause and Affidavit

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<sup>2</sup> Reconciliation extinguishing a cause of action for divorce is an issue of fact to be decided by the trial court after careful consideration of the particular facts and circumstances of each particular case; the overall circumstances of the case must show a mutual intention to resume the marital relationship in order for an alleged reconciliation to interrupt the continuity of a period of separation. [Orihuela v. Orihuela, App. 5 Cir.2015, 184 So.3d 182, 15-460 \(La.App. 5 Cir. 12/23/15\)](#).

One isolated incident of sexual intercourse is not controlling but is only one factor to be considered. [Eppling v. Eppling, App. 5 Cir.1989, 537 So.2d 814](#), writ denied [538 So.2d 619](#).

Defense of reconciliation is an affirmative defense to a separation or divorce action and defendant must prove it by preponderance of evidence. [Ogea v. Ogea, App. 3 Cir.1979, 378 So.2d 984](#), writ denied [379 So.2d 1104](#).

The rule to show cause provided in [Civil Code Article 102](#) shall allege proper service of the initial petition for divorce, that the requisite period of time, in accordance with [Civil Code Article 103.1](#), or more has elapsed since that service, and that the spouses have lived separate and apart continuously for the requisite period of time, in accordance with [Civil Code Article 103.1](#). The rule to show cause shall be verified by the affidavit of the mover and shall be served on the defendant, the defendant's attorney of record, or the duly appointed attorney for the defendant prior to the granting of the divorce, unless service is waived by the defendant.

#### La. C.C.P. Art. 3953. Nullity of Judgment

A judgment rendered in accordance with [Civil Code Article 102](#) shall be an absolute nullity when:

(1) Less than the requisite period of time, in accordance with Article 103.1, has elapsed between service of the petition, or between execution of written waiver of service of the petition, and filing of the rule to show cause.

(2) Less than the requisite period of time, in accordance with Article 103.1, has elapsed between the date the parties commenced living separate and apart and filing of the rule to show cause.

(3) The requirements of this Title with respect to jurisdiction and venue have not been met.

#### La. C.C.P. Art. 3954. Abandonment of Action

A. A divorce action instituted under [Civil Code Article 102](#) is abandoned if the rule to show cause provided by that Article is not filed within two years of the service of the original petition or execution of written waiver of service of the original petition.

B. This provision shall be operative without formal order, but on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of abandonment.

#### La. C.C.P. Art. 3955. Service of Petition

A. When a petition for divorce is filed in accordance with [Civil Code Article 102](#), service of the petition shall be requested on the defendant within ninety days of the filing of the petition.

B. If the defendant is an absentee, the request for appointment of an attorney to represent the absentee defendant within ninety days of commencement of the action constitutes compliance with the requirements of Paragraph A of this Article.

C. The defendant may expressly waive the requirements of Paragraph A of this Article by any written waiver.<sup>3</sup> The requirement provided by Paragraph A of this Article shall be expressly waived by a defendant unless the defendant files, in accordance with the provisions of Article 928, a declinatory exception of insufficiency of service of process specifically alleging the failure to timely request service of the petition, in which case, after due proceedings, the action shall be dismissed.

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<sup>3</sup> For a form waiver of the petition, see [http://www.lasc.org/rules/dist.ct/Title\\_IV/APPENDIX\\_27.1A.pdf](http://www.lasc.org/rules/dist.ct/Title_IV/APPENDIX_27.1A.pdf)

D. If not waived, a request for service of citation upon the defendant shall be considered timely if requested on the defendant within the time period provided by this Article, notwithstanding insufficient or erroneous service.

#### La. C.C.P. Art. 3956. Evidence of Facts in Divorce Action

The facts entitling a moving party to a divorce in accordance with [Civil Code Article 102](#) may be established by:

- (1) The petition for divorce.
- (2)(a) The sheriff's return of service of the petition.
- (b) The sheriff's return of service of the petition showing personal service on the defendant if the parties were living together at the time of the filing of the petition.
- (c) The return receipt when service is effectuated pursuant to [R.S. 13:3204](#).
- (d) Waiver of the service of petition.
- (3) The rule to show cause and the affidavit required by [Code of Civil Procedure Article 3952](#).
- (4) The sheriff's return of service of the rule, or by a waiver of that service.
- (5) The affidavit of the mover, executed after the filing of the rule, that the parties have lived separate and apart continuously for at least the requisite period of time, in accordance with [Civil Code Article 103.1](#), prior to the filing of the rule to show cause and are still living separate and apart and that the mover desires to be divorced.

#### La. C.C.P. Art. 3957. Waiver of Service of Petition and Rule to Show Cause and Accompanying Notices

A. A party in a divorce action under [Civil Code Article 102](#) may expressly waive service of the petition and accompanying notice by any written waiver executed after the filing of the petition and made part of the record.

B. If there is such a waiver, the periods specified by [Civil Code Article 102](#) and [Code of Civil Procedure Articles 3953](#) and [3954](#) shall run from the date of execution of the waiver.

C. A party in a divorce action under [Civil Code Article 102](#) may expressly waive service of the rule to show cause why a divorce should not be granted and accompanying notice by any written waiver executed after the filing of the rule to show cause and made part of the record.<sup>4</sup>

#### La. C.C.P. Art. 3958. Voluntary Dismissal

A judgment dismissing a petition for divorce under [Civil Code Article 102](#) shall be rendered upon joint application of the parties and upon payment of all costs, or upon contradictory motion of the plaintiff. A judgment of dismissal rendered under this Article shall be without prejudice to any separation of property decree rendered under [Civil Code Articles 2374](#) and [2375](#).

### **C. Divorce Under La. C.C. Art. 103**

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<sup>4</sup> For a form waiver of the rule to show cause, see [http://www.lasc.org/rules/dist.ct/Title\\_IV/APPENDIX\\_27.1B.pdf](http://www.lasc.org/rules/dist.ct/Title_IV/APPENDIX_27.1B.pdf)

### La. C.C. Art. 103. Judgment of Divorce; Other Grounds

Except in the case of a covenant marriage, a divorce shall be granted on the petition of a spouse upon proof that:

(1) The spouses have been living separate and apart continuously for the requisite period of time, in accordance with Article 103.1, or more on the date the petition is filed.

(2) The other spouse has committed adultery.<sup>5</sup>

(3) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.

(4) During the marriage, the other spouse physically or sexually abused the spouse seeking divorce or a child of one of the spouses, regardless of whether the other spouse was prosecuted for the act of abuse.

(5) After a contradictory hearing or consent decree, a protective order or an injunction was issued during the marriage against the other spouse to protect the spouse seeking the divorce or a child of one of the spouses from abuse.

### La. C.C. Art. 103.1. Judgment of Divorce; Time Periods

The requisite periods of time, in accordance with Articles 102 and 103 shall be as follows:

(1) One hundred eighty days where there are no minor children of the marriage.

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<sup>5</sup> “Adultery” is a violation of the marriage bed and is sexual intercourse between a married man and a woman not his wife, or between a married woman and a man not her husband, as that term is used in statute providing that a petitioner shall be granted a divorce upon proof that the other spouse has committed adultery. Marcotte v. Marcotte, 2004-0293 (La. App. 3 Cir. 11/10/04); 886 So. 2d 671.

Finding of repeated sexual contact in that wife slept in same bed with another man, that she touched other man's sexual organ and that he touched hers, and that they laid on top of each other was sufficient to establish adultery for purposes of divorce statute, even if they did not have sexual intercourse. Bonura v. Bonura, La. App. 4 Cir. 1987, 505 So. 2d 143, writ denied 506 So.2d 113.

“Adultery,” in context of divorce proceeding, included noncoital acts, specifically including commission of “oral sex.” Menge v. Menge, La. App. 5 Cir. 1986, 491 So. 2d 700.

Spouse seeking divorce has the burden of proving his claim of adultery by a preponderance of the evidence. Barnett v. Barnett, 2015-0766 (La. App. 5 Cir. 5/26/16), 193 So. 3d 460; writ denied 2016-1205 (La. 10/10/16), 207 So.3d 406,.

The facts and circumstances must lead fairly and necessarily to the conclusion that adultery has been committed as alleged in the petition in order for court to grant divorce on basis of adultery. Tidwell v. Tidwell, 49,512 (La.App. 2 Cir. 11/19/14); 152 So.3d 1045.

Preponderance of the evidence standard, rather than proof so convincing as to exclude any other reasonable hypothesis, applied in husband's action for divorce premised on adultery; husband was not relying only on circumstantial evidence but, instead, relied on content of wife's deposition, in which wife admitted to having sex with another man a number of times after she filed divorce petition. Tidwell v. Tidwell, 49,512 (La.App. 2 Cir. 11/19/14); 152 So.3d 1045.

(2) Three hundred sixty-five days when there are minor children of the marriage at the time the rule to show cause is filed in accordance with Article 102 or a petition is filed in accordance with Article 103.

La. C.C.P. Art. 969. Judgment on Pleadings and Summary Judgment Not Permitted in Certain Cases; Exception<sup>6</sup>

A. Judgments on the pleadings and summary judgments shall not be granted in any action for divorce or annulment of marriage, nor in any case where the community, paraphernal, or dotal rights may be involved in an action between husband and wife.

B. (1) Notwithstanding the provisions of Paragraph A, judgments on the pleadings and summary judgments may be granted without hearing in any action for divorce under [Civil Code Article 103\(1\)](#) under the following conditions:

(a) All parties are represented by counsel;

(b) Counsel for each party, after answer is filed, file a written joint stipulation of facts, request for judgment, and sworn verification by each party; and

(c) Counsel for each party file a proposed judgment containing a certification that counsel and each party agree to the terms thereof.

(2) The court may render and sign such judgments in chambers without a hearing and without the taking of testimony.

La. C.C.P. Art. 1701. Preliminary Default

...

B. When a defendant in an action for divorce under Civil Code Article 103(1), by sworn affidavit, acknowledges receipt of a certified copy of the petition and waives formal citation, service of process, all legal delays, notice of trial, and appearance at trial, a preliminary default may be entered against the defendant the day on which the affidavit is filed. The affidavit of the defendant may be prepared or notarized by any notary public. The preliminary default may be obtained by oral motion in open court or by written motion mailed to the court, either of which shall be entered in the minutes of the court, but the preliminary default shall consist merely of an entry in the minutes. Notice of the entry of the preliminary default is not required.

La. C.C.P. Art. 1702. Confirmation of Preliminary Default<sup>7</sup>

...

E. Notwithstanding any other provisions of law to the contrary, when the demand is for divorce under Civil Code Article 103(1) or (5), whether or not the demand contains a claim for relief incidental or ancillary thereto, a hearing in open court shall not be required unless the judge, in his discretion, directs that a hearing be held. The plaintiff shall submit to the court an affidavit specifically attesting to and testifying as to the truth of all of the factual allegations contained in the petition, the original and not less than one copy of the proposed final judgment, and a

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<sup>6</sup> For a 969(B) Checklist, see [http://www.lasc.org/rules/dist.ct/Title\\_IV/APPENDIX\\_28.2B.pdf](http://www.lasc.org/rules/dist.ct/Title_IV/APPENDIX_28.2B.pdf)

<sup>7</sup> For a 1702(E) Checklist, see [http://www.lasc.org/rules/dist.ct/Title\\_IV/APPENDIX\\_28.1B.pdf](http://www.lasc.org/rules/dist.ct/Title_IV/APPENDIX_28.1B.pdf)

certification which shall indicate the type of service made on the defendant, the date of service, the date a preliminary default was entered, and a certification by the clerk that the record was examined by the clerk, including the date of the examination, and a statement that no answer or other pleading has been filed. If the demand is for divorce under Civil Code Article 103(5), a certified copy of the protective order or injunction rendered after a contradictory hearing or consent decree shall also be submitted to the court. If no answer or other pleading has been filed by the defendant, the judge shall, after two days, exclusive of holidays, of entry of a preliminary default, review the affidavit, proposed final default judgment, and certification, render and sign the proposed final default judgment, or direct that a hearing be held. The minutes shall reflect rendition and signing of the final default judgment.

## **II. INCIDENTAL MATTERS**

### La. C.C. Art. 105. Determination of Incidental Matters

In a proceeding for divorce or thereafter, either spouse may request a determination of custody, visitation, or support of a minor child; support for a spouse; injunctive relief; use and occupancy of the family home or use of community movables or immovables; or use of personal property.

### La. C.C.P. Art. 2592. Use of Summary Proceedings

Summary proceedings may be used for trial or disposition of the following matters only:

...

(8) The original granting of, subsequent change in, or termination of custody, visitation, and support for a child; support for a spouse; injunctive relief; support between ascendants and descendants; use and occupancy of the family home or use of community movables or immovables; or use of personal property.

## **A. CHILD CUSTODY**

### **1. Jurisdiction and Venue**

#### La. C.C.P. Art. 10. Jurisdiction Over Status

A. A court which is otherwise competent under the laws of this state has jurisdiction of the following actions or proceedings only under the following conditions:

...

(5) A proceeding to obtain the legal custody of a minor if he is domiciled in, or is in, this state.

#### La. C.C.P. Art. 74.2. Custody Proceedings; Support; Forum Non Conveniens

A. A proceeding to obtain the legal custody of a child or to establish an obligation of support may be brought in the parish where a party is domiciled or in the parish of the last matrimonial domicile.

B. A proceeding for change of custody may be brought in the parish where the person awarded custody is domiciled or in the parish where the custody decree was rendered. If the person awarded custody is no longer domiciled in the state, the proceeding for change of custody may be brought in the parish where the person seeking a change of custody is domiciled or in the parish where the custody decree was rendered.

## **2. Establishing Custody; Best Interest of the Child**

### La. C.C. Art. 131. Court to Determine Custody

In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child.

### La. C.C. Art. 132. Award of Custody to Parents

If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the provisions of [R.S. 9:364](#) apply or the best interest of the child requires a different award. Subject to the provisions of [R.S. 9:364](#), in the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.

### La. C.C. Art. 133. Award of Custody to Person Other Than a Parent; Order of Preference

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.

### La. C. C. Art. 134. Factors in Determining Child's Best Interest

*\*Italics = New provisions effective May 23, 2018.*

A. Except as provided in Paragraph B of this Article, the court shall consider all relevant factors in determining the best interest of the child, including:

*(1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration.*

(2) The love, affection, and other emotional ties between each party and the child.

(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.

(4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.

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

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

(7) The moral fitness of each party, insofar as it affects the welfare of the child.

- (8) *The history of substance abuse, violence, or criminal activity of any party.*
- (9) *The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.*
- (10) *The home, school, and community history of the child.*
- (11) *The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.*
- (12) *The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, 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.*
- (13) *The distance between the respective residences of the parties.*
- (14) *The responsibility for the care and rearing of the child previously exercised by each party.*

*B. In cases involving a history of committing family violence, as defined in [R.S. 9:362](#), or domestic abuse, as defined in [R.S. 46:2132](#), including sexual abuse, as defined in [R.S. 14:403\(A\)\(4\)\(b\)](#), whether or not a party has sought relief under any applicable law, the court shall determine an award of custody or visitation in accordance with [R.S. 9:341](#) and 364. The court may only find a history of committing family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence.*

#### La. C. C. Art. 136. Award of Visitation Rights

A. Subject to [R.S. 9:341](#) and 364, 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. In addition to the parents referred to in Paragraph A of this Article, the following persons may be granted visitation if the parents of the child are not married or cohabitating with a person in the manner of married persons or if the parents of the child have filed a petition for divorce:

- (1) A grandparent if the court finds that it is in the best interest of the child.
- (2) Under extraordinary circumstances, any other relative, by blood or affinity, or a former stepparent or stepgrandparent if the court finds that it is in the best interest of the child. Extraordinary circumstances shall include a determination by a court that a parent is abusing a controlled dangerous substance.

C. Before making any determination under Subparagraph (B)(1) or (2) of this Article, the court shall hold a contradictory hearing as provided by [R.S. 9:345](#) in order to determine whether the court should appoint an attorney to represent the child.

D. In determining the best interest of the child under Subparagraph (B)(1) or (2) of this Article, the court shall consider only the following factors:

- (1) A parent's fundamental constitutional right to make decisions concerning the care, custody, and control of their own children and the traditional presumption that a fit parent will act in the best interest of their children.
- (2) The length and quality of the prior relationship between the child and the relative.
- (3) Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
- (4) The preference of the child if he is determined to be of sufficient maturity to express a preference.
- (5) The mental and physical health of the child and the relative.

E. If the parents of a child are married and have not filed for divorce or they are living in concubinage, the provisions of [R.S. 9:344](#) shall apply.

### **3. Joint Custody**

#### **La. R.S. 9:335. Joint Custody Decree and Implementation Order; Custody During an Emergency or Disaster**

A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.

(2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.

(b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.

(c) The implementation order shall include a provision that when either party is required to evacuate this state with a minor child because of an emergency or disaster declared under the provisions of [R.S. 29:721 et seq.](#), or declared by federal authority and it becomes impossible for the parties to exercise custody as provided in the judgment, the parties shall engage in continuous communication regarding the safe evacuation of the child, the location of the child during and after the emergency or disaster, and an interim custody plan for the child until the custody provisions of the judgment can be resumed.

(3) The implementation order shall allocate the legal authority and responsibility of the parents.

B. (1) In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown.<sup>8</sup>

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<sup>8</sup> Although each parent can share physical custody, the court can only designate a single domiciliary parent. [Hodges v. Hodges](#), 2015-0585, p. 9 (La. 11/23/15), 181 So. 3d 700, 706.

The court can choose not to designate a domiciliary parent at all and, instead, to allocate authority by means of an implementation order. [Hodges v. Hodges](#), 2015-0585, p.13 (La. 11/23/15, 13), 181 So. 3d 700, 708–09.

(2) The domiciliary parent is the parent with whom the child shall primarily reside, but the other parent shall have physical custody during time periods that assure that the child has frequent and continuing contact with both parents.

(3) The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.

C. If a domiciliary parent is not designated in the joint custody decree and an implementation order does not provide otherwise, joint custody confers upon the parents the same rights and responsibilities as are conferred on them by the provisions of Title VII of Book I of the Civil Code.

#### La. R.S. 9:336. Obligation of Joint Custodians to Confer

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.

### **4. Custody Modifications**

A stipulated custody order is one where the parties consent to a custodial arrangement and no evidence of parental fitness is presented to the court. The party seeking modification of a stipulated custody order must prove that there has been a material change of circumstances since the original custody decree was entered, and that the proposed modification is in the best interest of the child. [Evans v. Lungrin, 708 So. 2d 731 \(La. 1998\)](#).

A considered decree is an award of permanent custody in which the trial court receives evidence of parental fitness to exercise care, custody and control of the children. [Evans v. Lungrin, 708 So. 2d 731 \(La. 1998\)](#). When a considered decree is at issue, the party seeking a change of custody bears the burden of proving that a continuation of the present custody is so deleterious to the child as to justify a modification of custody, or of proving by clear and convincing evidence that any harm likely to be caused by a change of environment is substantially outweighed by the advantages to the child. [Bergeron v. Bergeron, 492 So. 2d 1193 \(La. 1986\)](#).

### **5. Emergency Custody**

#### La. C.C.P. Art. 3945. Incidental Order of Temporary Child Custody; Injunctive Relief; Exceptions

A. The injunctive relief afforded either party to an action for divorce or other proceeding which includes a provision for the temporary custody of a minor child shall be governed by the additional provisions of this Article.

B. An ex parte order of temporary custody of a minor child shall not be granted unless:

(1) It clearly appears from specific facts shown by a verified petition or by supporting affidavit that immediate and irreparable injury will result to the child before the adverse party or his attorney can be heard in opposition.

(2) The applicant's attorney certifies to the court, in writing, either:

(a) The efforts which have been made to give the adverse party reasonable notice of the date and time such order is being presented to the court.

(b) The reasons supporting his claim that notice should not be required.

C. An ex parte order of temporary custody shall:

(1) Expire by operation of law within thirty days of signing of the order; however, the order may be extended for good cause shown at any time before its expiration for one period not exceeding fifteen days.

(2) Provide specific provisions for temporary visitation by the adverse party of not less than forty-eight hours during any fifteen-day period, unless the verified petition or supporting affidavit clearly demonstrates that immediate and irreparable injury will result to the child as a result of such visitation.

(3) Be endorsed with the date on which the ex parte order is signed and the date and hour of the rule to show cause.

D. The rule to show cause why the respondent should not be awarded the custody, joint custody, or visitation of the child shall be assigned for hearing not more than thirty days after signing of the ex parte order of temporary custody.

E. Any ex parte order not in compliance with the provisions of this Article is not enforceable, and is null and void.

F. In the event an ex parte order of temporary custody is denied, the court shall specifically allocate between the parents the time which the child shall spend with each parent at the hearing on the rule to show cause set pursuant to Paragraph D of this Article, unless immediate and irreparable injury will result to the child.

G. The provisions of this Article do not apply to any order of custody of a child requested in a verified petition alleging the applicability of the Domestic Abuse Assistance Act, [R.S. 46:2131 et seq.](#), [Children's Code Article 1564 et seq.](#), or the Post-Separation Family Violence Relief Act, [R.S. 9:361 et seq.](#)

La. Dist. Ct. Rules Appendix 29.0(C). Court-Specific Rules Concerning Ex Parte Custody Orders; 15th JDC

A. All requests for ex parte child custody must be pled in accordance with one of the following statutes: (1) La. R.S. 46:2131 et seq., Domestic Abuse Assistance Act; (2) La. R.S. 9:361, 363, 364, Post Separation Family Violence Relief Act; (3) La. C.C.P. Art. 3945, Incidental Order of Child Custody; (4) La. Ch. Code 1564, et seq., Domestic Abuse Assistance Act; or (5) Any other statute expressly permitting such relief.

B. All applications for ex parte custody shall include the Appendix 29.0A Affidavit of Mover in Compliance with La. C.C.P. art. 3945(B) and Appendix 29.0B Certification by Applicant's Attorney in Compliance with La. C.C.P. art. 3945(B) if represented by counsel.

C. If an ex parte custody order is sought seeking to modify an existing legal custody order, the suit record must accompany the application. In addition to the certificate and/or affidavit required in Section B above, there must be a non-party affidavit attesting to the facts in support of the ex parte modification order or other supporting documentation or information.

D. Any Order granting temporary ex parte custody shall contain a provision which prohibits the parents or parties from changing the child's residence from the jurisdiction of the court or changing the child's school unless otherwise ordered by the Court.

E. The petition shall provide for a Rule to Show Cause in the proper division and except for good cause shown or where prohibited by law, the application must provide for visitation substantially in compliance with La. C.C.P. art. 3945.

F. The provisions of this Rule do not apply to any order of custody of a child requested in a verified petition alleging the applicability of the Domestic Assistance Act R.S. 46:2131 et seq. Children's Code Article 1564 et seq. or the Post Separation Family Violence Relief Act, R.S. 9:361 et seq. G. On the motion of a party, or on its own motion, the Court may impose appropriate sanctions pursuant to La. C.C.P. art. 863D for certifications that are not based in good faith.

## **6. Other Provisions Related to Child Custody**

- a) Evaluation By Mental Health Professional - See La. R.S. 9:331
- b) Drug Testing - See La. R.S. 9:331.1
- c) Provisional Custody By Mandate - See. La. R.S. 9:951, et, seq.
- d) Voluntary Transfer of Custody - See. La. Ch. C. Art. 1510, et, seq.
- e) Relocation - See La. R.S. 9:355.1 et, seq.
- f) Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) - See La. R.S. 13:1801, et. seq.

## **B. CHILD SUPPORT**

### **1. Louisiana Child Support Guidelines - La. R.S. 9:315, et seq.**

#### La. R.S. 9:315. Economic Data and Principles; Definitions

**A. Basic principles.** The premise of these guidelines as well as the provisions of the Civil Code is that child support is a continuous obligation of both parents, children are entitled to share in the current income of both parents, and children should not be the economic victims of divorce or out-of-wedlock birth. The economic data underlying these guidelines, which adopt the Income Shares Model, and the guideline calculations attempt to simulate the percentage of parental net

income that is spent on children in intact families incorporating a consideration of the expenses of the parties, such as federal and state taxes and FICA taxes. While the legislature acknowledges that the expenditures of two-household divorced, separated, or non-formed families are different from intact family households, it is very important that the children of this state not be forced to live in poverty because of family disruption and that they be afforded the same opportunities available to children in intact families, consisting of parents with similar financial means to those of their own parents.

**B. Economic data.**

(1) The Incomes Shares approach to child support guidelines incorporates a numerical schedule of support amounts. The schedule provides economic estimates of child-rearing expenditures for various income levels and numbers of children in the household. The schedule is composed of economic data utilizing a table of national averages adjusted to reflect Louisiana's status as a low-income state and to incorporate a self-sufficiency reserve for low-income obligors to form the basic child support obligation.

(2) In intact families, the income of both parents is pooled and spent for the benefit of all household members, including the children. Each parent's contribution to the combined income of the family represents his relative sharing of household expenses. This same income sharing principle is used to determine how the parents will share a child support award.

**C. Definitions.** As used in this Part:

(1) "Adjusted gross income" means gross income, minus:

(a) Amounts for preexisting child support or spousal support obligations owed under an order of support to another who is not a party to the proceedings and

(b) At the court's discretion, amounts paid on behalf of a party's minor child who is not the subject of the action of the court.

(2) "Combined adjusted gross income" means the combined adjusted gross income of both parties.

(3) "Gross income" means:

(a) The income from any source, including but not limited to salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, recurring monetary gifts, annuities, capital gains, social security benefits, workers' compensation benefits, basic and variable allowances for housing and subsistence from military pay and benefits, unemployment insurance benefits, disaster unemployment assistance received from the United States Department of Labor, disability insurance benefits, and spousal support received from a preexisting spousal support obligation;

(b) Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business, if the reimbursements or payments are significant and reduce the parent's personal living expenses. Such payments include but are not limited to a company car, free housing, or reimbursed meals; and

(c) Gross receipts minus ordinary and necessary expenses required to produce income, for purposes of income from self-employment, rent, royalties, proprietorship of a business, or joint

ownership or a partnership or closely held corporation. “Ordinary and necessary expenses” shall not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support.

(d) As used herein, “gross income” does not include:

(i) Child support received, or benefits received from public assistance programs, including Family Independence Temporary Assistance Plan, supplemental security income, food stamps, and general assistance.

(ii) Per diem allowances which are not subject to federal income taxation under the provisions of the Internal Revenue Code.

(iii) Extraordinary overtime including but not limited to income attributed to seasonal work regardless of its percentage of gross income when, in the court’s discretion, the inclusion thereof would be inequitable to a party.

(iv) Any monetary gift to the domiciliary party when the objective of the gift is to supplement irregular child support payments from the nondomiciliary party.

(v) Any disaster assistance benefits received from the Federal Emergency Management Agency through its Individuals and Households Program or from any other nonprofit organization qualified as a tax-exempt organization under [Section 501\(c\) of the Internal Revenue Code of 1954](#), as amended.

(4) “Health insurance premiums” means the actual amount paid by a party for providing health insurance on behalf of the child. It does not include any amount paid by an employer or any amounts paid for coverage of any other persons. If more than one dependent is covered by health insurance which is paid through a lump-sum dependent-coverage premium, and not all of such dependents are the subject of the guidelines calculation, the cost of the coverage shall be prorated among the dependents covered before being applied to the guidelines.

(5) “Income” means:

(a) Actual gross income of a party, if the party is employed to full capacity; or

(b) Potential income of a party, if the party is voluntarily unemployed or underemployed. A party shall not be deemed voluntarily unemployed or underemployed if he or she is absolutely unemployable or incapable of being employed, or if the unemployment or underemployment results through no fault or neglect of the party.

(c) The court may also consider as income the benefits a party derives from expense-sharing or other sources; however, in determining the benefits of expense-sharing, the court shall not consider the income of another spouse, regardless of the legal regime under which the remarriage exists, except to the extent that such income is used directly to reduce the cost of a party’s actual expenses.

(6) “Medical support” means health insurance and the payment of the medical expenses of the child.

(7) “Net child care costs” means the reasonable costs of child care incurred by a party due to employment or job search, minus the value of the federal income tax credit for child care.

(8) “Ordinary medical expenses” means unreimbursed medical expenses less than or equal to two hundred fifty dollars per child per year. Expenses include but are not limited to reasonable and necessary costs for orthodontia, dental treatment, asthma treatment, physical therapy, chronic health problems, and professional counseling or psychiatric therapy for diagnosed mental disorders not covered by medical insurance. The schedule of support in [R.S. 9:315.19](#) incorporates ordinary medical expenses.

La. R.S. 9:315.1. Rebuttable Presumption; Deviation From Guidelines By Court; Stipulations By Parties

A. The guidelines set forth in this Part are to be used in any proceeding to establish or modify child support filed on or after October 1, 1989. There shall be a rebuttable presumption that the amount of child support obtained by use of the guidelines set forth in this Part is the proper amount of child support.

B. (1) The court may deviate from the guidelines set forth in this Part if their application would not be in the best interest of the child or would be inequitable to the parties. The court shall give specific oral or written reasons for the deviation, including a finding as to the amount of support that would have been required under a mechanical application of the guidelines and the particular facts and circumstances that warranted a deviation from the guidelines. The reasons shall be made part of the record of the proceedings.

...

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

(1) That the combined adjusted gross income of the parties is not within the amounts shown on the schedule in [R.S. 9:315.19](#).

...

(2) The legal obligation of a party to support dependents who are not the subject of the action before the court and who are in that party’s household.

(3) That in a case involving one or more families, consisting of children none of whom live in the household of the noncustodial or nondomiciliary parent but who have existing child support orders (multiple families), the court may use its discretion in setting the amount of the basic child support obligation, provided it is not below the minimum fixed by [R.S. 9:315.14](#), if the existing child support orders reduce the noncustodial or nondomiciliary parent’s income below the lowest income level on the schedule contained in [R.S. 9:315.19](#).

(4) The extraordinary medical expenses of a party, or extraordinary medical expenses for which a party may be responsible, not otherwise taken into consideration under the guidelines.

(5) An extraordinary community debt of the parties.

(6) The need for immediate and temporary support for a child when a full hearing on the issue of support is pending but cannot be timely held. In such cases, the court at the full hearing shall use

the provisions of this Part and may redetermine support without the necessity of a change of circumstances being shown.

(7) The permanent or temporary total disability of a spouse to the extent such disability diminishes his present and future earning capacity, his need to save adequately for uninsurable future medical costs, and other additional costs associated with such disability, such as transportation and mobility costs, medical expenses, and higher insurance premiums.

(8) That support awarded for an adult child with a disability, as defined in [R.S. 9:315.22\(E\)](#), may be a long-term and financially burdensome obligation that warrants the court's special consideration of the circumstances surrounding the manifestation of the disability and the financial burden imposed on the obligor.

(9) Any other consideration which would make application of the guidelines not in the best interest of the child or children or inequitable to the parties.

D. The court may review and approve a stipulation between the parties entered into after the effective date of this Part as to the amount of child support to be paid. If the court does review the stipulation, the court shall consider the guidelines set forth in this Part to review the adequacy of the stipulated amount and may require the parties to provide the court with the income statements and documentation required by [R.S. 9:315.2](#).

## 2. Income Issues

### La. R.S. 9:315.1.1. Determination of Income; Evidence

A. When a party alleges that income is being concealed or underreported, the court shall admit evidence relevant to establishing the actual income of the party, including but not limited to the following:

**(1) Redirected income.** (a) Loans to the obligor by a business in which the obligor has an ownership interest and whether the loans will be repaid. There shall be a presumption that such loans are income of the obligor which may be rebutted if the obligor demonstrates there is a history of similar past loans being made and repaid in a timely manner with market interest rates, or the current loan is at market interest rates and is fully paid in accordance with a commercially reasonable time. The amount by which a commercially reasonable repayment amount exceeds the amount actually repaid shall be treated as income.

(b) Payment made by the obligor or by a business in which the obligor has an ownership interest to a person related by blood or affinity in the form of wages or salary. There shall be a presumption that such payments are income of the obligor, which may be rebutted if the obligor demonstrates there is a history of payments preceding the separation of the parties or the filing of an action to establish or modify child support, or that the payments are fair market value for services actually performed.

**(2) Deferred income.** Recent reductions in distributions of income, such as salary, bonuses, dividends, or management fees as a percentage of gross income of the business of the obligor. There shall be a presumption that past distributions of income will continue, which may be rebutted if the obligor demonstrates business conditions justify a reduction in distributions.

**(3) Standard of living and assets.** The standard of living and assets of the obligor both prior and subsequent to the establishment of a child support order, to establish the actual income if the amount claimed is inconsistent with his lifestyle.

B. When the income of an obligor cannot be sufficiently established, evidence of wage and earnings surveys distributed by government agencies for the purpose of attributing income to the obligor is admissible.

La. R.S. 9:315.11. Voluntarily Unemployed or Underemployed Party

A. (1) If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years. In determining the party's income earning potential, the court may consider the most recently published Louisiana Occupational Employment Wage Survey. In determining whether to impute income to a party, the court's considerations shall include, to the extent known, all of the following:

- (a) Assets owned or held by the party.
- (b) Residence.
- (c) Employment and earnings history.
- (d) Job skills.
- (e) Educational attainment.
- (f) Literacy.
- (g) Age and health.
- (h) Criminal record and other employment barriers.
- (i) Record of seeking work.
- (j) The local job market.
- (k) The availability of employers willing to hire the noncustodial parent.
- (l) Prevailing earnings level in the local community.
- (m) Other relevant background factors in the case.

(2) Absent evidence of a party's actual income or income earning potential, there is a rebuttable presumption that the party can earn a weekly gross amount equal to thirty-two hours at a minimum wage, according to the laws of his state of domicile or federal law, whichever is higher.

B. The amount of the basic child support obligation calculated in accordance with Subsection A of this Section shall not exceed the amount which the party paying support would have owed had a determination of the other party's income earning potential not been made.

C. A party shall not be deemed voluntarily unemployed or underemployed if either:

- (1) He has been temporarily unable to find work or has been temporarily forced to take a lower-paying job as a direct result of Hurricane Katrina or Rita.

(2) He is or was incarcerated for one hundred eighty consecutive days or longer.

### **3. Modification or Termination**

#### La. C.C. Art. 142. Modification or Termination of Child Support Award

An award of child support may be modified if the circumstances of the child or of either parent materially change and shall be terminated upon proof that it has become unnecessary.

### **C. SPOUSAL SUPPORT**

#### **1. La C.C. Art. 111, et seq**

#### La. C.C. Art. 111. Spousal Support; Authority of Court

In a proceeding for divorce or thereafter, the court may award interim periodic support to a party or may award final periodic support to a party who is in need of support and who is free from fault prior to the filing of a proceeding to terminate the marriage in accordance with the following Articles.

#### La. C.C. Art. 112. Determination of Final Periodic Support

A. When a spouse has not been at fault prior to the filing of a petition for divorce and is in need of support, based on the needs of that party and the ability of the other party to pay, that spouse may be awarded final periodic support in accordance with Paragraph B of this Article.

B. The court shall consider all relevant factors in determining the amount and duration of final support, including:

- (1) The income and means of the parties, including the liquidity of such means.
- (2) The financial obligations of the parties, including any interim allowance or final child support obligation.
- (3) The earning capacity of the parties.
- (4) The effect of custody of children upon a party's earning capacity.
- (5) The time necessary for the claimant to acquire appropriate education, training, or employment.
- (6) The health and age of the parties.
- (7) The duration of the marriage.
- (8) The tax consequences to either or both parties.
- (9) The existence, effect, and duration of any act of domestic abuse committed by the other spouse upon the claimant or a child of one of the spouses, regardless of whether the other spouse was prosecuted for the act of domestic violence.

C. When a spouse is awarded a judgment of divorce pursuant to Article 103(2), (3), (4), or (5), or when the court determines that a party or a child of one of the spouses was the victim of domestic

abuse committed by the other party during the marriage, that spouse is presumed to be entitled to final periodic support.

D. The sum awarded under this Article shall not exceed one-third of the obligor's net income. Nevertheless, when support is awarded after a judgment of divorce is rendered pursuant to Article 103(4) or (5), or when the court determines that a party or a child of one of the spouses was the victim of domestic abuse committed by the other party during the marriage, the sum awarded may exceed one-third of the obligor's net income and may be awarded as a lump sum.

#### La. C.C. Art. 113. Interim Spousal Support

A. Upon motion of a party, the court may award a party interim spousal support based on the needs of that party, the ability of the other party to pay, any interim or final child support obligation, and the standard of living of the parties during the marriage. An award of interim spousal support shall terminate one hundred eighty days from the rendition of a judgment of divorce, except that the award may extend beyond one hundred eighty days but only for good cause shown.

B. An obligation to pay final periodic support shall not begin until an interim spousal support award has terminated.

#### La. C.C. Art. 114. Modification or Termination of Award of Support

An award of interim spousal support or final periodic support may be modified if the circumstances of either party materially change and shall be terminated if it has become unnecessary. The subsequent remarriage of the obligor spouse shall not constitute a change of circumstance.

#### La. C.C. Art. 115. Extinguishment of Support Obligation

The obligation of interim spousal support or final periodic support is extinguished upon the remarriage of the obligee, the death of either party, or a judicial determination that the obligee has cohabited with another person of either sex in the manner of married persons.

#### La. C.C. Art. 116. Modification of Spousal Support Obligation

The obligation of final spousal support may be modified, waived, or extinguished by judgment of a court of competent jurisdiction or by authentic act or act under private signature duly acknowledged by the obligee.

#### La. C.C. Art. 117. Peremptive Period for Obligation

The right to claim after divorce the obligation of spousal support is subject to a peremption of three years. Peremption begins to run from the latest of the following events:

- (1) The day the judgment of divorce is signed.
- (2) The day a judgment terminating a previous judgment of spousal support is signed, if the previous judgment was signed in an action commenced either before the signing of the judgment of divorce or within three years thereafter.
- (3) The day of the last payment made, when the spousal support obligation is initially performed by voluntary payment within the periods described in Paragraph (1) or (2) and no more than three years has elapsed between payments.

## 2. Local Court Rules

### La. Uniform District Court Rules, Title IV, Appendix 32.0B

...

(a) When a party is seeking final periodic spousal support, the matter shall be bifurcated and fixed in regular course on the appropriate divisions' docket for a determination of the issue of mover's freedom from fault. Thereafter if the moving party is found to be free from fault, a Hearing Officer Conference shall be scheduled as soon as the docket permits to determine the amount of final periodic spousal support. If either party timely objects to the Hearing Officer's Recommendation, the matter shall be fixed before the District Judge. If a bifurcated hearing is held, the ruling of the Court on the issue of fault shall be considered an interlocutory decree if the moving party is found free from fault and shall not be

### **D. INJUNCTIONS AND OTHER RELIEF**

#### La. R.S. 9:371. Injunction Against Alienation or Encumbrance; Spouse's Right to Demand

A. In a proceeding for divorce, a spouse may obtain an injunction restraining or prohibiting the disposition or encumbrance of community property until further order of the court.

B. To be effective against a federally insured financial institution, an injunction granted under the provisions of this Section shall be served in accordance with the provisions of [R.S. 6:285\(C\)](#). An injunction granted pursuant to the provisions of this Section shall be effective only against accounts, safe deposit boxes, or other assets listed or held in the name of the following:

(1) One or both of the spouses named in the injunction.

(2) Another party or business entity specifically named in the injunction.

C. A federally insured financial institution shall not be liable for loss or damages resulting from its actions to comply with the injunction provided that the requirements of this Section have been met.

#### La. R.S. 9:372. Injunction Against Abuse; Form; Central Registry

A. In a proceeding for divorce, a court may grant an injunction prohibiting a spouse from physically or sexually abusing the other spouse or a child of either of the parties.

B. Immediately upon rendering a decision granting relief provided in Subsection A of this Section, the judge shall cause to have prepared a Uniform Abuse Prevention Order, as provided in [R.S. 46:2136.2\(C\)](#), shall sign such order, and shall immediately forward it to the clerk of court for filing on the day that the order is issued.

C. The clerk of the issuing court shall transmit the Uniform Abuse Prevention Order to the Judicial Administrator's Office, Louisiana Supreme Court, for entry into the Louisiana Protective Order Registry, as provided in [R.S. 46:2136.2\(A\)](#), by facsimile transmission or direct electronic input as expeditiously as possible, but no later than the end of the next business day after the order is filed with the clerk of court. The clerk of the issuing court shall also send a copy of the

Uniform Abuse Prevention Order, as provided in [R.S. 46:2136.2\(C\)](#), or any modification thereof, to the chief law enforcement officer of the parish where the person or persons protected by the order reside by facsimile transmission or direct electronic input as expeditiously as possible, but no later than the end of the next business day after the order is filed with the clerk of court. A copy of the Uniform Abuse Prevention Order shall be retained on file in the office of the chief law enforcement officer until otherwise directed by the court.

#### La. R.S. 9:372.1 Injunction Against Harassment

In a proceeding for divorce, a court may grant an injunction prohibiting a spouse from harassing the other spouse.

#### La. R.S. 9:373. Removal of Personal Property

A. In a proceeding for divorce, a court may grant an ex parte order requiring the sheriff or appropriate law enforcement officer to accompany a spouse to the family residence or another location designated by the court so that personal property specified in the order may be obtained by that spouse.

B. Personal property which may be obtained by a court order issued under this Section includes, but is not limited to, the following:

- (1) Items of personal wearing apparel belonging to the petitioning spouse or belonging to any children in the custody of the spouse.
- (2) Food and eating utensils necessary for the spouse or any children in the custody of the spouse.
- (3) Any other item or items deemed necessary by the court for the safety or well-being of the spouse or any children in the custody of the spouse.

#### La. R.S. 9:374. Possession and Use of Family Residence or Community Movables or Immovables

A. When the family residence is the separate property of either spouse, after the filing of a petition for divorce or in conjunction therewith, the spouse who has physical custody or has been awarded temporary custody of the minor children of the marriage may petition for, and a court may award to that spouse, after a contradictory hearing, the use and occupancy of the family residence pending the partition of the community property or one hundred eighty days after termination of the marriage, whichever occurs first. In these cases, the court shall inquire into the relative economic status of the spouses, including both community and separate property, and the needs of the children, and shall award the use and occupancy of the family residence to the spouse in accordance with the best interest of the family. The court shall consider the granting of the occupancy of the family residence in awarding spousal support.

B. When the family residence is community property or is owned by the spouses in indivision, or the spouses own community movables or immovables, after or in conjunction with the filing of a petition for divorce or for separation of property in accordance with [Civil Code Article 2374](#), either spouse may petition for, and a court may award to one of the spouses, after a contradictory hearing, the use and occupancy of the family residence and use of community movables or immovables pending partition of the property or further order of the court, whichever occurs first. In these cases, the court shall inquire into the relative economic status of the spouses, including both community and separate property, and the needs of the children, if any, and shall award the

use and occupancy of the family residence and the use of any community movables or immovables to the spouse in accordance with the best interest of the family. If applicable, the court shall consider the granting of the occupancy of the family residence and the use of community movables or immovables in awarding spousal support.

C. A spouse who, in accordance with the provisions of Subsection A or B of this Section, uses and occupies or is awarded by the court the use and occupancy of the family residence, a community immovable occupied as a residence, or a community manufactured home as defined in [R.S. 9:1149.2](#) and occupied as a residence, regardless of whether it has been immobilized, shall not be liable to the other spouse for rental for the use and occupancy, except as hereafter provided. If the court awards use and occupancy to a spouse, it shall at that time determine whether to award rental for the use and occupancy and, if so, the amount of the rent. The parties may agree to defer the rental issue for decision in the partition proceedings. If the parties agreed at the time of the award of use and occupancy to defer the rental issue, the court may make an award of rental retroactive to the date of the award of use and occupancy.

D. The court may determine whether a residence is separate or community property, or owned in indivision, in the contradictory hearing authorized under the provisions of this Section.

E. (1) In a proceeding for divorce or thereafter, a summary proceeding shall be undertaken by the court upon request of either party to allocate the use of community property, including monetary assets, bank accounts, savings plans, and other divisible movable property pending partition.

(2) The court shall determine allocation of community property after considering:

(a) The custody of the children and exclusive use and occupancy of the family residence.

(b) The total community property.

(c) The need of a spouse for funds to maintain a household prior to partition.

(d) The need of a spouse to receive legal representation during the course of the proceedings.

(3) Upon court order, each spouse shall provide the other a complete accounting of all allocated community property to demonstrate compliance with [Civil Code Article 2369.3](#).

#### La. R.S. 9:375. Award of Attorney's Fees

A. When the court renders judgment in an action to make executory past-due payments under a spousal or child support award, or to make executory past-due installments under an award for contributions made by a spouse to the other spouse's education or training, it shall, except for good cause shown, award attorney's fees and costs to the prevailing party.

B. When the court renders judgment in an action to enforce child visitation rights it shall, except for good cause shown, award attorney's fees and costs to the prevailing party.

### **III. COMMUNITY PROPERTY**

#### **A. Termination of Community**

#### La. C.C. Art. 159. Effect of Divorce on Community Property Regime

A judgment of divorce terminates a community property regime retroactively to the date of filing of the petition in the action in which the judgment of divorce is rendered. The retroactive termination of the community shall be without prejudice to rights of third parties validly acquired in the interim between the filing of the petition and recordation of the judgment.

La. C.C. Art. 2374. Judgment of Separation of Property

A. When the interest of a spouse in a community property regime is threatened to be diminished by the fraud, fault, neglect, or incompetence of the other spouse, or by the disorder of the affairs of the other spouse, he may obtain a judgment decreeing separation of property.

B. When a spouse is an absent person, the other spouse is entitled to a judgment decreeing separation of property.

C. When a petition for divorce has been filed, upon motion of either spouse, a judgment decreeing separation of property may be obtained upon proof that the spouses have lived separate and apart without reconciliation for at least thirty days from the date of, or prior to, the filing of the petition for divorce.

D. When the spouses have lived separate and apart continuously for a period of six months, a judgment decreeing separation of property shall be granted on the petition of either spouse.

**B. Community Property Partitions**

La. C.C. Art. 2369.8. Right to Partition; No Exclusion by Agreement; Judicial Partition

A spouse has the right to demand partition of former community property at any time. A contrary agreement is absolutely null.

If the spouses are unable to agree on the partition, either spouse may demand judicial partition which shall be conducted in accordance with [R.S. 9:2801](#).

La. R.S. 9:2801. Partition of Community Property and Settlement of Claims Arising from Matrimonial Regimes and Co-ownership of Former Community Property

A. When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising either from the matrimonial regime, or from the co-ownership of former community property following termination of the matrimonial regime, either spouse, as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter, may institute a proceeding, which shall be conducted in accordance with the following rules:

(1)(a) Within forty-five days of service of a motion by either party, each party shall file a sworn detailed descriptive list of all community property, the fair market value and location of each asset, and all community liabilities. For good cause shown, the court may extend the time period for filing a detailed descriptive list. If a party fails to file a sworn detailed descriptive list timely, the other party may file a rule to show cause why its sworn detailed descriptive list should not be deemed to constitute a judicial determination of the community assets and liabilities. At the hearing of the rule to show cause, the court may either grant the request or, for good cause shown, extend the time period for filing a sworn detailed descriptive list. If the court grants the request, no traversal shall be allowed.

(b) Each party shall affirm under oath that the detailed descriptive list filed by that party contains all of the community assets and liabilities then known to that party. Amendments to the descriptive lists shall be permitted. No inventory shall be required.

(2) Within sixty days of the date of service of the last filed detailed descriptive list, each party shall either traverse or concur in the inclusion or exclusion of each asset and liability and the valuations contained in the detailed descriptive list of the other party. For good cause shown, the court may extend the time period for a party to traverse or concur in the detailed descriptive list of the other party. The trial of the traverses may be by summary procedure. At the trial of the traverses, the court shall determine the community assets and liabilities; the valuation of assets shall be determined at the trial on the merits. The court, in its discretion, may by ordinary procedure try and determine at one hearing all issues, including those raised in the traverses.

(3) The court may appoint such experts pursuant to [Articles 192](#) and [373 of the Louisiana Code of Civil Procedure](#) as it deems proper to assist the court in the settlement of the community and partition of community property, including the classification of assets as community or separate, the appraisal of community assets, the settlement of the claims of the parties, and the allocation of assets and liabilities to the parties.

(4) The court shall then partition the community in accordance with the following rules:

(a) The court shall value the assets as of the time of trial on the merits, determine the liabilities, and adjudicate the claims of the parties.

(b) The court shall divide the community assets and liabilities so that each spouse receives property of an equal net value.

(c) The court shall allocate or assign to the respective spouses all of the community assets and liabilities. In allocating assets and liabilities, the court may divide a particular asset or liability equally or unequally or may allocate it in its entirety to one of the spouses. The court shall consider the nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances that the court deems relevant. As between the spouses, the allocation of a liability to a spouse obligates that spouse to extinguish that liability. The allocation in no way affects the rights of creditors.

(d) In the event that the allocation of assets and liabilities results in an unequal net distribution, the court shall order the payment of an equalizing sum of money, either cash or deferred, secured or unsecured, upon such terms and conditions as the court shall direct. The court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.

(e) In the event that the allocation of an asset, in whole or in part, would be inequitable to a party, the court may order the parties to draw lots for the asset or may order the private sale of the asset on such terms and conditions as the court deems proper, including the minimum price, the terms of sale, the execution of realtor listing agreements, and the period of time during which the asset shall be offered for private sale.

(f) Only in the event that an asset cannot be allocated to a party, assigned by the drawing of lots, or sold at private sale, shall the court order a partition thereof by licitation. The court may fix the minimum bids and other terms and conditions upon which the property is offered at public sale.

In the event of a partition by licitation, the court shall expressly state the reasons why the asset cannot be allocated, assigned by the drawing of lots, or sold at private sale.

B. Those provisions of a domestic relations order or other judgment which partitions retirement or other deferred work benefits between former spouses shall be considered interlocutory until the domestic relations order has been granted “qualified” status from the plan administrator and/or until the judgment has been approved by the appropriate federal or state authority as being in compliance with applicable laws. Amendments to this interlocutory judgment to conform to the provisions of the plan shall be made with the consent of the parties or following a contradictory hearing by the court which granted the interlocutory judgment. The court issuing the domestic relations order or judgment shall maintain continuing jurisdiction over the subject matter and the parties until final resolution.

C. In the absence of an agreement between the parties for an extension of time or the granting by the court of an extension for good cause, if a party fails to comply with any time limit provided in this Section, upon motion of the other party or upon its own motion, the court may award reasonable attorney fees and court costs to the other party for the filing of or the response to the motion. If the court rules, pursuant to Subparagraph (A)(1)(a) of this Section, that the other party's sworn detailed descriptive list be deemed to constitute the assets and liabilities of the community, then the court shall not award attorney fees and court costs to the other party.

#### **IV. ADDITIONAL RESOURCES**

**A. Louisiana Uniform District Court Rules, Title IV**

<http://www.lasc.org/rules/dist.ct/TitleIV.asp>

**B. 15th JDC Family Court**

<https://www.15thjdc.org/site79.php>

<https://www.15thjdc.org/site140.php>

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#### **V. VOLUNTEER OPPORTUNITIES**

Access to legal representation is an issue for many in our community. If you would like to help, the Lafayette Volunteer Lawyers program is an excellent opportunity to gain experience while working towards your yearly pro bono goal.

Lafayette Volunteer Lawyers (LVL) is the pro bono project of the Lafayette Parish Bar Foundation. Its mission is to provide access to justice for indigent residents in Lafayette Parish. Through the help and support of member's like you, LVL is able to help over 700 clients each year through one of its four programs.

For more information, please contact the Lafayette Bar Association or visit their website at <https://www.lafayettebar.org/volunteer>.