

RECENT DEVELOPMENTS
IN JUVENILE LAW

-2009-

prepared for:
2010 City, Family and Juvenile Judges' Conference
January 15, 2008

Kären Hallstrom, J.D./M.S.W.

Deputy Judicial Administrator for Children and Families
Office of the Judicial Administrator
Supreme Court of Louisiana

2009 West Advance Sheets Nos. 1 – 51
994 So.2d 523 – 20 So.3d 600

TABLE OF CONTENTS

CHILD IN NEED OF CARE	3
TERMINATION OF PARENTAL RIGHTS	5
ADOPTION	9
FAMILIES IN NEED OF SERVICES.....	10
DELINQUENCY	11
PATERNITY.....	16
PROTECTIVE ORDERS.....	17
CHILD CUSTODY and VISITATION.....	19
CHILD SUPPORT	29
MISCELLANEOUS	35

CHILD IN NEED OF CARE

State in Interest of J.A. and J.A., 999 So.2d 811 (2 Cir. 2008)

Court of appeal affirmed child in need of care adjudication against a mother. Evidence included 4 year old child's consistent statements of abuse, as well as testimony of day care workers and the detective. The mother denied abuse, denied awareness of bruises, accused the daycare workers of lying, refused to detach from her boyfriend who the child alleged had sexually abused her, and did not comply with the case plan because she did not think she had done anything wrong. Affirmed.

State in Interest of P.A.P., L.N.P. and P.C.P., 4 So.3d 182 (2 Cir. 2009)

Mother appealed award of **guardianship** to relatives at permanency hearing. The department has no requirement to seek a judicial determination under Ch.C. art. 672.1 prior to proceeding with the permanency hearing. Mother did not demonstrate "significant measurable progress on her case plan, although she did complete some elements and requested additional time (with which the department was willing to agree until she was arrested). Both the trial court and appellate court had concerns that the department's conclusions were unduly optimistic. "Considering the time that has elapsed since the children's removal and the mother's arrest, her failure to attend outpatient drug treatment, her failure to find steady employment, and her failure to obtain housing, we cannot say that she has made significant and measurable progress in correcting the conditions that required the children to be placed in care." Guardianship was deemed to be in the best interests of the children. Since parental rights have not yet been terminated, the "mother and father still have the opportunity on their own to reform and seek the return of the children."

State in Interest of ERL,III, 4 So.3d 286 (2 Cir. 2009)

Biological father, who was in jail when his child was allegedly abused, appealed a CINC adjudication and OCS custody. Although he was a **non-offending parent**, he consented to a background check by OCS that revealed a history of drug use and current drug use. He did not request custody of the child, but wanted his sister and niece to take care of the child. On appeal, the father argued that the background check and drug screen were conducted without due process because he was never implicated in the abuse. Ch.C. arts. 612 and 625 "plainly require the parent to assist the state in investigating a report of a child in need of care and to cooperate with the state in drafting a case plan." The father's admission that he was in jail for striking the child's mother, that he had 5 other children, and that he was living off SSI was sufficient for OCS to request the background check and drug screen when the father seemed interested in being involved with his child. In addition, the father voluntarily complied with the request, and did not timely object or seek a protective order and hearing under Ch.C. art. 618. The father's claim that the

background check and drug screen were inadmissible hearsay was rejected since “Ch.C. art. 680 expressly makes the case plan admissible and [the father] failed to prove any denial of due process in its preparation.”

State in Interest of C.H., 14 So.3d 601 (2 Cir. 2009)

In a CINC proceeding initiated by the mother during a custody dispute, child was adjudicated based on father’s sexual abuse. Father appealed adjudication and mother answered appeal demanding the couple’s other child also be declared in need of care. Noting that the **proceeding was commenced by the mother in the midst of an acrimonious custody dispute**, the appellate court made a complete review of the entire record and held that the trial court was clearly wrong in concluding that there was a preponderance of the evidence to support its finding that the child was a victim of sexual abuse by the father. “[W]hen the petitioner’s personal interest in the outcome... might not coincide with the best interest of the child, which, after all, is the paramount goal of the CINC proceeding, a court should be extremely cautious in giving much weight to the accuser’s testimony...”

State in Interest of D.T., 17 So.3d 31 (1 Cir. 2009)

Both 13 year old mother and her child were adjudicated in need of care. Mother appealed from case review hearing where court denied the request of mother and OCS to change the plan from adoption back to reunification. The appellate court vacated. “Because the record fails to show that OCS undertook **reasonable efforts to reunify** the mother and child, the juvenile court erred in failing to approve OCS’s proposal to change the case plan from adoption back to reunification. The matter was remanded with instructions that the juvenile court “require that the OCS case plan for reunification...include a psychological evaluation of [the child], as well as any other relevant factors that may impact his best interests in relation to his physical custody and goal of reunification with [his mother].”

TERMINATION OF PARENTAL RIGHTS (a/k/a Certification for Adoption)

State in Interest of S.D.G., 996 So.2d 1242 (3 Cir. 2008)

Trial court terminated rights under Ch.C. art. 1015(5) of deaf/mute mother of special needs child after 4 years of OCS services. The appellate court reversed, finding that the facts “reveal marked improvement in, and apparent resolution of, the issues of drug abuse and homelessness” that caused the removal. The court held that it was not established by clear and convincing evidence that there had been no substantial compliance with the case plan as necessary for the safe return of the child, nor was it established that there was no reasonable expectation of significant improvement in the near future.

State in Interest of T.S.H., S.R.H., Jr. and S.D.H. v. Hill, 997 So.2d 604 (2 Cir. 2008)

Parental rights of drug addict mother were terminated. The mother appealed, arguing that DSS failed to comply with Ch.C. art. 672.1 and that there was insufficient evidence of her abandonment. The appellate court held that there was no legal requirement for DSS to comply with **Ch.C. art. 672.1** prior to termination, and that the department did prepare a reunification plan, but she complied with none of it. Where the mother’s whereabouts were unknown for over 4 months after she was released from jail and she had not supported, visited or communicated with her children for more than six months, overwhelming evidence supported termination under Ch.C. art. 1015(4).

State in Interest of H.G. and C.G., 997 So.2d 819 (3 Cir. 2008)

Third circuit affirmed dismissal of termination of parental rights petition. DSS argued that termination of both mother’s and father’s rights was warranted under Ch.C. arts. 1015(4) and 1015(5). Neither parent had complied with all of the requirements of the case plan. The mother had not secured employment or adequate housing, and had not complied with assessments and treatment. The father had not provided proof of income, maintained a stable home, missed all but 13 visits with his children due to incarceration, and did not complete his drug treatment program or mental health assessments. The court found sufficient evidence that the parents had not substantially complied with the case plans, but that DSS failed to prove that there was **no reasonable expectation of significant improvement in the future**. The court held that failure to visit was not sufficient to prove abandonment.

DSS appealed only the finding that the father had not abandoned the children. On appeal, the court finds that the record does not clearly show that the father failed to visit or communicate with the children for 6 months, even though he was incarcerated for 5 ½ months. Without specific information as to his last visits prior to incarceration,

abandonment was not established by clear and convincing evidence. In addition, the appellate court held that “although there has been less than substantial compliance with the case plan, certain requirements of the plan have been undertaken by both parents and/or completed” thus the trial court’s findings were not clearly wrong. Dismissal of termination affirmed.

State in Interest of D.L.R., 998 So.2d 681 (La. 2008)

Trial court terminated parental rights of mother. Court of appeal reversed termination of mother’s parental rights, finding that lack of compliance with the case plan was not established by clear and convincing evidence and that termination was not in the child’s best interest because “the state presented no evidence that it has a plan in place for D.R.’s future.” Supreme Court reversed appellate decision and reinstated trial court’s judgment of termination. “When the court of appeal reversed the district court, it did so without finding that the district court was clearly wrong or manifestly erroneous. In fact, the court of appeal substituted its own view of the evidence for the view of the district court, and took this action despite its own admission that it did not have the entire record before it.”

Reviewing the entire record, the Court found no error in the district court’s finding of clear and convincing evidence of failure to comply with the case plan. With regard to best interest, the Court held **that the fact that OCS had not yet found a possible adoptive parent does not necessarily mean that termination of parental rights was not in the child’s best interest.**

State in Interest of T.M.S., 999 So.2d 21 (3 Cir. 2008)

Mother with psychotic disorder appealed termination of her parental rights, arguing that the trial court applied the wrong standard, “fully comply”, instead of “no substantial parental compliance.” The appellate court affirmed. Despite the use of the phrase “fully comply” in the reasons for judgment, the trial court did not apply the wrong standard and the record supported determination that the mother failed to **substantially comply** with the case plan.

And despite the trial court’s failure to use the precise terms “clear and convincing evidence” and “best interest of the child” as set forth in Ch.C. art. 1037(b), the reasons reference such findings and the judgment itself reflects the determination that OCS met its burden of proof and the termination was in the child’s best interest.

With regard to the mother’s failure to support, the court found no manifest error in the determination that sporadic gift-giving does not amount to significant support. In addition, the mother failed to comply with the case plan, including the mental health treatment program, which was essential for any improvement.

Termination was in the best interest of the 4 year old child who had been in state custody

for 3 ½ years and was bonded with the foster parents who plan to adopt him, while his mother continued to exhibit **mental health** problems and was unable to provide a proper environment.

State in Interest of S.D.P. and S.L.P., 1 So.3d 808 (2 Cir. 2009)

Mother appealed termination of her parental rights to her twin daughters. Although she admitted that she had not done her best in the past to follow the case plan, the mother requested additional time to show consistency in working it. (The court had previously delayed disposition to allow her to work her plan, which she did not do.) The caseworker and the CASA both testified that the mother had a pattern of complying followed by a period of non-compliance. As to best interest, the twins had been in state custody for more than 42 months and did not want to leave their foster home. The appellate court held that they “deserve some stability in their lives after being in the state system for so long at such an impressionable age. Their mother has had a difficult time in subduing her self-interest for the good of the twins.” Affirmed.

State in Interest of B.O.G., D.D.G., B.T.G. and K.M.G., 5 So.2d 1018 (3 Cir. 2009)

Fathers appeal termination of parental rights. Termination was affirmed for father with criminal history who had made no efforts to establish any relationship with his child and no efforts to comply with any components of the case plan even when not in jail. At age 2, the child has never known his father and is bonded to his maternal aunt and uncle.

Termination was reversed for the other father who had been complying with several components of the case plan and maintaining contact with OCS. The appellate court found evidence that there had been improvement and was a **reasonable expectation for further improvement**, “not yet warranting the parental death penalty”. While he was not totally successful, his efforts are indicative of his intent to maintain a parental relationship with his children. In addition, the court found termination not to be in the best interest of the children. Although the children were doing well in foster care, they continued to have a relationship with the father. “Because of the finality of termination of one’s parental rights, it is far better to err in favor of reunification than to err on the side of termination. Should [the father] falter in the future with his case plan, then termination will be much more certain to follow.”

State in Interest of P.S.T., 11 So.3d 565 (3 Cir. 2009)

Termination of parental rights is reversed on appeal, the appellate court finding that termination was not in the child’s **best interest** even though mother has been incarcerated since the child was 4 and will not be released until 2016. “The evidence indicates that [the child] is doing well with foster parents and has established a bond with his mother that includes plans after her future release from jail. While we agree that this situation is not

ideal, we cannot say that termination of [the mother's] parental right is in the best interest of [the child]. This is especially true in light of the uncertainty regarding the foster parents' willingness to adopt and the concern of all the parties, including the trial court, about [the child's] well-being in light of a judgment of termination."

The dissenting judge would not find this to be an exceptional case for reversing a termination, where there was no evidence of a "significant" bond with the mother and the foster parents have made the child part of their family. "I can only say that I find clear and convincing evidence that it is not in the best interest of this child to rely on the hopes of a parent."

State in Interest of L.W., J.W. & L.W., 11 So.3d 1225 (3 Cir. 2009)

Termination of mother and father's parental rights is affirmed on appeal. Despite parents' contention that the court erred in admitting the **testimony of the clinical psychologist**, the appellate court found the expert "clearly possesses an expertise in providing assessment in cases involving parental fitness," used clinically standardized tests, and qualified his testimony as not including any circumstances that had changed since his assessment. In reviewing the evidence, including the parents' drug abuse, instability, abandonment and incarceration, the court concluded that grounds for termination under 1015(5) were established by clear and convincing evidence.

State in Interest of J.D.P., T.D.G., JR., T.J.C, JR., and T.J.C., 16 So.3d 543 (3 Cir. 2009)

Appellate court affirmed termination of parental rights pursuant to Ch.C. arts. 1015(4) and (5). Mother had over 30 months to comply with case plan, to which she **failed to substantially comply**, and demonstrated unstable and unhealthy behavior. "[The mother's] ability to care for her minor children is clearly overshadowed by her behavioral issues, which remain untreated." Failure of the trial court to provide written reasons (as required by Ch.C. art. 1037) held not to require reversal of the judgment.

State in Interest of H.M.D. and J.J.W., 20 So.3d 564 (3 Cir. 2009)

Termination was reversed on appeal where the hearing had been held in the mother's absence and she received untimely **notice of the hearing**. The trial court's authority to hold a termination hearing in the absence of the parent is dependent upon compliance with the service requirements in Ch.C. art. 1021. The parent is entitled to service at least 5 days before the hearing. "Given the serious and consequential nature of a termination hearing, we can find no reason to allow less notice than that given for a disposition hearing, and conclude that service on the court-appointed counsel is not sufficient to constitute service on the defendant parent. The trial court erred in not continuing the matter absent timely service..."

ADOPTION

In re. Spillars Applying for Intrafamily Adoption of L.M.S., 2 So.3d 593 (2 Cir. 2009)

Biological father (who had established paternity) and his wife petitioned to adopt his child, who he had had primary physical custody of for 7 ½ years, without the consent of the mother under Ch.C. art. 1245. Mother appealed, arguing that she had attempted to communicate but was **thwarted** by the father and his wife, and that the adoption was not in the child's **best interest**.

Despite the mother's claims that she had sought help from the sheriff's office and the advice of counsel and had called the paternal grandmother, the trial court found no substantiation of these claims. The mother's claim that she did not know where the child was living was also not supported by the evidence, since their phone number was in the phone book and the father's cell number and P.O. box number had not changed. The trial court found that the mother never tried to send the child a gift or letter, never attempted to exercise her visitation rights, and never tried to communicate with the child's school. The appellate court opinion emphasizes that this is not a case of "significant" attempts to communicate; it is a case of no attempts at all.

The appellate court upheld the finding of best interest as well, and found no abuse of discretion in the court's failure to obtain psychological evaluations in the case. In addition, the appellate court was not in error for failing to appoint an attorney for the child, since this new requirement in the law was not enacted until after the hearing. (Ch.C. art. 1245.1)

In re. B.E.S. Applying for Intrafamily Adoption, 15 So.3d 133 (5 Cir. 2009)

Biological father opposed stepparent adoption and court denied the petition. Appellate court reversed, finding **no just cause for the father's failure to communicate**. Neither incarceration nor fear that the mother would call the police on his parents was considered just cause. Nothing prevented him from sending cards, gifts or letters to the child. And there was no evidence that he had a substantial commitment to his parental responsibilities. Father failed to rebut the presumption that the adoption was in the best interests of the child.

Failure of the court to appoint an attorney for child was not found to be error since art. 1245.1 provides a right to counsel to the child of a parent whose consent to the adoption is required and parental consent was not required in this case under 1245. (Footnote 2 explains that the statute requiring counsel was not applicable because it became effective following the hearing.) The dissent disagrees and would remand for rehearing after appointment of counsel for the child.

FINS

State in Interest of C.T., Jr., 997 So.2d 891 (2 Cir. 2008)

Trial court adjudicated child ungovernable and put him on supervised probation for 2 years. The child had been expelled from school. Disposition was modified when child was determined to have a serious mental illness and custody was placed with DHH/OMH. At a review hearing, the child was returned to the parents and the school system ordered to admit the child within the week. The written judgment specifically ordered the school to determine an educational placement for the child. The school board appealed.

The appellate court found that the juvenile court had jurisdiction over the school board employees pursuant to Ch.C. art. 729. Although **school board employees** had been ordered to appear for the hearing, the court held that they were **indispensable parties** to the action who should have been joined. Judgment against the school board and employees reversed.

DELINQUENCY

State in Interest of M.L.L., 994 So.2d 600 (3 Cir. 2008)

Three juveniles entered a home without permission and items were taken. On error patent review, although the city court clearly found that the state *failed* to prove aggravated burglary, the appellate court could not ascertain with reasonable certainty the intent of the city court judge as to which **lesser offense(s)** the trial court *had* found this juvenile to have committed. Adjudication reversed, disposition vacated and case remanded.

State in Interest of N.W.L., 994 So.2d 607 (3 Cir. 2008)

Same as M.L.L. above.

State in Interest of A.M., 994 So.2d 1277 (La. 2008)

Supreme Court reverses decision of appellate court permitting defendant's expert access to **videotaped interviews** with the 8 year old victim and 12 year old witness, protected persons under R.S. 15:440.1 *et seq.* The Court held that recent amendments to R.S. 15:440.5(C) clearly indicated the legislature's intent to limit strictly pre-trial access to the defendant and defense counsel. This does not violate the defendant's constitutional right of confrontation since the child must be available to testify for admission of the tape. Neither does it violate the defendant's right to cross-examine witnesses; he and his attorney can prepare for cross-examination "unaided by a psychologist or an investigator, or for that matter, a law partner..."

State in Interest of D.J., 995 So.2d 1 (3 Cir. 2008)

Third juvenile defendant is adjudicated for aggravated burglary, which is "conditionally" affirmed on appeal. The juvenile raised sufficiency of the evidence, and the appellate court found that the juvenile "did not have the requisite intent for aggravated burglary, as he did not return to the house with the intent to take a gun, and while he knew [another juvenile] wanted to take a gun, there is no indication that he intended to help [him] take a gun." The court exercised its authority to review the record and to enter a conviction for a **lesser-included offense** supported by the record, and found sufficient evidence to support unauthorized entry of an inhabited dwelling.

The juvenile also argued **ineffective assistance of counsel**. The appellate court found that a conflict of interest existed between the juveniles, since D.J. implicated them in his statement, so any attorney representing all of them would have a conflict. Case remanded for an evidentiary hearing on the conflict and ineffective assistance. [errors patent: post-conviction relief]

State in Interest of D.A., 995 So.2d 11 (3 Cir. 2008)

Juvenile was found guilty of unauthorized entry of an inhabited dwelling based on his role as the “lookout” for other juveniles who entered the home. Officer’s testimony that other juvenile told him that defendant was the lookout was sufficient evidence that defendant was a **principal** to the unauthorized entry.

The juvenile also argued that conflict attorneys should have been appointed for the four juvenile defendants. Insofar as D.A. was represented separately at adjudication, the court found no actual conflict. But since the record did not clearly establish which attorney represented D.A. at disposition, the case was remanded for a determination of whether an actual **conflict of interest** existed at that time.

State in Interest of S.R., 995 So.2d 63 (4 Cir. 2008)

When state failed to follow through with offer to **divert** juvenile, trial court dismissed possession of marijuana petition and state appealed. The appellate court found that failure of the state to exercise due diligence to enroll the juvenile in the diversion program for over a month was “good cause” under Ch.C. art. 876 for the trial court to dismiss. Affirmed.

State in Interest of D.M.J., 996 So.2d 413 (2 Cir. 2008)

Juvenile was adjudicated delinquent for oral sexual battery of his 10-year-old stepbrother. Videotaped forensic interview with the victim was consistent with his testimony at trial and with his 7 year-old sister’s testimony.

The juvenile argued that **videotape** was not admissible under Ch.C. art. 326 because the child was asked leading questions and was prohibited from leaving the interview after requesting to do so. The appellate court found that the leading questioning appeared to be an attempt to clarify the victim’s statements, and that the encouragement to continue the interview seemed to be a “plausible interviewing tactic, especially with such a young victim” that would not induce fear, duress or intimidation.

State v. Price, 2 So.3d 578 (2 Cir. 2009)

Juvenile court appointed **sanity commission** for 16 year-old juvenile accused of aggravated rape of a 6 year-old male. The sanity commission issued a report stating that the juvenile was competent to stand trial; subsequently the grand jury indicted him as an adult and the case was transferred to district court. The juvenile’s mother hired an independent evaluation that found juvenile not competent to stand trial. Defense counsel moved to quash the indictment because it was filed before the juvenile court had determined competency. Over a year later, the competency hearing was held in district

court. Based on the 2 old sanity reports, the court found the juvenile competent. The appellate court found that the trial court did not abuse its discretion by failing to order a new examination. The reports of the earlier commission had been completed, nothing indicated and the juvenile's mental capacity had changed, and the reports had been submitted by joint agreement of the state and the juvenile. Failure of the attorney to insist on a formal contradictory hearing and to submit the report of the independent evaluation was more properly argued in a claim for ineffective assistance of counsel in an application for post-conviction relief (although the appellate court suggested that any prejudice to the juvenile would have been minimized by the fact that 2 physicians had found him competent.)

State in Interest of D.J. c/w State in Interest of R.N., 5 So.3d 923 (4 Cir. 2009)

Delinquency proceeding cannot be based on **illegal possession of a handgun by juvenile** under R.S. 14:95.8. "Delinquent act" is defined as an act committed by a child that, if committed by an adult, would be a criminal offense. Since no adult can be charged with a violation of R.S. 14:95.8, a delinquency proceeding cannot be based on a violation of that statute. A concurring opinion notes that the legislature has failed to provide any consequences for violation of R.S. 14:95.8 other than a FINS adjudication. "A different result would require the Legislature to carve out an exception to the definition of delinquency or to criminalize the possession of a handgun by an adult."

State in Interest of J.S., 6 So.3d 904 (4 Cir. 2009)

Appellate court reversed and remanded adjudication of delinquency for possession of marijuana. Juvenile argued that the evidence on the ground was seized as a result of an illegal imminent stop. The opinion discusses the factual basis for an "actual stop" stop that is "imminent" concluding that the officer's actions did not constitute either an **actual stop or an imminent actual stop**. Thus the juvenile abandoned the bag prior to any unlawful intrusion into his right to be left alone from governmental interference.

However, the appellate court finds that it was error for the court to admit into evidence the certificate of analysis as *prima facie* evidence contrary to R.S. 15:501, where the juvenile had preserved his right to cross-examine the criminalist by timely requesting a subpoena. The case was remanded to the juvenile court for a new trial.

State in Interest of C.J., 9 So.3d 845 (La. 2009)

Juvenile court abused its discretion in finding juvenile was not entitled to a free **transcript** of his adjudication hearing for purposes of appeal because mother was "voluntarily unemployed." Although the court was entitled to reassess a determination of indigency at any time, R.S. 15:175(A), it must make a finding that, in fact, because of other resources or assets available, the cost of the transcription can be afforded.

State in Interest of J.E.T., 10 So.3d 1264 (3 Cir. 2009)

11 year-old juvenile's motion to **suppress his confession** to aggravated incest was denied by trial court. Juvenile entered an *Alford/Crosby* plea and then appealed. The appellate opinion recites a section of the Author's Notes to Ch.C. art. 808 and proceeds to address the juvenile's arguments as to his young age, lack of an interested adult during questioning (the mother and stepfather had a conflict of interest since the victim was their child), the legal capacity/authority of the stepfather to waive the juvenile's rights. Based on this analysis, the appellate court found that serious doubts were raised as to whether the juvenile knowingly and voluntarily waived his rights.

The juvenile further argued that his statement was improperly induced by threats, coercion and intimidation. Evidence supporting the claim included: sheriff's "joke" during transportation about harming the child; entering the building alone and being interrogated for 2 hours with only his stepfather present; and being subjected during the interview to a threat to tell the truth "or else" as well as to cursing and possibly to thrown objects; and the turning off of lights at the conclusion of the interview. Based on the totality of the circumstances standard (*Fernandez*), the appellate court found that the juvenile did not make a knowing and voluntary waiver. Reversed and remanded.

State in Interest of N.H., 11 So.3d 27 (1 Cir. 2009)

Juvenile pled guilty to 3 (of 9) counts and court entered judgment of disposition. Juvenile appealed. Insofar as the Criminal Code provision that prohibits defendants from **appealing a sentence imposed in conformity with a plea agreement** (C.Cr.P. art. 881.20) has no equivalent in the Children's Code, which favors review of dispositions, the appeal was considered. (Dissent disagrees.) The appellate court held that the trial court did not abuse its discretion by not transferring the case to the jurisdiction where other hearings were pending and where the juvenile's probation was being supervised. Further, the trial court "correctly concluded that an informal disposition hearing was appropriate in this matter...

Defense counsel had discussed the plea agreement with the child and his family, and had agreed on the plea agreement and disposition with the State." Finally, the court held that where a specific sentence is agreed to in a plea bargain, there is no need for the court to comply with Ch.C. art. 903(A).

State in Interest of W.B., 11 So.3d 60 (4 Cir. 2009)

Upon review of the evidence, appellate court affirmed finding **sufficient evidence** to support adjudication of indecent behavior and simple burglary where juvenile had entered the home of girl he spoke to from outside a window, then disrobed and waited for her to return.

State in Interest of D.G., 11 So.3d 548 (4 Cir. 2009)

Juvenile appealed sexual battery adjudication, claiming that virtually all of the evidence against him was **hearsay** of what the victim told others but he was not allowed to cross-examine the victim (who was available but not called by the state to testify). The appellate opinion reviews the relevant 6th Amendment case law and concludes that this was not a jury trial where calling the victim to testify might adversely affect the defendant. Admission of the videotape interview of the victim was admissible under Ch.C. art. 322.

The 3 year disposition imposed at the delayed hearing requested by both parties was not an increase in severity where the court had referred to a possible 2 year disposition prior to the continuance. “[T]he dispositional decision by the juvenile judge was a considered an act consistent with the requirements of the Children’s Code and not an act of whimsy.”

State in Interest of B.A.A., 13 So.3d 1183 (2 Cir. 2009)

Appellate court affirmed attempted aggravated burglary adjudication and disposition of juvenile, finding **sufficient evidence** that the juvenile had specific intent to commit a burglary and performed acts which tended directly toward the accomplishment of that goal, and was armed with a dangerous weapon while the victim was home during the offense.

Juvenile argued that he was not represented by **counsel during the predisposition interview**. The appellate court concluded that “the predisposition investigation does not constitute a stage of the proceedings such that the defendant was entitled to counsel.. We note that a predisposition investigation serves only as an aid to the court, and is neither an adjudicative nor a punitive stage which could result in a juvenile’s commitment to an institution.”

State in Interest of K.M.T., 18 So.3d 183 (2 Cir. 2009)

Juvenile appealed adjudication for attempted forcible rape and disposition of 2 years in secure care. Considering the record, the appellate court concluded that the **evidence was sufficient** to support the adjudication. “The testimony of the victim supports all of the elements of the crime, including intent...The defense witnesses’ testimony regarding [the victim’s] possible motive for allegedly fabricating the attack to get back at [the juvenile] was considered and discounted as not credible. The appellate court further found the disposition to not be constitutionally excessive. And despite juvenile’s claim of **ineffective assistance of counsel**, the court found that any alleged errors would have affected the outcome of the proceedings.

PATERNITY

J.M.Y. v. R.R., 1 So.3d 725 (3 Cir. 2008)

Legally presumed father (former husband of mother) filed suit against biological father seeking **reimbursement for child support** ordered in the divorce. Trial court granted exceptions of no right and no cause of action. Appellate court affirmed, holding that this is not an issue of dual paternity: the presumed father never disavowed (C.C. art. 189), the biological father never acknowledged or otherwise established paternity (C.C. art.198), and the mother has never filed a filiation action on behalf of the child (C.C. art. 197). “[T]here is no cause of action under Louisiana law for a legal father to demand reimbursement for child support he has paid from an individual who has never been established to be the biological father.”

DSS in the Interest of P.B. v. Reed, 15 So.3d 205 (5 Cir. 2009)

State filed petition to prove paternity and obtain **child support** against the biological father of a child born during the mother’s marriage to his brother. The court found him to be the biological father and ruled that he failed to show that establishment of paternity was not in the best interest of the child. Because the issue of support was not included in the judgment, it was a partial judgment that had not been designated as final, and was therefore not ripe for appeal. C.C. P. art. 1915(B)

PROTECTIVE ORDERS

Lee v. Smith, 4 So.3d 100 (5 Cir. 2008)

Where neither party's testimony was entirely credible, trial court's decision to deny petition for protection from abuse was not an abuse of discretion. However, the decision to order **mutual restraining orders** was reversed in part, since no pleadings had been filed against the petitioner and she was not given reasonable notice that a restraining order could be issued against her. Petitioner failed to meet her standard of proof required for a protective order under R.S. 46:2131, *et seq.*

Remondet v. Remondet, 13 So.2d 1127 (5 Cir. 2009)

Custody award of children to grandparents was not appropriately based on a Petition for Protection from Abuse under R.S. 46:2121-2143. No factual allegations of abuse were made and no evidence of abuse was in the record. Thus, absent a petition for custody under C.C. art. 131, the petition should have been dismissed. Reversed.

Newton v. Berry, 15 So.3d 262 (2 Cir. 2009)

Father filed for protective order on behalf his daughter against her stepfather pursuant to the DAAA. Based on alleged sexual abuse, the juvenile court found probable cause to believe the child was in need of care, entered a TRO and after hearing granted the protective order. The acts complained of included getting into bed while naked with child, which the appellate court found "can easily be included under the ambit of domestic abuse. Such behavior appears to constitute **grooming**...and we find nothing in the law that would require the courts to ignore such behavior and leave a child at the mercy of the perpetrator until more harm is done." The court's review of the DVD forensic interview with the child, without admission into evidence, did not prejudice the stepfather insofar as it was cumulative and not necessary to prove the allegations where the testimony more than sufficed to support the issuance of the protective order.

Teutsch v. Cordell, 15 So.3d 1272 (2 Cir. 2009)

Mother filed petition for protection from abuse based on allegations that the (noncustodial) father slept in the bed with and touched their 9 year-old child during visitation. Juvenile court issued a TRO and scheduled a hearing on the protective order. The court found the child to be in need of care based on sexual abuse and issued a protective order effective until the child turned 18 (pursuant to Ch.C. art. 1570). The court was convinced that the touching was not accidental, as the father had argued, but sexual fondling "...and in fact, what it is is **grooming** behavior."

CUSTODY AND VISITATION

Henry v. Henry, 995 So.2d 643 (1 Cir. 2008)

Mother's motion for change from joint custody to domiciliary custody was denied by the trial court, finding that the proposed change was not in the child's **best interest**. Affirmed.

Jones v. Willis, 996 So.2d 364 (2 Cir. 2008)

Upon mother's death, stepfather given custody of 8 year-old he had raised since age 2, and not **grandparents** who had adopted the child's sibling but had an "insignificant relationship" with the boy.

Beene v. Beene, 997 So.2d 169 (2 Cir. 2008)

Modification of joint custody agreement to award father sole custody was upheld. The record reflects that this was not a "considered decree" subject to the *Bergeron* standard. The evidence, including the mother's domestic disputes and tumultuous relationship, warranted the modification. The trial court's order requiring drug testing and counseling by the mother was amended to limit the time period to one year (unless results indicate further testing is needed). Subsequent "**review**" **hearings** would have been inappropriate, but the judgment clearly indicated that issues remained to be resolved.

Wilson v. Paul, 997 So.2d 572 (3 Cir. 2008)

Ex parte order of temporary custody was granted to maternal **grandparents**, followed by order awarding temporary custody to them and visitation rights for the parents. Mother appealed. Evidence was sufficient to prove that custody to the mother (former domiciliary parent) would have resulted in **substantial harm** to the child. Affirmed.

Earle v. Earle, 998 So.2d 828 (2 Cir. 2008)

Mother appeals court's award to father of **overnight or out-of-state visitation** of 2 year-old child with respiratory problems and of either minor child due to father living with a woman to whom he was not married. Nothing in the record indicated to the appellate court that the father would not be diligent in caring for his son or that he would not abide by the provision in the judgment that neither party be allowed to have an opposite sex guest spend the night in the house when the children are present. (See also Support)

Teague v. Teague, 999 So.2d 86 (2 Cir. 2008)

In divorce proceeding between mother and father, custody was awarded to paternal **grandparents** due to parents' drug use, instability, immaturity, poor judgment, fighting, unemployment and neglectful parenting. Appellate court finds it in the children's best interest to be in their grandparent's stable home environment, but orders that the father no longer reside with them in the same residence as the children and only have supervised visitation, and imposes a visitation schedule for the mother.

Young v. Young, 999 So.2d 351 So.2d (3 Cir. 2008)

Protective order that father got against mother (for attempting to run over him) cannot be modified to give father sole custody of the child, where the father's motion to modify asserted behaviors that did not constitute abuse as required by R.S. 46:2134(A)(2).

Bernberg v. Strauss, 999 So.2d 1184 (4 Cir. 2008)

Father sued expert who had testified in custody dispute, alleging that the doctor knowingly provided false testimony (including the dangers of mother's diagnosed borderline personality disorder) that led the court to award domiciliary custody to the mother, causing severe emotional distress to the child. The trial court granted the doctor's exception of no right/cause of action. The appellate court found there to be no cause of **action against a physician who renders expert testimony** on behalf of an opposing party in a child custody proceeding. As an adverse expert witness, the doctor is entitled to absolute witness immunity. (In footnote 7, the court further finds that he would have no cause of action even without witness immunity.)

In re. Green, 1 So.3d 683 (3 Cir. 2008)

Grandparents' motion to amend a judgment of visitation (rendered pursuant to R.S. 9:344) was denied because the proposed amendment would create a substantive change to the judgment. "If the **grandparents** thought that this condition was not part of the stipulation, they should have filed a motion for new trial or appealed the judgment." Affirmed.

Picou v. Picou, 1 So.3d 761 (4 Cir. 2008)

Mother requested modification of stipulated consent judgment of visitation. During trial, at the close of the mother's case, court granted an involuntary dismissal under C.Civ.P. art. 1672(b). The court found no material change in circumstances, despite the mother's contention that the father had relinquished his custodial duties to his parents because of his work schedule. The appellate court found ample evidence that mother did not prove the **material change in circumstances** and further that she did not introduce any expert testimony to prove that the current joint custody arrangement was not in the children's best interest.

Slaughter v. Slaughter, 1 So.3d 788 (2 Cir. 2008)

Mother appealed modification of joint custody naming ex-husband as primary domiciliary parent. The appellate court reviewed the **conflict in the expert testimony** and concluded that the trial court was not wrong in finding that the mother had had sex with men with her children present and her poor parenting was harmful to the child. The parties offered conflicting stories about why the father had not visited with the child in 2 years and had failed to pay support; the court found that the mother had not allowed the father to exercise visitation. “While we may have weighed the evidence differently if sitting as a trier of fact, we cannot conclude on this record that the trial court was manifestly erroneous in its determination.”

Edwards v. Edwards, 2 So.3d 482 (5 Cir. 2008)

Trial court summarily dismissed a custody matter for failure of parties to timely submit memos as required by court rule, and then denied a motion to reset with an attached memo. The appellate court found this to be, in effect, **dismissal with prejudice** which is not among the sanctions provided in the court rules and is an inappropriate sanction. “This is a child custody matter and the parties deserve, and should be afforded, a chance to be heard before the trial court in order to make sure the best interest of the children are met.” Reversed for a full evidentiary hearing on the issue.

Martin v. Martin, 3 So.3d 512 (2 Cir. 2008)

Appellate court affirmed trial court’s grant of father’s request to relocate with his child. Mother, appearing *pro se*, argued 12 assignments of error by the court. Assignments were not substantiated or not appropriately before the court, the mother did not object to any of the court rulings, and upon review the appellate court could find no rulings that could possibly be construed as a denial of the mother’s due process. And there was no abuse of discretion where the child had spent several years with her father and his family while having virtually no contact with her mother, and the reasons for **relocation** “appear likely to enhance the quality” of the child’s life and to advance the father’s career.

Preuett v. Preuett, 4 So.3d 260 (3 Cir. 2009)

Trial court exceeded the limited **scope of proceedings set to resolve exceptions** filed when it ruled, without hearing evidence, on the merits of rules the parties had filed. Upon *de novo* review to determine whether the exceptions were correctly denied, the appellate court held that a cause of action for modification of a custody decree was established by mother’s assertion that the previous visitation schedule did not account for relocation and that the father will not allow the children to visit her in Oregon. Maintaining the current custody decree would be “deleterious to the children, in light of the fact that it provides for each parent to have physical custody of the minor children on a weekly basis – a feat that is unworkable considering the parents’ locations.”

Perry v. Monistere, 4 So.3d 850 (1 Cir. 2008)

Biological father established paternity of child with presumed legal father and requested custody. The court ordered joint custody, making mother the domiciliary parent and setting a visitation schedule. Father filed a motion to **modify custody** based on a change in his employment. Upholding the trial court, the appellate court found the *Bergeron* standard to be applicable, despite an intervening consent judgment modifying visitation, and found that the father failed to carry his burden of proof, despite the fact that the mother had in the past failed to comply with the visitation schedule.

Mohsen v. Mohsen, 5 So.3d 218 (1 Cir. 2008)

Mother appealed denial of her motion to establish **international visitation** and order to **surrender the child's passport**. Because the motion required supporting proof, and no evidence was offered in support of her motion, the court's denial of the motion was affirmed on appeal. The order to surrender the child's passport was based solely on the fact that Nicaragua is a nonparticipant in the Hague Convention. The appellate court held that the other factors enumerated in R.S. 13:1857(A) are also required, and remanded the matter "for a full hearing on, and reconsideration of, all of the factors involved in a determination of the issue of whether there was a credible risk of abduction of the child, thereby justifying the surrender of the child's passport.

Howard v. Oden, 5 So.3d 989 (2 Cir. 2009)

Court found mother in **contempt** (for the 3rd time) for repeated and willful failure to follow the court's order disallowing contact between her children and the man to whom she is married, and granted primary domiciliary custody to the paternal grandfather. Various agencies had made exhaustive efforts to keep the children from going into foster care based on the father's mental health problems and the mother's inability to exercise good judgment and care for the children (especially with regard to her new husband).

The appellate court found that the record supported a finding that the mother engaged in a pattern of willful and intentional violation of court orders without good cause, which may be considered a material change in circumstances warranting a modification of custody under R.S. 13:4611(1)(f). "It is clear from the manner in which the trial court handled this matter that the change of custody is not the trial court's infliction of a punishment upon the mother for her disobedience of its orders; rather, it is a sad acknowledgment of the fact that the mother has repeatedly shown that she does not have the best interest of her children at heart." (Note dissent objecting on both procedural and substantive grounds.)

Schmidt v. Schmidt, 6 So.3d 197 (4 Cir. 2009)

Trial court properly denied mother's exception of no cause of action to father's motion to

amend the custody judgment, where the motion sought to **modify** the visitation provisions in a prior custody judgment under which the father shared joint custody. The mother asserted that the father did not meet the *Bergeron* standard for a change in custody, but the appellate court found that the father was seeking a modification of visitation, which is not subject to the *Bergeron* rule, but to the best interests of the child standard (citing discussion in Triche's *Family Law Handbook*).

Mason v. Hadnot, 6 So.2d 256 (1 Cir. 2009)

Mother denied father contact after father used **corporal punishment** to discipline child for lying causing the child to have PTSD. Father filed a motion to reset custody/visitation and a motion for contempt against mother. The court found that the mother had a justifiable reason for denying visitation, despite the fact that reasonable corporal punishment by parents is permitted by law. (R.S. 14:18; C.C. art. 131) The appellate court agreed that the father had gone beyond that which was reasonable in disciplining the child, providing the mother with good cause to deny him visitation.

Judge Hughes dissented: "While I personally agree that a twelve year-old should not be spanked with a belt, even if it is not illegal, if the mother felt it was a problem, she should have filed pleadings to suspend visitation rather than take the law into her own hands by unilaterally terminating visitation contrary to the order of the court. The failure to address the mother's actions may encourage others to ignore orders of the court and harms the respect and integrity of the court system. Two wrongs do not make a right."

McMillin v. McMillin, 6 So.3d 414 (3 Cir. 2009)

Paternal **grandparents** obtained a consent judgment of visitation when their son died. Mother subsequently married and her husband adopted the child. When mother did not afford them the visitation privileges afforded them by the consent judgment, grandparents filed motion for contempt.

Appellate court held R.S. 9:344 inapplicable, since the mother and father had been divorced prior to the father's death, but found C.C. art. 136(B) provides for reasonable relative visitation under extraordinary circumstances if the court finds it to be in the best interest of the child. The original award of visitation pre-dated the adoption but "the subsequent adoption neither nullifies nor negates the provisions of C.C. art.136(B), which is the last legislative pronouncement addressed to that issue." The appellate court held that the consent judgment affording the grandparents visitation prior to the adoption created the extraordinary circumstance required under art. 136(B) and the evidence in the record clearly established that the grandparental visitation was in the best interest of the child.

However, the appellate court agreed with the mother that the extensive visitation ordered by the court was not "reasonable" under the facts of this case, particularly considering the

recent holding in *Troxel v. Granville* and its progeny. The visitation schedule was amended and the grandparents were required to assume sole responsibility for transportation. In addition, the trial court's order that the mother tell the child about her biological father was reversed. "In following the mandates of *Troxel*, we find that [the mother], the sole surviving biological parent, is the proper and appropriate person to make the determination, as she sees fit, as to when [the child] should be told about her biological father. That is a parental decision, not a court decision." The finding of contempt against the mother (for willfully disobeying the consent judgment) was affirmed.

Hill v. Ross, 6 So.3d 828 (4 Cir. 2009)

Child custody proceedings were initiated in 3 different parishes. By the time the father appealed, the custody matter had been transferred to Orleans Parish, so the appeal was deemed to be moot.

Whitman v. Williams, 6 So.3d 852 (3 Cir. 2009)

Mother appealed trial court judgment **awarding joint custody to her, the child's alleged father and the father's maternal aunt** and designated the aunt as the domiciliary parent. Finding that the court had considered all of the relevant factors and noted that the child had lived half her life with the aunt in a stable and wholesome environment, the appellate court affirmed.

Bergeron v. Bergeron, 6 So.3d 948 (2 Cir. 2009)

Both parents appealed from judgment awarding child support, **shared custody**, and continuation of the children in current school. Where each parent complained about the other, but the expert found both to be good parents and found that the children would benefit from living in each parent's home on alternating weeks, the trial court's finding that the best interest of the children would be served by implementing such a shared custody plan was not erroneous.

Although the law presumed that the mother/domiciliary parent's decision about school placement was in the children's best interest, the original school decision was made jointly and required exchange of education information. Mother made unilateral decision to change schools, with no evidence that another school would provide more. Considering the children's need for stability and the willingness of the grandparents to contribute to the cost of education, the trial court decision to maintain the children in their school was affirmed.

Note concern of Judge Caraway about how when courts make exceptions to bright line rules they "entertain expensive litigation" and "foster family disputes". (See also Support)

Hartman v. Lambert, 7 So.3d 758 (3 Cir. 2009)

Mother registered Orleans support and custody order in St. Landry Parish then filed a rule to modify custody. Court found that Orleans retained jurisdiction and transferred the case to Orleans. Although the Orleans order stated that it retained **jurisdiction**, the appellate court found that neither R.S. 13:1814 (UCCJEA) nor R.S. 9:355.17 (relocation) were applicable in this case, so the St. Landry court did have subject matter jurisdiction pursuant to Article 5 of the Louisiana Constitution.

Gallet v. Gallet, 10 So.3d 255 (3 Cir. 2009)

Where a judgment concerning **school selection** did not concern child support or enforcement of visitation, attorneys fees were not authorized under R.S. 9:375. Trial court did not abuse its discretion in refusing to appoint an attorney for the child, since the evidence did not support the presence of any of the factors set out in R.S. 9:345. Denial of motion for contempt was appropriate where mover was “twisting the intent of the custody plan by insisting on a hyper-technical adherence to it form over its substance.” Finally, the child’s separation anxiety was not sufficient to support a change in custody.

Palazzolo v. Mire, 10 So3d 748 (4 Cir. 2009)

In a bitter **same-sex partners’ custody dispute** between adoptive mother and birth mother, appellate court held that the birth mother was properly awarded custody but that the adoptive mother’s visitation rights were improperly terminated. The opinion thoroughly reviews the evidence adduced, including the expert and lay testimony, as well as the law on custody and the concept of parent alienation. The appellate court concluded that the general rule favoring joint custody is overcome by the recommendations and testimony of the experts that sole custody is in the child’s best interest (although they disagreed on which parent should have custody). As between the mothers, the appellate court reviewed the evidence in light of the Article 134 factors and affirmed the trial court’s determination of sole custody to the birth mother. With regard to visitation, since there was no evidence that visitation would be dangerous, the trial court erred in terminating the adoptive mother’s visitation rights and the issue was remanded for a hearing with a recommendation for appointment of a parenting coordinator.

Watts v. Watts, 10 So.3d 855 (4 Cir. 2009)

In this “contentious custody battle in which both parents, who the experts stated both love their children, seek designation as the domiciliary parent,” trial court’s designation of mother as domiciliary parent was not an abuse of discretion although each parents’ expert asserted **parent alienation** on the part of the other parent.

Cramer v. Tuttle, 11 So.3d 503 (3 Cir. 2009)

3 years after a Texas court had entered custody order, mother brought action in Louisiana under UCCJL to dissolve an injunction against moving and to increase child support. Father argued that Texas retained exclusive **jurisdiction** pursuant to the PKPA. The appellate court held that under both UCCJL and PKPA, Louisiana was the child's home state.

L.E.P.S. v. R.G.P., 11 So.3d 633 (3 Cir. 2009)

Appellate court reversed and remanded order of trial court naming legal father as primary domiciliary custodial parent of triplet daughters under direct supervision of his mother pending the resolution of criminal charges against the father. The 15 year old triplets all testified that they did not want to move to Arizona with their mother. Although the trial judge clearly considered evidence of father's arrest for carnal knowledge and contributing to the delinquency, the judge erred in not admitting the evidence, which was relevant to father's moral fitness, into the record. The court further found the evidence overwhelming that it was not in the children's best interest for father to be domiciliary parent based on father's ongoing drug problem and continued association with known drug users.

Considering the evidence and the **relocation** factors in R.S. 9:355.12, the appellate court awarded joint custody to the parents, subject to his mother's supervision pending the outcome of the criminal charges, with mother named as domiciliary parent and authorized to move the children to Arizona. Remanded for determination of visitation schedule. (One dissenting judge would grant the mother sole custody, and another would not have reversed the judgment of the trial court.)

Bingham v. Bingham, 12 So.3d 448 (2 Cir. 2009)

Mother's second request to **relocate** with children to Wyoming was denied and mother appealed. The appellate court held that the "trial court's determination to deny relocation was thoughtful and firmly supported by the record" and that court's decision not to impose sanctions against the mother was not erroneous.

Parker v. Parker, 12 So.3d 485 (2 Cir. 2009)

Appellate court affirms denial of mother's request to **relocate** with the children to Mississippi. The court agreed with the trial court that this was a "close case" and although they may not have reached the same conclusion, the trial court's ultimate determination was not an abuse of discretion. The opinion notes that the mother's primary reason for relocating was that her new (4th) husband lived there, whereas the father's reason for opposing relocation was that he wanted to maintain regular contact with his children."

Black v. Simms, 12 So.3d 1140 (3 Cir. 2009)

Same sex partners each had a child using the same sperm donor. In a custody dispute several years later between the mothers, the trial court found that the non-biological mother of one child failed to prove that substantial harm would come to the child if she continued to live with her birth mother and dismissed the non-biological mother's petition for custody.

The appellate court acknowledges that there are no laws governing gay and lesbian relations, but observes that there are no laws governing heterosexual relationships in which only one of the parties is the biological parent. "Any non-parent who has a relationship with a biological parent and develops a relationship with the child has to meet the same standard in establishing a basis for custody of the child. This includes grandparents and step parents." C.C. art. 133 "first requires a finding that an award of sole custody to the parent would cause substantial harm to the child. It is only after this finding that the best interest of the child comes into play."

The non-biological mother argued that separating a child from a functional parent (and relatives) is sufficient to establish substantial harm. The court held that while the birth mother's actions did deprive the child of the love of the other family, this does not amount to substantial harm. "Plain and simple, Ms. Simms is the mother of Braelyn and has the right to direct how Braelyn is raised. *Troxel*, 530 U.S. 57, 120 S.Ct. 2054."

Garner v. Thomas, 13 So.3d 784 (4 Cir. 2009)

Award of visitation to maternal **grandparents** was affirmed. Mother of children had died and grandparents were denied access to the children with whom they testified they had had a close and loving relationship.

On appeal the father contends that the trial court's judgment violated his fundamental parental right to make decisions regarding the care, custody and control of his children, as per *Troxel*. However, "the presumption that a fit parent has the right to determine issues such as visitation must be considered to have been overcome in this case in light of the trial court's rejection of Mr. Thomas' testimony as disingenuous, and the record considered in its entirety." Considering and applying the standards of C.C. art. 136(B), the appellate court concluded that the grandmother sustained her burden of proving that increased visitation was in the best interest of the children.

Shivers v. Shivers, 16 So.3d 500 (2 Cir. 2009)

Trial court's denial of father's **relocation** petition and award of custody to the mother was an abuse of discretion where the court apparently based its decisions on conversations with counsel and the parties in chambers or the father's demeanor during the proceeding. Considering the evidence presented, the appellate court found that although it might have ultimately reached a different result, the trial court did not abuse its great discretion in

denying the motion to relocate. However, the judgment awarding sole custody to the mother was reversed and substituted with the appellate court's judgment awarding joint custody with the mother as domiciliary parent. Case was remanded for implementation of a joint custody plan.

Smith v. Smith, 16 So.3d 643 (2 Cir. 2009)

Mother appealed denial of relief under the **PSFVRA** (R.S. 9:361 *et seq.*). Although the appellate court found evidence that "each party provoked verbal and sometimes physical altercations with the other," the trial court was not manifestly erroneous in finding no showing of a history of family violence requiring application of the PSFVRA. The trial court's conclusions regarding the mother's depression were found to be supported by the evidence. "Evidence of her longstanding depression, use of medication, erratic behavior, which included threats of suicide, along with a poorly kept house, provided a sufficient basis for the trial court to make a commonsense conclusion that [the mother's] mental health issues had an effect on the problems in the marriage and affected her ability to serve as domiciliary parent. No medical testimony is required to make this conclusion..."

However, the court's failure to consider the factors under R.S. 9:355.12 in denying the mother's **relocation** request was considered legal error. The appellate court made a *de novo* review and analysis of the factors and concluded that relocation with the mother was not in the best interest of the child.

The appellate court upheld the trial court's change in domiciliary custody based on art. 134 factors, findings on the issue of violation of the mother's use of the home, and denial of child support for the emancipated daughter.

Willhite v. Willhite, 17 So.3d 495 (2 Cir. 2009)

Maternal **grandmother** filed a petition for custody of her grandson, asking for sole custody and child support. Thereafter, the mother filed a motion for sole custody, naming the father as defendant. After a hearing, the court found that the grandmother had not borne the burden of proof necessary to deprive the mother of custody, and awarded sole custody to the mother. Considering the record, the appellate court did not find that continuing custody with the mother would result in substantial harm to the child, noting that much of mother's past irresponsible conduct was stale and that allegations of her current boyfriend's outlandish behavior were largely unsubstantiated. Failure of the trial court to grant the grandmother visitation was found not to be an abuse of discretion.

Robert v. Robert, 17 So.3d 1050 (2 Cir. 2009)

Mother appealed trial court designation of father as **domiciliary parent**. Appellate court affirmed, finding that the trial court's determination was based heavily on its factual

findings. “In its written reasons for judgment, the trial court discussed each of the factors set forth in art. 134 and found that overall they favor the father.”

Jones v. Coleman, 18 So.3d 153 (2 Cir. 2009)

Father brought action to modify consent judgment of sole custody to maternal **grandparents** and requested appointment of a mental health expert evaluation of the parties. At trial, the mental health expert refused to make a recommendation as to what placement would be in the best interest of the child, stating that the child could do well in both households. The trial court denied the father’s request for custody, finding that although there has been a change in circumstances, the best interest of the child supported maintaining custody of the child with the grandparents.

Appellate court reviewed “the constitutionally protected primacy of the parental right of custody, the Civil Code’s provision for the parent’s loss of custody in favor of a nonparent, and most significant for this decision, the applicable burden of proof for any change of the nonparent’s custody after a prior judgment establishing such custody over the parent’s paramount right.” The opinion finds that:

- The initial judgment under art. 133 placing custody of the child with a nonparent is a determination of the unfitness of the parent and the fitness of the nonparent to provide an adequate and stable environment.
- The considered versus nonconsidered decree analysis does not apply to future action to modify the nonparent’s custody.
- In any proceeding to restore custody to the parent from the nonparent, the parent has the burden of proving that his rehabilitation eliminated the former threat of substantial harm and that the adequate and stable environment in which the child was placed with the nonparent has materially changed.
- Absent such change, the parent’s rehabilitation affords the parent only an appropriate visitation allowance under C.C. art. 136.

McCormic v. Rider, 19 So.3d 628 (3 Cir. 2009)

Biological parents filed petition for custody against **adoptive mother (paternal grandmother)** of their child. Trial court awarded joint custody to all three parties and later named the mother as domiciliary parent with other two parties given visitation. Adoptive mother appealed. Due to adoption, the biological parents were considered non-parents seeking custody from a parent. The court found substantial harm justifying a change in custody, but granted the adoptive parent joint custody. “Pursuant to C.C. art. 133, if substantial harm is found, then the parent cannot have custody. The trial court’s own comments regarding its finding as to [the parent’s] fitness as a parent negate its finding that substantial harm to the child existed. Obviously, if the trial court found that [she] was still entitle to joint custody, [biological parents] failed to meet the heavy burden of proving that custody in [her] favor would result in substantial harm to [the child]. Since no substantial harm was proven the trial court was prohibited from granting custody

to the nonparents. Therefore, the trial court erred in awarding custody to the non-parents...” Reversed.

Piccione v. Piccione, 20 So.3d 576 (3 Cir. 2009)

Trial court granted mother’s exception of no cause of action to father’s rule to increase **visitation**, finding that the father failed to meet the *Bergeron* standard of proof. The appellate court reversed, finding that because the rule did not seek to alter custody, only visitation, it did not matter whether the original custody decree was a consent judgment or considered decree, because *Bergeron* did not apply and a showing that the change in visitation is in the best interest of the child is sufficient.

CHILD SUPPORT

Vega v. Vega, 996 So.2d 613 (5 Cir. 2008)

Consent judgment entered on the record in court was enforceable, despite unavailability of transcript and signed agreement, because the instruments contained in the record when read together evidenced the acquiescence by both parties to the increase in child support.

DSS v. Swords, 996 So.2d 1267 (3 Cir. 2008)

Court increased child support for 15 year old, finding that the father was **voluntarily under-employed**, including as income the payments of taxes, insurance and rent his parents made on the home he rented from them, and adding private school tuition because of the increased personal attention the child would get for his educational needs.

Appellate court found **tuition award** an abuse of discretion, because the only evidence of “special needs” was the unsupported testimony of the mother. The imputed income calculation was upheld, despite father’s physical disability. “No specific evidence was introduced as to how his condition limits his work capabilities... [and he] manages to participate in numerous outdoor activities despite his stated health problems.” Finally, the appellate court found that the **imputed amounts** paid by his parents for the home he rented to be error by the trial court. The costs of appeal were assessed 25% to the father and 75% to DSS.

Davis v. Davis, 997 So.2d 149 (2 Cir. 2008)

Mother and father filed support rules and both parties objected to the resulting child support judgment. Father was found to be **voluntarily under-employed**; his testimony about giving up his medical license because of stress and health problems was self-serving and unsupported by medical testimony. Trial court’s increase in support and decision to not make it **retroactive** to the date of judicial demand was not an abuse of discretion. The father had made unilateral reductions in his child support payments, which he argued were extrajudicial agreements. In calculating arrearages, the court properly gave the father **credit** for direct payment made to his children to which the mother had not objected. However, the father’s reduction of **in globo child support** on the eldest child’s reaching majority was improper and contrary to law. The award of arrearages, calculated subject to the credit and payable in monthly installments, was not an abuse of discretion.

The appellate court remanded for consideration of whether the father could have purged himself of the **contempt** “through sincere but unsuccessful efforts” or whether he should serve the sentence imposed. In addition, the opinion considers the law regarding **sealing of court records**. “Our review of this entire record reveals examples of poor behavior and/or unfortunate choices by both parties. However, nothing required the sealing of this record. In addition to impinging on the constitutionally protected right of public access to

the courts, a sealed record is a burden on the courts and an extreme inconvenience to attorneys. A record should be sealed in its entirety only in extremely limited situations. If court records must be restricted, the court must always fashion the relief to cause the least interference with public access.”

Earle v. Earle, 998 So.2d 828 (2 Cir. 2008)

Mother appeals child support award, specifically the trial court’s giving father credit for health insurance and not considering his bonus when determining income. Because the trial court did not provide reasons for not **considering the bonus**, despite the inclusion of a bonus in the definition of gross income in R.S. 9:315(C)(3)(a), the appellate court found an abuse of discretion and recalculated the child support. Trial court was correct in including the **health insurance premiums** in determining the support obligation (R.S. 9:315.8(A) and in allowing the father credit for them as provided by R.S. 9:315.8(D).

D.S.S. in Interest of O.M.H. v. Cruz, 998 So.2d 837 (2 Cir. 2008)

Hearing officer recommended granting non-domiciliary biological father the **income tax dependency deductions** for every other year, and trial court affirmed the recommendation. The state appealed, arguing that no evidence was presented to show that the deduction would result in substantial benefit to the father without causing significant harm to the mother as provided in R.S. 9:315.18.

The father argued that the state did not have standing to challenge the award of the dependency deduction. The appellate court held that the rule seeking the deduction had been filed in a legal proceeding brought pursuant to R.s. 46:236.1.2, in which the state was a proper party to oppose the rule.

As for the deduction award, R.S. 9:315.18 places an affirmative burden of proof on the father to produce evidence that he would substantially benefit without significantly harming the mother. Because the trial court did not conduct a hearing and require such proof, the matter was remanded to the trial court for a contradictory hearing.

Miller v. Miller, 1 So.3d 815 (2 Cir. 2009)

Divorced parents entered into a Joint Custody Implementation Plan which included provisions related to **college expenses**. Father moved for a decrease in child support when the oldest child turned 18 and the mother responded with a request for enforcement of the JCIP provisions. The appellate court found no evidence to clarify the intent of the language in the college expense provision (“agrees to begin setting funds aside”) and set aside the provision for vagueness and ambiguity.

Heflin v. Heflin, 1 So.3d 820 (2 Cir. 2009)

Mother was awarded 5 years in past due child support and father appealed. The trial court finding of **no express or implied agreement to suspend court ordered support** during the 10 years the child lived with the father, relying on *Dubroc v. Dubroc*, 338 So.2d 377 (La.1980). Louisiana law generally provides that a child support obligation remains in effect until it is modified, reduced or terminated by the court. The appellate opinion reviews *Dubroc* as well as another line of cases that recognize an exception when the child resides with the obligor at the request of the other parent for a substantial period of time and the obligor parent provides full support for the child during that time. Considering the circumstances in this case, the appellate court concludes that “this case is one of those rare cases in which the implied agreement exception should apply.”

Hall v. Hall, 4 So.3d 254 (5 Cir. 2009)

Father appealed order of child support set at \$2,700 per month. The combined gross income exceeded the schedule in R.S. 9:315.19 and the court exercised its discretion (under 9:315.13) to not reduce the award in consideration of the parents’ plan for equal custody. Such a reduction would not be in the child’s best interest, since the mother’s income alone would not support the child during the periods in her custody. Affirmed.

Lauve v. Lauve, 6 So.3d 184 (4 Cir. 2009)

Father moved for reduction in child support due to post-Katrina loss of employment; trial court reduced support finding that father (a physician executive not board certified who had not seen a patient in 15 years) was not in bad faith and that he was not voluntarily underemployed. The appellate court found that the court did not abuse its discretion in implicitly allowing the expansion of the pleadings at trial after 5 months of discovery. The court’s findings that the father was in good faith, credible and not **voluntarily underemployed** were supported by the record. (The mother asserted that he should be forced to move to Missouri to potentially earn post-Katrina income, for which the court found no basis.)

On rehearing, the appellate court found that the trial court had failed to include health insurance premiums, extraordinary medical expenses and private school expenses in the basic child support obligation. The court calculated the appropriate support including these expenses and amended the trial court’s judgment accordingly.

Guidry v. Guidry, 6 So.3d 845 (3 Cir. 2009)

Trial court erred in **considering future payments resulting from a personal injury settlement as income**. “While we agree that the income received from this source should be included in his income calculation, it is the opinion of this court that only those amounts actually received can be included and that future payment should not be considered now in making the award of child support. They may be considered when

received, along with other circumstances relative to child support at that time.”

The trial court further erred in finding that the mother was **caring for a child under the age of 5** (so her earning potential need not be considered under R.S. 9:315.11) when the child is in daycare Monday through Friday. “Although the statute does not specify what is meant by caring for a child under the age of 5 years, it is our opinion that this language was meant to apply to those who were actually caring for the child during normal working hours. Further, implicit in the cases on point is an expectation that the party seeking this exclusion be voluntarily unemployed or underemployed for the purpose of caring *at home* for a child under 5 years of age.”

Bergeron v. Bergeron, 6 So.3d 948 (2 Cir. 2009)

Both parents appealed from judgment awarding child support, shared custody, and continuation of the children in current school. The appellate court held that reduction of the amount of interim child support ordered was agreed to by the parties pending rendering of a final child support judgment. Since an interim child support award was in place, under R.S. 9:315.21, the final child support award applies prospectively from the date of the signing of the judgment. Note concern of Judge Caraway that when courts make **exceptions to bright line rules** they “entertain expensive litigation” and “foster family disputes”. (see also Custody)

Jones v. Jones, 6 So.3d 1275 (2 Cir. 2009)

Judge Caraway authors this opinion regarding modification of ***in globo* child support** awards, noting that firm rules permitting no challenge *to in globo* awards when a child reaches majority would promote a policy preventing further controversy. (R.S. 9:315) In this case, the parents’ former agreement to continue the *in globo* determination supported the court’s modification of support as an *in globo* award.

Aguillard v. Aguillard, 9 So.3d 183 (1 Cir. 2008)

Reduction in father’s child support was affirmed. Father was not **voluntarily under-employed**, based on his testimony about the circumstances surrounding his change of employment, resignations and inability to find a higher paying job. Calculation of support based on “**shared custody**” was not an abuse of discretion where the parties asserted a range from 43% to 45.3% and evidence was insufficient to determine exact percentages.

Searles v. Searles, 9 So.2d 997 (1 Cir. 2009)

Rule for arrearages and contempt was improperly dismissed where trial court did not conduct a **full contradictory hearing** of the matter. Vacated and remanded. Concurring opinion notes that “trial judges often are amenable to informal resolution of perfunctory matters to avoid the expenses associated with litigation.”

Cradeur v. Cradeur, 10 So.3d 1252 (3 Cir. 2009)

Trial court erred in setting past due child support amounts based on **equity**. Citing C.Civ.P. art. 3946 and relevant case law, the appellate court held that “[a]lthough we are sympathetic to the reasons set forth by the trial court for its judgment in this case, they simply are contrary to established law and jurisprudence, and as a matter of law are unsupportable.” Evidence that the child resided with the mother for the majority of the time child support payments were due was sufficient “good cause” for judge to refuse to award attorney fees and costs to father.

Durfee v. Durfee, 12 So.3d 984 (2 Cir. 2009)

Judgment ordering mother to pay child support and provide insurance coverage was reversed and remanded for further proceedings. The parties had signed an early consent judgment that gave the father sole custody and stated that neither party would have the obligation to pay child support, but the appellate court found this to be against **public policy** and thus void.

The opinion distinguishes between **voluntary and involuntary changes in circumstances** justifying modification of support. The father did not carry his burden to show that the decrease in family income as a result of his wife quitting her job to stay home with the 4 school aged children was involuntary or voluntary but still warranted. Thus the wife’s earning potential must be included in the determination of income.

Where the trial court ordered the mother to pay **health insurance premiums**, the mother was entitled to deduct that amount from the total child support obligation. Failure of the court to award this credit to the mother was erroneous.

DSS v. Pineyro, 13 So.3d 193 (5 Cir. 2009)

DSS filed petitions for child support against both father and mother of child who was in the custody of OCS. Juvenile court **deviated from the guidelines** based on the special needs children that were in the home and set child support at \$25 per month. DSS appealed. Appellate court found trial court’s failure to follow the mandates of R.S. 9:315.1 in determining child support to be legal error.

“We note that apparently, the trial court took into consideration R.S. 9:315.1(C)(8) which allows the court to look at any other consideration which would make application of the guidelines **inequitable** to the parties. However, the record contained no specific testimony regarding the care required by the handicapped children including whether they attend school and whether Mrs. Pineyro has any assistance in caring for them. While we acknowledge that it may be inequitable to order a mother who is voluntarily unemployed because she is caring for handicapped children to pay child support for a child in the

custody of the state, we must follow the laws as they were enacted by the legislature. The record in this matter does not contain enough information to support the trial court's ruling."

Lirette v. Wickramasekera, 13 So.3d 744 (4 Cir. 2009)

Motion for Clarification of Judgment Awarding **Tax Dependency Deductions** was not proper vehicle to address failure of judgment to address tax deduction upon failure to pay support; a motion for new trial or timely appeal would have been appropriate vehicle to challenge judgment. Neither was it appropriate to amend a judgment to designate arrearages as executor, since this would modify the substance of the judgment in violation of C.C.P. art. 1951.

Rougelot v. Rougelot, 15 So.3d 119 (5 Cir. 2009)

When father continually failed to produce financial documentation and then did not appear for the hearing, the hearing officer did not abuse his discretion in calculating the child support obligation on the basis of the information submitted by the mother.

Frederick v. Buckingham, 15 So.3d 1223 (2 Cir. 2009)

Family aid to mother, including college expenses, an automobile, and expenses and housing immediately after the child's birth, were not considered "**recurring monetary gifts**" that should be included in mother's income. Father failed to prove his obligation to provide support payments for another (out-of-state) daughter, and deviation was discretionary with court under R.S. 9:315.1(C). And medical expenses for child's circumcision incurred prior to the child being covered by the father's health insurance was appropriately apportioned to father.

Bourgeois v. Bourgeois, 16 So.3d 431 (5 Cir. 2009)

Mother filed a **contempt** rule alleging father owed her \$29,113.52 in retroactive child support. Court denied contempt, crediting the father for mortgage payments and energy and water bill payments. Mother appealed alleging that the payments had previously been determined to have been aid as interim spousal support. Reviewing the record, the appellate court could find no support for the trial judge's determination that the parties intended the mortgage payments or utility payments to be part of the father's child support obligation, so he is not entitled to those credits. The father "essentially made his own determination that he should not have to pay retroactive child support..." although the general rule in Louisiana is that a support judgment remains in effect until it is modified or terminated by the court.

Stanley v. Nicosia, 19 So.3d 56 (5 Cir. 2009)

Where a judge granted father, in a prior proceeding in the matter, a **credit** for excess garnishment amounts against retroactive child support amounts, that credit was applied on appeal. Father was not credited for time that the parents reconciled, since they had not been married. “The doctrine of **reconciliation** is codified in C.C. art. 104... Reconciliation has no bearing on an action for child support between parties who have never been married to each other and who are not pursuing a case of action for divorce.”

MISCELLANEOUS

State v. Bernard, 13 So.2d 611 (1 Cir. 2009)

OCS child protection investigator who interviewed defendant in prison relative to possible abuse or neglect of children living at his residence was considered a state actor for *Miranda* purposes, and therefore should have informed defendant of his *Miranda* rights prior to questioning him.

Galloway v. Lolly, 17 So.3d 479 (2 Cir. 2009)

Trial court dismissed mother's action against child care business alleging child molestation, after defendant's motions in limine excluded the live testimony of the child and her videotaped testimony taken at the police department. Because the mother did not submit a proffer of the evidence excluded, it was not available for review. Because the mother had requested 3 previous continuances and made no attempt over the 2 years prior to trial to secure the testimony of the interviewer, the court did not abuse its discretion in denying mother's 4th request for a continuance. Affirmed.