Opinion released March 24, 2000

SUPREME COURT OF LOUISIANA

No. 99-C-2132

LISA SMITH MUNN GUILLOT

VERSUS

MARION PATRICK MUNN, JR.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, FAMILY COURT FOR THE PARISH OF EAST BATON ROUGE

VICTORY, J., dissenting.

"Legislation is a solemn expression of legislative will." La. C.C. art. 2. No matter how strenuously judges might disagree with the law passed by the legislature, we are not free to simply disregard the law as clearly expressed by the legislature in an attempt to do what we think is right. Therefore, I cannot agree with the majority opinion which essentially rewrites the provisions of La. R.S. 9:315.8(E), resulting in the adoption of a test that, until today, was not part of our law. In reaching its result, the majority ignores the mandatory principles of statutory construction, i.e, that "[t]he words of law must be given their general prevailing meaning" and that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Yet, the majority goes even further and replaces the term "joint custody" in La. R.S. 9:315.8(E) with "shared custody" or "extraordinary visitation," while at the same time recognizing that "[i]n Louisiana, however, the terms shared custody and extraordinary visitation do not appear in our statutes." Slip Op. at p. 11, n.7.

In concluding that the nondomiciliary parent's share of the total child support obligation cannot be adjusted unless the child spends more than a "typical" amount of visitation with the nondomiciliary parent, the majority makes three major legal errors. The majority's first error is holding that La. R.S. 9:315.8(E) is a deviation from the guidelines as contemplated in La. R.S. 9:315.1, and accordingly, that the trial court must undertake the analysis required for deviations under La. R.S. 9:315.1(B). The majority's second error is holding that the "'typical visitation' arrangement has already been factored into the guideline formula," Slip Op. at p. 14, and thus the court can only adjust the child support if the nondomiciliary parent has "shared custody" or "extraordinary visitation." The majority's third error is holding that while La. R.S. 9:315.8(E) "purports to apply 'in cases of joint custody' . . . when read in context, the statute is intended to apply only in those cases where the parents share physical custody rather than only in those cases of joint legal custody." Slip Op. at p. 12, n.8. A simple application of La.R.S. 9:315.8(E) as written would have rendered all the above findings unnecessary.[1]

As correctly stated by the majority, Louisiana's Child Support Guidelines, found at La. R.S. 9:315-9:315.15, were adopted in response to the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988), which mandated that states enact presumptive guidelines to be used in any proceeding to establish or modify child support. Christopher L. Blakesley, Louisiana Family Law, 52 La. L. Rev. 607, 609, and n.18 (1992). Louisiana chose the Income Shares Model to fix the appropriate level of child support, which as of 1998, is also used by 32 other states. Jane C. Venohr and Robert G. Williams, The Implementation and Periodic Review of State Child

[1]La. R.S. 9:315.8(E) provides: "In cases of joint custody, the court shall consider the period of time spent by the child with the nondomiciliary party as a basis for adjustment to the amount of child support to be paid during that period of time. The court shall include in such consideration the continuing expenses of the domiciliary party."

Support Guidelines, 33 Fam. L. Q. 7, 19 (1999). Robert Williams, a member of the Advisory Panel that developed the prototype of the Income Shares Model and author of the Louisiana guidelines, explained that in the Income Shares Model, the "estimate of actual child-rearing expenditures in an intact family forms the basic child care obligation," which amount is found in our law at the chart in La. R.S. 3:315.14. ***Id.*** at 12. This model was chosen by the Louisiana Legislature because " it starts with the premise that both parents have the obligation to support the child." House Bill 18, Senate Committee on Judiciary A, Minutes on July 9, 1989, p. 14.

Louisiana's guidelines were enacted by House Bill 18 of the 2nd Extraordinary Session of 1989 effective October 1, 1989, as La. R.S. 9:315-315.15.La. R.S. 9:315.1(A) contains the general federally mandated provisions that the guidelines, are to be used and that "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." La. R.S. 9:315.2-7 of the guidelines address the following: the method of calculating the basic child care obligation, La. R.S. 9:315.2; the addition of net child care costs, health insurance premiums, extraordinary medical expenses and other expenses to the basic child care obligation, La. R.S. 9:315.3-6; and, the deduction of income of the child from the basic child care obligation, La. R.S. 9:315.7.

La. R.S. 9:315.8 provides the method of calculating each party's share of the "total child support obligation." That statute provides that the court first determine the basic child support obligation amount, according to the chart found at La. R.S. 9:315.14, and then add to that amount the net child care costs, the cost of health insurance premiums, extraordinary medical expenses, and other extraordinary expenses, and then subtract from that amount any income of the child, all found at La. R.S. 9:315.2-7. The resulting amount is the "total child support obligation." La. R.S.

9:315.8(A-B). To determine each party's share of the total child support obligation, each party's percentage share of the combined adjusted gross income is multiplied by the total child support obligation. La. R.S. 9:315.8(C). The party without legal custody or the nondomiciliary party owes his or her amount as a money judgment to the custodial or domiciliary party. La. R.S. 9:315.8(D). Finally, "[i]n cases of joint custody, the court shall consider the period of time spent by the child with the nondomiciliary party as a basis for adjustment to the amount of child support to be paid during that time." La. R.S. 9:315.8(E) (emphasis added). This adjustment is part of the normal procedure in determining each party's share of the total child support obligation under La. R.S. 9:315.8 in joint custody cases.

After determining each party's share of the total child support obligation, including a possible adjustment under La. R.S. 9:315.8(E), the court must then consider any deviations, which are found in an entirely different section of the guidelines. That provision, La. R.S. 9:315.1(C), contains a specific listing of the types of circumstances that may warrant a deviation from the guidelines, and the time a child spends with the nondomiciliary parent is not one of them.[2] If a court finds one of the

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[2]La. R.S. 9:315.1(C) provides:

> In determining whether to deviate from the guidelines, the court's considerations may include:
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> (1) That the combined adjusted gross income of the parties is not within the amounts shown on the schedule in R.S. 9:315.14. If the combined adjusted gross income of the parties is less than the lowest sum shown on the schedule, the court shall determine an amount of child support based on the facts of the case. If the combined adjusted gross income of the parties exceeds the highest sum shown on the schedule, the provisions of R.S. 9:315.10(B) shall apply.
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> (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.
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> (3) 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.

enumerated conditions to be present, he may deviate from the guidelines if the requirements of La. R.S. 9:315.1(B) are met. That section provides:

> 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.

La. R.S. 9:315.1(B). These requirements only apply where the court is deviating from the guidelines in accordance with one of the listed provisions of La. R.S. 9:315.1(C). The amount of time spent with the nondomiciliary parent under a joint custody decree is not a deviation from the guidelines because it is not listed in La. R.S. 9:315.1(C). Instead, as specifically stated in La. R.S. 9:315.8(E), it is a normal adjustment to be considered in determining a party's share of the total child support obligation in all joint custody cases, from which amount deviations may then be made under La. R.S. 9:315.1. Because it is not a deviation, the majority has erred in holding that the requirements of La. R.S. 9:315.1(B) apply.

The majority's second legal error is its finding that the typical visitation

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> (4) An extraordinary community debt of the parties.
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> (5) 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.
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> (6) 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.
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> (7) 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.

arrangement has already been factored into the guideline formula, and thus the court may only adjust the child support if the nondomiciliary parent has "shared custody" or "extraordinary visitation."[3] However, there is no indication in any Louisiana source material that a "typical visitation" arrangement has already been factored into Louisiana's child support guidelines or that the legislature intended the statute to apply only in cases of "shared custody" or "extraordinary" visitation.

To the contrary, a review of the legislative history of La. R.S. 9:315-315.15 proves otherwise. The draft statute for implementing Louisiana's child support guidelines was written by Robert Williams and was presented to the legislative committee as House Bill 1383. In a letter to Jerry Jones, the attorney for the Committee on Civil Law and Procedure, Williams explained the factors considered and adjustments made in building the tables contained in the statute, and found now at La. R.S. 9:315.14.[4] Significantly, there is no mention of a deduction built into the numbers on the chart to account for an assumption that a child will spend a certain amount of his or her time with the nondomiciliary parent. Had such a significant deduction been factored into the table as La. R.S. 9:315.14, Williams would surely have made the legislature aware of this in his explanatory letter. Further, the mere fact that the chart contained in the income shares model is based on the amount it would take to raise the child or children in <u>one intact household</u> suggests that the amount has not been discounted to take into account a nondomiciliary parent's "typical" visitation with his or her child. Venohr and Williams, *supra* at p. 12.

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[3]That the majority is in error is bolstered by the wording of La.R.S. 9:315.8(E), which mandates that the trial court consider an "adjustment" for time spent with the nondomiciliary parent in all joint custody cases. Yet the majority concludes that the trial court can only "deviate" when the nondomiciliary parent meets a three part test, not even mentioned in the guidelines.

[4]Such factors included Louisiana's income distribution, net and gross income, adjustments of Earned Income Tax Credit and Social Security, a self-support reserve of $498 per month which is built into the table, and an adjustment to basic support to ensure that support increases slightly as the number of children needing support increases.

House Bill 1383 was distinguishable from the bill that enacted our present guidelines, House Bill 18, in that House Bill 1383 contained a special definition of "joint physical custody" at proposed section 9:315(7) to mean that "each parent keeps the child overnight for more than twenty-five percent of the year, and that both parents contribute to the expenses of the child in addition to the payment of child support." It then contained proposed section 9:315.9 which provided for the calculation of the total child support obligation in these "joint physical custody" situations.[5] In House Bill 1383, the worksheet at proposed section 9:315.15 contained worksheet A, for sole custody (which is the one in the present law) to be used in cases of less than 25% custody, and worksheet B, for joint physical custody, and worksheet C, for adjustments under joint physical custody.

This bill died in committee during the 1989 regular legislative session and House Bill 18 was introduced in the 2nd Extraordinary Session of 1989. In House Bill 18, the provisions above for joint physical custody are removed and House Bill 18 contains the present La. R.S. 9:315.8(E), which provides generally that "[i]n cases of joint custody, the trial court shall consider the time spent with the nondomiciliary parent as a basis for adjustment to the amount of child support to be paid during that period of time." Thus, the legislature explicitly rejected the "joint physical custody" provisions that the majority now claims are built into our present guidelines. Further, if our

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[5]In such situations, the basic child support obligation was to be multiplied by 1.5, to reach the shared custody basic obligation amount, and the percentage of time each party spends with the child would be obtained by the number of nights the child spends with each parent. If this figure was less than 25%, this section would not apply and the child support obligation would be figured in the normal way. If it was greater than 25 %, the theoretical child support obligation for each party would be obtained by multiplying his percentage share of income times the shared custody basic obligation amount. Then the basic child support obligation for time with the other party shall be obtained by multiplying the percentage of time spent by the child with each party times the other party's amount of theoretical child support obligation. All child care expenses are then added together and multiplied by each parties' percentage share of adjusted gross income. Finally, each party's child support obligation is then obtained by adding his basic child support obligation for time with the other parent together with his share of total additional expenses. After all this, the party owing the greater amount owes the other party the difference between the two amounts and this is paid as a money judgment.

guideline numbers already had built into them an adjustment for the period spent with the nondomiciliary parent, there would have been no need for the legislature to mandate that the trial court consider an adjustment found in La. R.S. 9:315.8(E) in cases of joint custody.

The Senate Committee Minutes on House Bill 18 also provide significant insight into the intent of the legislature in enacting House Bill 18, instead of the complicated formula for "joint physical custody" in House Bill 1383. One member expressed his concern that there was no provision in House Bill 18 for reducing his child support payments because he only had his children on weekends and three weeks in the summer and he understood that the bill provided reductions for "extended periods" only. Sen. Bradley, the author of House Bill 18, explained to him that "a House amendment had removed the word 'extended' from the bill, and the period of time the child is with each party will be taken into consideration." Senate Committee on Judiciary A, Minutes of Meeting of July 9, 1989, p. 14. Senator Bradley later explained that "we also adjusted the area of the bill, . . . , the section that deals with joint custody, we basically just said that in that situation that the court can consider the amount of time spent by the child with the non-custodial parent as a grounds for adjustment." ***Id.*** at p. 17. "The original bill was filed during the regular session and we could not get it scheduled for hearing because of the threatened abbreviated session, which turned out not to be abbreviated. That bill was much more complicated than this and it had a whole very complicated section on joint custody, which we Xed that second worksheet out and . . . ." ***Id.*** at p. 18.

Thus, both the legislative history of House Bill 1383 and 18, and the material provided to the legislature by the drafter of the statutes, Robert Williams, clearly indicate that there is no built-in deduction in the amounts found in the chart at La. R.S

9:315.14 for the amount of time that the child will spend with the nondomiciliary parent. The legislature clearly rejected the complicated formula for computing child support in situations involving the uniquely defined "joint physical custody" found in House Bill 1383 for the discretionary standard found in House Bill 18, which as explained by the author of the bill, allows the court to consider the amount of time spent by the child with the nondomiciliary parent as a grounds for adjustment, with no "extended" custody required. Instead of being built into our guidelines, any adjustment for the time spent with the nondomiciliary parent is at the discretion of the trial court. While some states may have a built-in reduction in their child support guidelines to account for "typical visitation" by the noncustodial spouse, that reduction is not universal to all child support guidelines and is certainly not contained in Louisiana's guidelines as evidenced by the legislative history.[6] *See* Marygold S. Melli, Guideline Review: Child Support and Time Sharing by Parents, 33 Fam. L.Q. 219 (1999); Robert G. Williams and David Price, Analysis of Selected Factors Relating to Child Support Guidelines, (Jan. 19, 1993), pp. 16-17 and Table 2 (surveying the states using the Income Shares approach and comparing the varying levels of visitation that qualify for an adjustment in the different states). The clear language of La. R.S. 9:315.8(E) shows that there is no built in reduction in our guidelines. If the reduction had been built into our guidelines, there would be no need for La. R.S. 9:315.8(E).

The majority's third error is rewriting La. R.S. 9:315.8(E) by holding that

[6]Further, if such a reduction were built into the Louisiana guidelines, then a nondomiciliary parent who never had physical custody of the children would have to pay more than the guidelines provide to make up for the shortfall that the majority asserts is built into the guidelines. However, there is clearly no provision for this in the law, but none is needed, as there indeed is no visitation assumption built into the guidelines.

although "[t]he statute purports to apply 'in cases of joint custody' . . . "[c]learly, however, when read in context, the statute is intended to apply only in those cases where the parents share physical custody rather than only in those cases of joint legal custody." Slip Op. at p. 12, n.8. Contrary to the majority's assertion that "Lousiana's scheme does not explicitly state those circumstances in which La. R.S. 9:315.8(E) is to apply," Slip. Op. at p. 9, La. R.S. 9:315.8(E) explicitly states that it applies "in cases of joint custody." La. R.S. 9:315.8(E).

"Joint custody" has had a well-understood and particularized meaning under Louisiana law for decades. La. R.S. 9:335 specifically deals with "joint custody" decrees and implementation orders and provides standards governing physical custody and legal authority and responsibility for the child or children. The provisions defining "joint custody" do not require a child to spend a predetermined amount of time with each parent. Rather, the time spent with each parent is determined on a case-by -case basis so that each parent is assured of frequent and continuing contact with both parents and "to the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally." La. R.S. 9:335(A)(2)(a)(b). Had the Legislature intended that La. R.S. 9:315.8(E) only apply to joint custody situations where the non-domiciliary parent had physical custody of the child for extraordinary amounts of time, it would not have made La. R.S. 9:315.8(E) applicable "[i]n cases of joint custody."

In addition to the clear wording of La. R.S. 9:315.8(E), other laws on point make clear that when the legislature said "in cases of joint custody," that is just what it meant. Civil Code article 141 provides the general authority for a court to award child support. Revision Comment (c) explains the awarding of child support as follows:

> "Under R.S. 9:315.8(C), the share of the total cost of child support for which each parent is responsible is proportional to his percentage share of the total income of both parents. Thus, one parent can be ordered to pay substantially more than the other when he can afford to do so, and such an order is necessary to afford the child the requisite standard of living. Such an order is particularly appropriate when sole, rather than joint custody is ordered. See Comment (e) infra; ***Cox v. Cox***, 447 So. 2d 578 (La. App. 1st Cir. 1984). Similarly, under R.S. 9:315.8(E), a court may adjust a child support award downward to reflect time spent by the child living in the home of the payor. Accord: ***Flournoy v. Flournoy***, 546 So. 2d 617, 621 (La. App. 3d Cir. 1989) (under prior, jurisprudential, law). And under R.S. 9:337[7] (this revision), a court may, in or in conjunction with a joint custody implementation order, make a special monetary award to one spouse in order to enable that spouse to maintain adequate housing for a child."

Again, in this explanation of La. R.S. 9:315.8(E), there is no caveat that the time with the nondomiciliary can only be considered when it is extraordinary.

Further, La. C.C. art. 141 states: "[a]n award of child support may be modified if the circumstances of the child or of either parent change and shall be terminated upon proof that it has become necessary." Revision Comment (d) provides:

> Under this Article, whenever a sole custody arrangement is changed to joint custody, the court may consider reducing the child support entitlement of the former sole custodian, provided that the change in the legal situation gives rise to an actual change of circumstances sufficient to justify doing so. See, R.S. 9:315.8(E); ***Chaudoir v. Chaudoir***, 454 So. 2d 895 (La. App. 3d Cir. 1984); ***Plemer v. Plemer***, 436 So. 2d 1348 (La. App. 4th Cir. 1983). Compare former C.C. Art. 131(A)(1)(c)(i): "An award of joint custody shall not eliminate the responsibility for child support."

According to the comment, the change of circumstance necessary to bring La. R.S. 9:315.8(E) into play is a change from sole to joint custody, with no preset amount of

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[7]La. R.S. 9:337 Joint custody decree or implementation order; child support provisions

A. A joint custody decree or implementation order may include in the sum awarded for child support a portion of the housing expenses of a parent even for a period when the child is not residing in the home of that parent, if that parent would otherwise be unable to maintain adequate housing for the child.

visitation required in the joint custody arrangement before La. R.S. 9:315.8(E) will be applicable.

It is clear, however, that any adjustment made under La. R.S. 9:315.8(E) is discretionary and the court should only consider added expenses, such as food, entertainment, and transportation costs, etc., paid by the nondomiciliary parent during the period of time the child is with him or her. Further, the legislature mandated that the court also consider the continuing expenses of the domiciliary parent, i.e, those expenses that the domiciliary parent will still have to incur even when the child is with the nondomiciliary parent. For example, if the nondomiciliary parent pays the domiciliary parent $1000.00 per month and has custody of the child for three months out of the year, or 25% of the time, the trial court must consider adjusting the support paid by the nondomiciliary parent during those three months under La. R.S. 9:315.8(E). The trial judge may, but is not required to, reduce the amount paid for non-continuing expenses that will have to paid by the nondomiciliary parent, instead of the domiciliary parent, during that time. If the nondomiciliary parent presents evidence that during those three months he will have to pay $200.00 extra per month for the child's food, entertainment, and transportation, etc., the trial judge has the discretion to reduce his payment by a maximum of $200.00 for each of those three months, but only after considering the continuing expenses of the domiciliary parent. Clearly, the statute was not intended to authorize a specific percentage reduction in the total amount of child support that corresponds to the amount of time spent with the nondomiciliary parent, i.e., a 25% reduction in all monthly payments because the nondomiciliary parent has the child 25% of the year.

In my view, the trial court should not have adjusted the $640.00 per month child support award reached in a stipulated judgment on November 5, 1993 on the basis that

the children spend 37% of their time with the father. As I understand it, it was estimated that the children would spend 37% of their time with the father when he entered into the stipulated judgment and this circumstance has remained unchanged. Thus, the only factors the trial judge should have considered were the two actual changes in circumstances, namely, that the child care costs for the children had been reduced from $300.00 per month to $90.00 per month and that he and his new wife had a child in December of 1993.

For all of the above reasons, I respectfully dissent.