

Louisiana Law Review

Volume 17 | Number 2

The Work of the Louisiana Supreme Court for the

1955-1956 Term

February 1957

Civil Code and Related Subjects: Persons

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Repository Citation

Robert A. Pascal, *Civil Code and Related Subjects: Persons*, 17 La. L. Rev. (1957)

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Civil Code and Related Subjects

PERSONS

*Robert A. Pascal**

PUTATIVE MARRIAGE AND COMMUNITY PROPERTY

The decision in *Prince v. Hopson*¹ was that under the putative marriage and community property laws a legal consort has an interest in property acquired by the putative consort of their common spouse during the existence of both marriages. In the writer's opinion, however, the only community in which a spouse, legal or putative, can have an interest is that between him or her and the other spouse to the particular marriage; for the community by definition can consist only of property acquired by either or both these spouses.² If property is acquired by a third person, as in this case the putative wife, it cannot possibly fall into the community between the legal spouses.³ Both putative and legal marriages induce the community of acquets and gains between their respective spouses unless another régime be chosen by marriage contract. If bigamy is involved and one of the parties to the invalid marriage is in good faith, there can be two communities, but not one in which all parties participate. The legal marriage will induce its community between the legal spouses,⁴ and under the putative marriage laws the null marriage will induce its own community régime in favor of the spouse or spouses in good faith.⁵ If the spouse common to both marriages acquires property, it may seem that the application of the normal rules would place it in both communities, but, correctly considered, there will be a situation not contemplated by the legislation. In that event the judge should resort to equity as directed in Article 21 of the Civil Code.⁶ But this situation can never occur where the acquisition is by a spouse not the

*Professor of Law, Louisiana State University. The writer has commented only on those decisions which he considers of particular interest.

1. 89 So.2d 128 (La. 1956).

2. LA. CIVIL CODE arts. 2334, 2402 (1870).

3. This case is discussed in a student note appearing at page 489 of this issue of the *Review*, but the writer feels that its importance justifies double treatment.

4. LA. CIVIL CODE art. 2399 (1870).

5. *Id.* arts. 117, 118.

6. *Id.* art. 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

common spouse, for in this case the property falls either into the legal or into the putative community, as the case may require, but not into both.

Even where the common spouse has made the acquisition, the interests of the parties may be determined according to accepted principles of interpretation. Unless the consort of the common spouse by the null marriage is in good faith, there is no community as to him or her, for the putative marriage laws then have no application.⁷ Given the good faith of this consort of the common spouse by the null marriage (who for convenience will be referred to as the putative consort) and entitlement to community rights on the part of the legal consort of the common spouse (hereafter called the legal consort), there will be no difficulty in the case in which the common spouse is in bad faith. Under the long adhered to jurisprudence, which seems equitable, the property acquired by the common spouse will be made available to satisfy the community rights of both the putative and legal consorts to the prejudice of the common spouse.⁸ If the common spouse is in good faith, however, then two solutions suggest themselves. Either the common spouse should be allowed his one-half interest and the other one-half divided between the legal and putative consorts, or each should be recognized as having a one-third interest in the property. The first solution would be founded on the theory that the share of the acquiring common spouse is not in dispute, but only the other share, and that it alone must be divided in some fashion. The second solution would respect better the several spouses' equality of good faith predicament.

It would be error, however, the writer believes, to consider property acquired by the common spouse to fall into the community between the legal spouses simply because their marriage has not been dissolved. If the legal consort is in bad faith, e.g., has knowledge of the putative marriage situation and does nothing to prevent it or terminate it, then it would seem equitable that he or she not be permitted to prejudice the rights of the putative spouse or spouses in good faith. Otherwise there would be an abuse of the law. Similarly, if the legal consort excusably believes the legal marriage terminated (in the case under dis-

7. *Id.* arts. 117, 118.

8. The initial decision was *Patton v. Cities of Philadelphia and New Orleans*, 1 La. Ann. 98 (1846).

cussion the legal wife believed herself divorced and had remarried) there is hardly any reason to recognize community rights in his or her favor, whether or not there is a putative consort involved. It would seem equitable here to use Article 21 to invoke a putative non-marriage or putative divorce⁹ doctrine, a counterpart of the putative marriage doctrine. Just as it is proper to give parties the benefit of the effect of marriage if they believe themselves married in certain cases, so too it would seem proper to withhold the effects of marriage if parties do not believe themselves married so as not to prejudice either of them as to the legal expectancies normal for the state of life which they putatively possess.

PUTATIVE MARRIAGE — GOOD FAITH

What in fact may constitute good faith for purposes of the putative marriage laws was again considered in *Succession of Pigg*.¹⁰ The common husband and woman claiming putative spouse status lived in adulterous concubinage for seven years before he fraudulently obtained a divorce judgment and married the concubine. To claim putative status she of course alleged good faith. The court of appeal was of the opinion the evidence indicated bad faith, but the Supreme Court was of the opinion the presumption of good faith had not been overcome. It seems that the woman claiming putative wife status knew the man was married to another then confined in an institution for the insane and, according to the Supreme Court's opinion, may have understood that under the circumstances a divorce between the spouses was impossible. The Supreme Court ruled, nevertheless, that the second wife could rely on the divorce judgment unless she had personal knowledge it had been procured through fraud and that proof of this personal knowledge had not been made against her. In so ruling the court relied on its previous decision in *Funderburk v. Funderburk*,¹¹ in which it refused to impute a knowledge of the law of divorce (there of venue) to the wife claiming good faith. The fact of the rendition of the judgment, therefore, was considered sufficient ground for good faith on her part. There was no suggestion that she, a person without competence in the law, should have inquired about its valid-

9. This second term was suggested to me by Mr. Fred R. Godwin, the student author of the note which appears at page 489, *infra*.

10. 228 La. 799, 84 So.2d 196 (1955).

11. 214 La. 717, 38 So.2d 502 (1949).

ity, even if she had previously understood a divorce to be impossible. This decision of course must be distinguished from those in which the allegation of good faith was based on the mere statement of the prospective consort concerning divorce from his legal spouse.¹²

SEPARATION AND DIVORCE — PROOF OF ADULTERY

In two cases entitled *Williams v. Williams*¹³ and combined for trial a husband sought to divorce his wife on the ground of adultery and to disavow paternity of her child. To provide proof for each claim he requested that blood grouping tests be ordered, for if his and the child's blood groups were genetically incompatible he could not be its father and adultery would be established. The plaintiff's request was refused for both purposes. In refusing to order the test for the purpose of proving adultery to establish the cause for divorce¹⁴ the court said that to prove adultery "it is necessary to prove the time, the place, and the co-respondent."¹⁵ If so, this is a requirement imposed by the Justices themselves, for the Civil Code says no more than that adultery is a cause for separation or divorce. The matter is one of proof only, not of substantive law. If the blood grouping test is scientifically reliable for disproving biological filiation, as seems to be the case,¹⁶ then there is no reason to reject it as evidence of adultery. Indeed, the test can provide a far more certain indication of adultery than the circumstantial evidence on which reliance usually is placed.¹⁷

DIVORCE AND SEPARATION — DATE MARITAL RÉGIME DISSOLVED

In *Tanner v. Tanner*¹⁸ the Supreme Court declared the marital régime terminated as of the effective date of the judgment

12. Succession of Thomas, 144 La. 25, 80 So. 186 (1918).

13. 230 La. 1, 87 So.2d 707 (1956).

14. The disavowal aspect of the decision is considered separately at page 310, *infra*.

15. 87 So.2d 707, 710 (La. 1956).

16. See SCHATKIN, DISPUTED PATERNITY PROCEEDINGS, 164-289 (3d ed. 1953).

17. It is true that the case involved a request to order the taking of a blood grouping test, not simply an effort to introduce in evidence the result of such a test. The lower court had refused the request on the basis it had no authority to order a skin puncture, but the Supreme Court did not make any point of this, and simply denied the possibility of using the results of the test as evidence of adultery.

18. 229 La. 399, 86 So.2d 80 (1956). The decision was followed in *Messersmith v. Messersmith*, 229 La. 495, 86 So.2d 169 (1956) and *Coney v. Coney*, 89 So.2d 326 (La. 1956). In each case the question here discussed was preliminary to

of divorce or separation and not as of the date of the filing of suit for separation or divorce. The original opinion of the court was to the contrary, applying Article 2432, according to which "the judgment which pronounces the separation of property, is retroactive as far back as the day on which the petition for the same was filed," as a provision *in pari materia*. On rehearing the court reversed its judgment, inferring that the community must exist beyond the date of filing suit if Articles 149 and 150 of the Civil Code authorize the wife to demand an inventory of property in the husband's hands pending suit and forbid him to incur any debt on account of the community or alienate its assets in fraud of the wife's rights. In reaching this decision the court must have ignored the possibility of the husband's powers over the assets of the community continuing provisionally during the suit for separation or divorce and the régime terminating retroactively for purposes of partition or accounting between the spouses in the event of a judgment of divorce or separation. Such a solution would be consistent with all provisions of the Civil Code. Article 2432 would be satisfied. The dispositions of property not in fraud of the wife's rights would be valid and in the partition of the wife's rights would be satisfied by the money or other values received in exchange for the community property disposed of by the husband. Indeed, this solution would have eased very considerably the financial and proprietary difficulties of persons involved in a suit for separation or divorce. At the same time it would have respected better the basic presupposition of marital régime law, that the parties are living together as man and wife, for this condition ceases to exist in fact as soon as a separation or divorce suit is filed.¹⁹

particular issues, the right of the wife's attorney to have his fee paid "out of community funds" (*Tanner v. Tanner*), the ownership of stock dividends declared *pendente lite* (*Messersmith v. Messersmith*), and the finality of an accounting made before final judgment in the divorce suit (*Coney v. Coney*).

19. French law recognizes that the divorce is effective as of different dates for different purposes. Thus the status of the parties is changed as of the day on which the judgment of divorce is definitive, third parties interests are protected through the day on which the fact of divorce is recorded on the official registry of civil status, and property rights between the spouses are fixed retroactively to the day on which suit is filed. See FRENCH CIVIL CODE art. 252; 2 ENCYCLOPÉDIE DALLOZ, V^o Divorce, §§ 1485-1498 (1952). The following passage may be interesting for the problem under discussion: "From the fact of the retroactivity of the divorce, it follows that the assets and liabilities of the community are fixed definitely as of the date of filing suit. Property acquired by either spouse while the suit is pending belongs to that spouse alone and does not fall into the community. Thus, if the wife had been named administrator and manager of a business conducted in common, she may claim as her own the new business lines she has acquired [pending suit] and which have no connection with the business (Be-

ALIMONY AFTER DIVORCE

Article 160 of the Civil Code originally provided very simply that "the wife who has obtained the divorce" may claim alimony if she is in need. This meant, in effect, that only the wife who had not been at fault could ever claim alimony, for divorce based on separation in fact was introduced only by Act 269 of 1916 and until 1898 there was not any way in which the party cast in a separation judgment could demand a divorce merely because a period of time had passed without the reconciliation of the parties. Act 25 of 1898, which as amended now appears as R.S. 9:302, introduced that idea by giving the party cast the right to ask for divorce two years after the separation judgment if the other spouse had not sought it up to that time. This same act also provided that if the husband obtained the divorce after being cast in the separation judgment the wife nevertheless could claim alimony *as if she had obtained the divorce* (i.e., after her freedom from fault had been established by a separation judgment in her favor), but has always been silent on the alimony rights of the wife who obtains the divorce after the husband has obtained the separation. Thus a literal interpretation of Article 160 of the Civil Code could have led to the recognition of a claim for alimony after divorce on the part of the wife against whom a separation judgment had been pronounced, but the claim has never been allowed, and this in itself perhaps is the best proof that Article 160 was understood to mean that only the wife not responsible for bringing about the marital difficulties could ever claim alimony after divorce.

A parallel bit of legislation, the amendment to Article 160 by Act 21 of 1928, has not been interpreted so well. This amendment provided that if the husband obtained a divorce on the ground the spouses have lived separate and apart for a period of years as required by statute²⁰ the wife nevertheless could claim

sançon, March 8, 1949, D.1949.518, note Ripert). The enjoyment of separate property having ceased to belong to the community from the day suit was filed, the revenues of separate property arising or realized during the suit, and the product of the work of the spouses, ought to be given to each spouse separately. (Aix, May 10, 1906, D. P. 1908.2.401; cf. Paris, January 18, 1927, D. P. 1928.2.145; Trib. Civ. Pontoise, May 25, 1932, D. H. 1932, 472. More particularly, the husband must account to the wife for the revenues from her separate property of which he has enjoyment, less, however, the alimony he may have been compelled to pay *pendente lite* (Req. May 2, 1927, D. P. 1928, 1.44; March 13, 1928, D. H. 1928.289; Civ. July 26, 1937, D. H. 1937.453). . . . Interest on the amounts recovered must be paid from the date of demand (Civ. May 11, 1937, D. P. 1938.1.71)."² ENCYCLOPÉDIE DALLOZ, V^o Divorce, § 1494 (1952).

20. Now two years under LA. R.S. 9:301 (1950).

alimony by showing she "has not been at fault." It said nothing about the wife *at fault* who secured the divorce on that ground. From this it has been concluded in the past that if the wife obtains the divorce under this legislation she is entitled to alimony if she is in need and the question of her fault cannot be raised. Thus under this interpretation fault is an issue in determining the wife's right to alimony only if the husband has brought the suit. Unless the amendment to Article 160 was intended to spur husbands on in the race for demanding divorces, which I doubt, the interpretation cannot be accepted, for it ignores the real meaning of the original Article 160. The much more reasonable interpretation is that the wife "who has obtained the divorce" still means the wife "who has not been at fault" and that it is because this meaning was relied on by those amending Article 160 in 1928 that they failed to specify for the case in which the wife at fault has obtained the divorce on the ground of living separate and apart.

The decision in *McKnight v. Irving*²¹ perhaps may be interpreted as an expression of willingness to reconsider this misinterpretation of Article 160 as amended. A husband appealed from a judgment of divorce obtained by the wife, on the ground of living separate and apart for two years, complaining that the judge below should have determined the fault of the wife even though she had not claimed alimony. The Supreme Court denied this contention on the ground fault was not an issue in the divorce proceeding as such and could not be determined without a claim having been made for alimony. It may be significant that the opinion, far from excluding the fault issue for alimony purposes simply because the wife obtained the divorce, implied that it might be raised if the wife ever sued for alimony. The fact that Justice McCaleb concurred in the decree only, stating that he adhered to the heretofore accepted literal interpretation of Article 160, lends support to this view of what the majority meant to signify in their opinion. If the writer's understanding of the case is correct, then a husband need no longer fear condemnation to pay alimony to a divorced wife in need simply because she has beaten him in the race to the office of the clerk of court.

21. 228 La. 1088, 85 So.2d 1 (1956).

DISAVOWAL OF PATERNITY

Problems such as the disavowal question presented in *Williams v. Williams*²² raise one of the most important issues concerning the proper function of a court in interpreting and applying law. A husband anxious to disavow paternity of his wife's child asked the court to order blood grouping tests in the hope that the results would show that he could not be the child's father. In affirming the lower court's refusal of the request the Supreme Court reasoned that the Civil Code lists only two grounds for the disavowal of children conceived during marriage, the remoteness of the husband and wife from each other at the time of possible conception of the child, and the mother's concealment of the pregnancy and birth of the child from the husband.²³ Though the decision follows logically from these two grounds if accepted as premises in their bare literal sense, it has the effect of denying disavowal even though the evidence of non-paternity rejected by the decision is far more conclusive than either of the grounds specified in the Civil Code.²⁴

Thus it may be asked whether the literal statements of the two grounds for disavowal relied upon by the court properly represent the totality of the law on this subject. Several points may be observed. First, the Civil Code does admit of disavowal of paternity in two instances in which non-paternity is indicated with sufficient certainty for practical judgment.²⁵ Secondly, if the Civil Code limits the acceptable evidence of non-paternity to two specified kinds, it is also true that the newer and more certain evidence, the blood grouping test, was not known at the time of the Code's redaction and enactment. Thirdly, it may be assumed that if the blood test and its reliability had been known in 1808, 1825, or 1870 it would have been listed in the legislation as acceptable evidence of non-paternity. To conclude otherwise is to accuse the Legislature of arbitrarily accepting less certain evidence and rejecting the more certain. If these obser-

22. 230 La. 1, 87 So.2d 707 (1956). This matter is also the subject of a student note published in this issue of the *Review* at page 494, *infra*.

23. LA. CIVIL CODE arts. 185, 189 (1870).

24. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 164-289 (3d ed. 1953).

25. The Supreme Court referred to "the policy against" having children disavowed. The writer submits there is no such policy evidenced by the legislation, but only one to make certain that there shall not be a judgment of disavowal without sufficiently certain evidence of nonpaternity. This should be evident from the very fact disavowal is expressly permitted. If the reference of the court is to a "judicially assumed policy," then the court is overstepping the proper limits of judicial authority.

vations be true, then it must be concluded that the statement of the rule of law found in the Civil Code, though properly drawn in the light of the state of knowledge at the time of its redaction, is now revealed as defective. The problem, then, is whether the judiciary may remedy the defect by interpretation (here accepting the newly found type of evidence in order to give full effect to the rule now inadequately specified) or must wait for legislative action. In the opinion of the writer, justice to the parties concerned requires that the former course of action be considered a proper exercise of the judicial function.

ADOPTION

In *re Amorello*²⁶ is a tale of "delinquency" and "abuse of power" (the terms are those of the Supreme Court) on the part of the State Department of Welfare in placing a child for adoption. The Department of Welfare has discretion in placing a child for adoption once it has been surrendered formally by its parents, but this discretion most certainly must be exercised with the utmost diligence and regard both for the child and other persons involved. In the instant case a child had been given into the custody of foster parents pending its placement for adoption. After the child had been with the foster parents three years and eight months (from age ten months to age four years, six months), during which time the foster parents themselves expressed a desire to adopt it, the Department of Welfare placed the child with another couple for adoption. The uprooting of a child that had lived so long with its foster parents was a serious blow to the emotions of both which should have been avoided. The court nevertheless refused to re-uproot the child, because by the time of decision on appeal she had been with the would-be adopting parents for fourteen months. The opinion of the court nevertheless should amount to a strong reprimand and caution for those charged with executing the adoption legislation.

TUTORSHIP — ALIMONY DUE DESCENDANTS

The facts in *Thornton v. Floyd*²⁷ must be stated briefly for a proper consideration of the problems involved. In the same judgment a wife was awarded a separation from bed and board, given custody of the children, and the husband and father ordered to

26. 229 La. 304, 85 So.2d 883 (1956).

27. 229 La. 237, 85 So.2d 499 (1956).

pay alimony to the wife for support of the children. Later the husband obtained a divorce on the ground of non-reconciliation of the spouses during a period of more than one year and sixty days since the separation judgment.²⁸ Nothing was said in this divorce judgment of the custody of the children or of alimony in their favor. The father ceased paying the alimony for the children and the mother sought to enforce payment by motion filed in the same numbered proceeding in which the separation and divorce judgments had been rendered and the custody and alimony determined. The Supreme Court ruled that (1) the divorce judgment superseded all judgments previously rendered in the proceeding, even those relating to the custody of the children and the alimony for them, and (2) the divorce judgment put an end to the numbered civil proceeding itself. Accordingly, the Supreme Court decided that all the mother could do (presumably as tutrix) was to file a suit claiming alimony from the date of demand.

It is certainly true that a divorce judgment puts an end to the proceeding and all matters incidental to it. It is also true that a divorce judgment supersedes a separation judgment and all matters incidental to it. The question, then, is whether it is correct to consider judgments relating to the custody of children and alimony for their support, though rendered in the same numbered proceeding as the separation suit, as judgments incidental to the separation proceeding. The writer is of the opinion they are not incidental, but independent judgments, and therefore that the rights which they declare remain in effect even though the parents may later obtain a divorce.

A separation judgment does terminate parental authority and give rise to an occasion for the award of custody and tutorship to one parent and hence the articles of the Civil Code on this subject are found in the chapter "Of the effects of separation from bed and board and of divorce."²⁹ They are not to be found, and significantly, in the chapter "Of the provisional proceedings to which a suit for separation or divorce may give occasion."³⁰ Not being provisional, but definitive, the award of custody simultaneous with or after a separation suit, though usually made in the same numbered proceeding, cannot be terminated simply because the separation judgment is super-

28. LA. R. S. 9:302 (1950) ; LA. CIVIL CODE art. 139 (1870), as amended.

29. LA. CIVIL CODE, Book I, Title V, c. V, arts. 155-161 (1870).

30. *Id.* Book I, Title V, c. 3, arts. 146-151.

seded by a divorce judgment. This interpretation is confirmed by the third paragraph of R.S. 9:302, under which the award of a judgment of divorce to a spouse against whom a separation had been pronounced, because of non-reconciliation of the spouses during the one year and sixty days or more since the separation judgment, does not affect the custody rights of the spouse who obtained the separation judgment.

The termination of the alimony judgment in favor of the children is even less understandable. It is customary to permit the spouse seeking the custody of minor children after separation or divorce to ask for alimony in their behalf, but the claim of the children, though occasioned by the divorce or separation, is in no way connected with the separation or divorce proceedings as such. Nothing on alimony for children will be found in the Civil Code's title on separation and divorce. If children are entitled to alimony as of and after a judgment of separation or divorce, it is simply because they are children and in need.³¹ If the spouse obtaining custody and tutorship of a minor asks for alimony for its support, it is really in the capacity of tutor or tutrix of the child. If it is customary to deal with this matter in the same suit as that for divorce or separation, and even to make the award to the wife in her own name rather than to her as tutrix, it is nevertheless true that it cannot be identified with the subject matter of the divorce or separation suit or be considered incidental to it.³²

PROPERTY

*Joseph Dainow**

"PUBLIC THINGS"

The Commission Council of the City of New Orleans authorized the Commissioner of Public Buildings and Parks to sell land comprised within "Commerce Place" but the highest bidder refused to complete the transaction on the ground that the city could not transfer a merchantable title. The trial judge recognized the city's ownership and right of alienation for private use,

31. *Id.* arts. 227, 229.

32. *Id.* arts. 350, 229.

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