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## Civil Code and Related Subjects: Part I

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challenging indeed. To grapple with them effectively, our lawmakers must be given more time.

The following symposium does not purport to treat all of the many acts passed at the 1958 regular session, only those which appear to be of greatest significance to the members of the Louisiana legal profession. In the past, the Review has sometimes carried a digest of some of the less significant legislation, but in view of the fact that such easy reference to new legislation is afforded by West's Louisiana Legislative Service and by the supplements to the 1950 Revised Statutes, this practice has been discontinued.

It should be noted that in this symposium some of the new acts have different references to the Revised Statutes than those accorded the same acts in West's Louisiana Legislative Service. This is due to the fact that subsequent to the publication of the Legislative Service the Louisiana State Law Institute, in keeping with its mandate from the Legislature,<sup>3</sup> has integrated the new legislation into the Revised Statutes and given the acts official title and section designations.

One of the most important measures approved at the 1958 regular session is not discussed in detail in this symposium, but will be the subject of separate treatment in a subsequent issue of this Review. It is a proposed constitutional amendment which would make many needed changes in the structure, composition, and jurisdiction of the state's appellate courts. The subject of intensive study by many Bar groups over a considerable period of time, and formulated by the Judicial Council, with only minor modifications by the Legislature, the proposed amendment reflects the benefits that can be derived from forward-looking cooperative thought of many men. The plan is a fine one and should result in a much more efficient appellate court system.

## Civil Code and Related Subjects: Part I

*Robert A. Pascal\**

### MARRIAGE

Article 161 of the Civil Code declares the marriage between one divorced for adultery and his or her accomplice to be null.

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3. L.A. R.S. 24:251 *et seq.* (1950).

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This article remains in effect for the future, but by reason of a clause added to it by Act 340 of 1958 all such marriages contracted before the effective date of the 1958 legislation are ratified.<sup>1</sup> No doubt this was in fact special legislation, aimed at validating some particular person's unlawful and null relation and, like most such special legislation, it probably will result in further lessening, rather than increasing, family stability. Now that the marriage of the adulterer and accomplice, like that between first cousins,<sup>2</sup> enjoys a precedent for subsequent legislative ratification, such validations may be expected every few years. It is to be admitted, of course, that the text of Article 161 itself, our jurisprudence, and the general facilitation of divorce on other grounds already had made it quite easy for the adulterer and accomplice to marry validly. Article 161 as written applies only if one party has been divorced on the ground of adultery committed with the person with whom he attempts marriage. Divorce on other grounds, now most easily obtained, has never placed an impediment in the way of the adulterer's marriage with his accomplice. Through judicial decision, moreover, Article 161 has been deemed not applicable unless the accomplice be identifiable from the record in the divorce suit.<sup>3</sup> Now Act 340 of 1958, while not authorizing such marriages for the future, gives rise to the not too unreasonable hope that if contracted they will be ratified by legislative act.

It is common knowledge that adultery frequently has led to divorce and marriage of the adulterer and accomplice. Were such marriages absolutely impossible whether or not the divorce has been obtained on ground of adultery, many a working marriage would be saved. Adultery, after all, serious as it is, need not mean the end of a marriage. Yet not only have the legislation and jurisprudence increased the possibility of marriage between adulterer and accomplice, but one recent change in our law even encourages it. Until 1948 an adulterous illegitimate could not be acknowledged or legitimated, and so the legitimation of adulterous offspring could not be a motive for marriage of the

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1. The amendment of a living document like the Civil Code to include a provision which spends its force as soon as it becomes law is rather artless legislation. It would have been better to make this provision the subject of a separate statute.

2. See Article 113 of the Louisiana Civil Code, which has been re-enacted periodically to ratify marriages contracted in contravention of its provisions.

3. In one case this interpretation even permitted a divorced adulterer to marry his step-child accomplice. *Succession of Knupfer*, 174 La. 1048, 142 So. 609 (1932).

parents. Since 1948, however, the adulterous illegitimate can be acknowledged and legitimated, but only if his parents first marry.<sup>4</sup> The pressure which a pregnant accomplice may put on her paramour to divorce his wife and marry her to make possible the legitimation of the child is not to be underestimated.

### *Celebration of Marriage*

Under Article 102 of the Civil Code as amended by Act 229 of 1952, clergymen intending to officiate as marriage celebrants were required to register first with the clerks of the several district courts for the parishes in which they were to officiate.<sup>5</sup> Act 331 of 1958 further amends this article in three ways: First, the clergyman need register only in the parish in which he officiates principally; secondly, he must deposit with the state department of health an affidavit stating his name, address, and parish of registry; thirdly, he must state in the "record of marriage" (presumably the *act of marriage*) the parish in which he is registered. By Act 369 of 1958 (new R.S. 9:208) the authority to grant permission to marry to underage applicants has been extended to any judge who exercises juvenile court jurisdiction. Inasmuch as Article 92 of the Civil Code contains the list of the other judges authorized to exercise such authority, it would seem that the extension of authority to juvenile court judges should have been made by amendment to Article 92 and not by an addition to the revised statutes.

The third and last act relating generally to the celebration of marriage is Act 160 of 1958, which amends R.S. 9:241 and 9:242 and repeals R.S. 9:281. The effect of the amendments to R.S. 9:241 and 9:242 are: (1) to require that the medical certificates to be presented to the license issuing officer may be dated ten days before, and not seven days before, as under the former law; (2) to permit members of the armed forces stationed outside Louisiana to present certificates signed by the medical officer in charge at the applicant's duty station; (3) to delete the provision in the former R.S. 9:242 that microscopical examination for gonococci would be made free of charge at the state laboratory of hygiene; (4) to make the filing of a certified copy of each applicant's birth certificate with the license issuing

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4. Arts. 198 and 204 of the Louisiana Civil Code as amended by Acts 482 and 483 of 1948.

5. In the Parish of Orleans, registry was to be with the New Orleans Health Department.

officer a precondition to the lawful issuance of the license; (5) to provide for the substitution of a letter from the recorder of births at the place of birth to the effect that no record of the applicant's birth can be found, if that is the case; (6) to permit the license issuing officer to demand other proof of "birth facts" when a birth registration cannot be found; (7) to permit any district judge outside Orleans and East Baton Rouge Parishes, the City Court judges in New Orleans, and the Family Court judge in East Baton Rouge to authorize the issuance of marriage licenses without the production of a birth certificate in extenuating circumstances; and finally, (8) to delete the provision in the former section R.S. 9:241 providing fine and imprisonment for the issuance of a marriage license without requiring the presentation of the medical certificates. The repeal of R.S. 9:281 without the repeal of R.S. 9:282-9:284 is not explainable by this writer. All these sections form part of Act 478 of 1950 and all deal with the proof of the age of marriage license applicants. Now that this matter is covered completely by the amended Sections 9:241 and 9:242, it seems that the repeal of R.S. 9:281 alone must have been an error.

#### *Separation from Bed and Board*

Until 1928 the mere fact of abandonment was never in itself a cause for separation from bed and board. Under Articles 143 and 145 of the Civil Code the separation could be granted only after the defendant had failed to obey repeated summons to resume the common life. This was true even in the case in which the defendant had answered to the petition either admitting or denying the fact of abandonment. Thus the procedure reflected the effort of the law to bring the parties together and avert a permanent rupture of the marital life. By Act 271 of 1928 Article 145 was amended to provide that the abandonment could be proved as a "fact" in any instance in which an answer had been filed. Thus the role of the summons in any case was reduced from an attempt to encourage reconciliation to a mere mode of proof, for if answer were filed it was not necessary to issue the summons, but only to prove the fact that one spouse had discontinued the common life without cause. The initial act of abandonment, rather than the refusal to return to or accept the other spouse became the legal ground for the judgment of separation. Now by Act 82 of 1958, Article 145 of the Civil Code has been amended again, and the summons is dispensed with in

every instance. No longer is it ever required to do more than to prove by any kind of evidence the fact of abandonment without cause. No effort to encourage the errant spouse to return is ever to be made. In every case now the fact of the act of abandonment, like the fact of adultery, is an absolute ground for a judgment of separation. Needless to say, this legislation, whether or not motivated by such a consideration, has made abandonment the ground on which parties desiring a quick separation can obtain one in the shortest possible time, without the necessity of fabricating more defamatory grounds.

Consistent with the above change is the amendment to Article 143, by Act 154 of 1958, to permit a reconventional demand for separation grounded on abandonment. There had never been any legislation denying the possibility of such a reconventional demand, but the jurisprudence had very rightly refused to permit it.<sup>6</sup> As long as a separation grounded on abandonment could not be granted until the failure of the errant spouse to return after repeated summons, the plaintiff spouse could not be judged guilty of abandonment until he or she had failed to obey the summons. Of course it would have been folly to issue such summons prior to the trial of the plaintiff's suit on the merits, for he could not be expected to resume the common life until he himself had been adjudged without cause; and to wait until judgment on the plaintiff's cause of action would have defeated the primary purpose for a reconventional demand, that is, the trial of the merits of both suits at the same time. If the reconventional demand could not be tried until the termination of the plaintiff's suit, the defendant's action might just as well be by separate suit. After the amendment of Article 145 in 1932 permitting the issue of abandonment to be tried as any other fact wherever answer had been filed, there was no procedural obstacle to a reconventional demand based on abandonment; for the plaintiff is deemed to deny all allegations in the demand and therefore might have been deemed to have answered, opening the way to proof of the abandonment by any kind of evidence; yet to have allowed the reconventional demand logically would have had the effect of giving the reconvening defendant a judgment of separation any time the plaintiff failed to obtain judgment himself, for then the plaintiff would have left the common life without cause, and the abandonment would have been proved. Thus the Supreme Court continued to refuse to allow reconven-

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6. *Bullock v. Bullock*, 174 La. 839, 141 So. 852 (1932) is the principal case.

tional demands based on abandonment.<sup>7</sup> Now that legislation authorizes a reconventional demand grounded on abandonment, and that the abandonment need only be proved as any other fact, it would seem to follow logically that any time the plaintiff in a divorce or separation suit fails to prove his case the defendant in reconvention can obtain a separation on the ground of abandonment. This situation can be avoided if the Supreme Court will exercise its power under Article 21 of the Civil Code to refuse to consider as an act of abandonment the discontinuance of the common life merely for the purpose of bringing suit for separation or divorce. If precedent be required, an analogy may be drawn from those decisions refusing to treat the initiation of suits for separation based on fault as "public defamation" of the defendant.<sup>8</sup>

#### THE EFFECT OF ADOPTION ON INHERITANCE AND OTHER RIGHTS

Pursuant to the proposal in Act 548 of 1958, Article IV, Section 16, of the Louisiana Constitution was amended so far as it deals with the effect of adoption on inheritance by and from the party adopted.<sup>9</sup> Presumably it was the intent of the drafters of the amendment (1) to give the adopted person all the forced heirship rights of a legitimate child of the adopting parents both against the adoptive parents (as formerly) and against the blood relations of the adopting parents (new); (2) to provide constitutionally that the adopted person shall continue to be an heir of his blood relatives in every respect as if he had not been adopted; and (3) to terminate all inheritance from the adopted person by his blood relatives.

Broader than the amendment to Article IV, Section 16, but on the same subject, is Act 514 of 1958, which amends Article 214 and repeals Articles 214.1-214.8 of the Civil Code. The new Article 214 requires the adopted person (1) to be considered a legitimate child of the adopting parents *for all purposes*,<sup>10</sup> thus

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7. *Williams v. Williams*, 212 La. 334, 31 So.2d 818 (1947) and *Bonvillion v. Papa*, 218 La. 203, 48 So.2d 897 (1950).

8. See e.g., *Homes v. Carrier*, 16 La. Ann. 94 (1861).

9. Though the writer assumes that the drafters of the proposed amendment intended it to apply to all adopted persons, regardless of their ages at the time of adoption, it must be noted that the text refers only to "*children lawfully adopted*."

10. A review of legislation such as this is not the place to go into a discussion of the merits of Louisiana adoption law in general, but it may be observed that the recent amendments seem properly applicable only to the young child who is given or placed in adoption so that he may have a home and family which can

integrating him into that family, with regards to adopted as well as blood relatives of the adopting parents, not only in matters of inheritance or support, but also in such matters as paternal authority, tutorship, property regime between parents and children, and possibly, impediments to marriage; (2) retains the right of the adopted person to inherit from his blood relatives; but (3) otherwise cancels all rights and duties between the adopted person and his blood relatives. Were it not for the provisions in both the amendment to Article IV, Section 16, and the new Article 214, preserving the adopted person's right to inherit from his blood relatives, adoption in Louisiana would have the same effect generally as adoption in Roman law. As it is, the adopted person is now in every respect a member of the family of his adopting parents, but he remains a member of the family of his blood parents only for the purpose of inheriting from them.

There is at least one serious inconsistency between the amendment to Article IV, Section 16, of the Constitution and the new Article 214 of the Civil Code. The latter provides that if the adoptive parent is married to a blood parent of the adopted person, the relationship of that blood parent and his blood relatives to the adopted person shall remain unaltered; the constitutional provision, however, does not seem to admit of this possibility, for it does not furnish any exception to its new rule that on adoption all blood relatives of the adopted person shall cease to have the right to inherit from him.<sup>11</sup> Thus it would seem that in spite of Article 214 as now written, the blood parent and his relatives could not inherit from the adopted person once he is adopted by the parent's spouse. As to matters other than inheritance from the child, of course, the blood parent and his relatives would continue to be related to the child, for in matters other than inheritance the new constitutional provision and the new legislation are not in conflict.

#### *Adoption Without Consent of Parent*

Under Act 501 of 1958 (new R.S. 9:422.1) a step-parent, married to a parent with custody under award of court, may adopt the child without the consent of the other parent if he or

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care for him. Yet adoption of a major, even one older than the adopted, is permissible, and the new legislation scarcely seems proper for such a case.

11. Under the proposed amendment Art. IV, Sec. 16, would read in part: ". . . but their blood relatives shall have their rights of inheritance from these children terminated."

she has failed for three years to comply with an order for its support. The act does not distinguish between intentional failure and unintentional failure to support. Cases in which a parent has failed to support a child after court order because of some inability to do so will not be many, but should such a case arise it is to be hoped that the legislation will be interpreted to refer only to an intentional failure to support; otherwise the act would be morally objectionable. It is one thing to place a child in the custody of another than his parent when the parent cannot care for it; it is quite another to destroy the relationship between parent and child simply because the parent is unable to fulfill his duties.

#### MINORS

##### *Administration of Property Donated to Minors*

Under Act 195 of 1958 (new R.S. 9:735-742) it is possible to donate to a minor securities or money to be administered (1) as a separate fund outside the minor's regular patrimony and (2) by a donor-appointed "custodian" whose extremely broad powers of utilization and management of the property are fixed unalterably by the statute. It is to be noted that this special regime cannot be imposed on property already in the patrimony of the minor, but can be imposed only in the act of donation. In this respect it has much the same effect as a trust created for the benefit of a minor. It resembles trust, too, in that it is a regime imposed by private act rather than by public order, as in the case of tutorship; but it is not based on trust theory, and in this resembles tutorship more, for title to the property is in the minor and the custodian is, as in tutorship, only the minor's representative. Again, the new regime resembles tutorship more than trust in that the powers of the tutor are fixed unalterably by the statute, the donor not being able to impose any variation or condition, and it differs from both tutorship and trust in Louisiana in that the judiciary has no role whatsoever in the administration of the property. Moreover, the "custodian," unlike the tutor or trustee, need only act as a prudent investor in investing or reinvesting the money or securities of the minor; he is not obliged to follow any legal list of permissible investments. Nor is the custodian who is not also the minor's tutor liable for any losses to the property, except such as result from bad faith or intentional wrongdoing, and he need not give security against loss to the minor. Most significant of all, third persons dealing

with a custodian or one purporting to be a custodian are not obliged to determine the fact of his appointment or the legitimacy of his act. If the minor is prejudiced, his only recourse is against the custodian or person purporting to act as such.

This legislation was based in part on the *Uniform Gifts to Minors Act*, a recommendation of the National Commissioners on Uniform State Laws prepared in 1957 and now adopted in at least fourteen other states, and in part on the *Model Act Concerning Gifts of Securities to Minors*, prepared by the New York Stock Exchange and the Association of Stock Exchange Firms and adopted by thirteen states before the preparation of the Uniform Act.<sup>12</sup> As this genesis suggests the purpose of the Model Act was to increase investments in securities by making such investments for the benefit of minors simple in form, final and safe from the points of view of those dealing with the minor or his representative, and attractive to those in a position to make donations to minors by insuring the tax benefits of outright gifts to minors<sup>13</sup> without the danger either of the donated property falling under the sphere of application of the usual regimes for the management, investment, and utilization of minor's property, or being subject to our more liberal, but nonetheless strict, trust laws. The resulting Model Act met with such approval that the Uniform Act extended its regime to money as well as securities.

In the opinion of the writer the basic principles of this legislation should be adopted for the law on the administration of property in tutorship and under parental authority. The tutor should be unlimited in discretion in the investment, reinvestment, and utilization of the minor's property; legal lists for investments and the necessity of judicial authorization for tutorial acts should be abolished in the interest of making the minor's patrimony serve the minor's interests in investment or utilization, as the case might be; and third persons in good faith should be absolutely secure in dealing with the minor's representative. The one serious defect in the legislation, in the writer's opinion, is that there is no provision for a record of the donation, and thus it would seem that a minor unaware of its existence might very easily be deprived of it in fact by an unscrupulous custodian.

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12. For the text of the Uniform Gifts to Minors Act and notes on the differences between it and the Model Act see 9B UNIFORM LAWS ANNOTATED 179-194 and 1957 supplement thereto, pages 10-12.

13. For an excellent discussion of the tax advantages which the Uniform Act is thought to provide, see Forbes, *Gifts to Minors*, 19 MONT. L. REV. 106 (1958).

*"Legal List" Investments for Tutors and Trustees*

Act 326 of 1958 specifically authorizes tutors and trustees to invest in federal savings and loan association shares and, by absolving these associations of liability for money paid to trustees and tutors on account of such shares, apparently authorizes such payments to tutors and trustees. No mention is made of curators of interdicts. Act 75 of 1958 also amends Article 348 of the Civil Code to require that mortgage investments by tutors and curators be restricted to mortgages on immovables in Louisiana. By still another separate act, No. 201, amending R.S. 9:733, debentures of federal intermediate banks and of banks for co-operatives were made legal investments for tutors and curators. All legislation on this subject, the legal list of permissible investments, should be in one place.

*Support and Aid for Dependent Children*

All orders to pay alimony for the support of a "child" now prime all prior or subsequent garnishments of the father's wages under Act 479 of 1958, adding R.S. 13:3928. The act does not specify *minor* child, but undoubtedly this is its tenor.

By amendment to R.S. 46:231, by Act 405 of 1958, a portion of the law on public assistance for dependent children, has been amended to make assistance available to children over sixteen and under eighteen years of age who are not attending school because of physical or mental incapacities.

## MISCELLANEOUS

*Vital Statistics*

Under R.S. 40:158(c) vital statistics records may be disclosed only to persons with a "direct and tangible interest," which fact of interest is to be determined by the registrar to his satisfaction. This section now has been amended by Act 180 of 1958 to add that the "credentials" of an attorney at law together with his "declaration" as to the record in which he is interested and his declaration that he is the legal representative of the party of interest, shall constitute sufficient proof of a "direct and tangible interest." Perhaps it was the intent of the drafters of this amendment to deprive or relieve the registrar of the power or duty to determine the fact of interest in the event an attorney at law sought access to or requested copies of records

on behalf of a client whom he declared to have an interest. In the opinion of the writer, however, the poorly phrased amendment does no more than provide the conditions under which an attorney may ask for a disclosure of the records on behalf of an interested client; the interest of the client would seem to remain a matter within the determination of the registrar.

#### *Veterans' Guardianship Law*

Act 508 of 1958 amends R.S. 9:362 and 369 to allow more substantial compensation in certain cases to tutors or curators under the Veterans' Guardianship Law and to attorneys in proceedings on behalf of a ward under that law.

#### *Successions*

Acts 327 and 328 of 1958 add new sections R.S. 6:842 and 6:789.1 to permit federal savings and loan associations and Louisiana homestead and building and loan associations to deliver shares and other holdings in the name of the deceased to the executor or administrator of his succession without court order.

Act 126 of 1958 amends R.S. 9:1513 to increase from five hundred dollars to one thousand dollars the amount a depository may pay to a surviving spouse out of deposits in the name of the deceased spouse, that of the surviving spouse, or those of both.

#### *Liability of Construction Contractors*

Act 183 of 1958 (new R.S. 9:2771) absolves construction contractors of liability for destruction, deterioration, or defects in works constructed by them attributable to faults or deficiencies in plans or specifications furnished to rather than by the contractor. The act makes no provision for this, but it would seem proper to interpret this act not to absolve the contractor who recognizes the deficiencies in the furnished plans and fails to communicate with his principal. In other words, in the opinion of the writer, this legislation should be interpreted so as to relieve the contractor of the obligation to determine the sufficiency of furnished plans, but not to relieve him of liability for construction according to plans which he recognizes to be deficient.

*Marital Regimes*

R.S. 6:750, which specifies that a married woman may purchase and sell shares in state homestead and building and loan associations and federal savings and loan associations, as if a *femme sole*, has been amended to read specifically that she may also "receive the fruits" from such shares.

*Interstate Compact on Mental Health*

The interstate compact on mental health, together with supplemental local provisions, has been enacted into law by Act 336 of 1950 (R.S. 28:721-726). This compact, adopted in eight other states,<sup>14</sup> is designed to accomplish two things principally, (1) to place the primary responsibility for mental health treatment on the state in which the patient is *present*, regardless of his "residence, settlement, or citizenship qualifications," and (2) to encourage other states which are parties to the compact to accept patients from other compact states as their own if "there are factors based on clinical determinations indicating that the care and treatment of said patient would be improved thereby."

Article VIII of the Mental Health Compact (in R.S. 28:721) contains rather broad provisions which appear to have some impact on the internal law of tutorship so far as it relates to a minor mental patient and on the law of the curatorship of interdicts. The "guardian" of the patient's state of "settlement" (domicile) may not be removed by action of the "receiving state," though the receiving state may appoint a "supplemental guardian" under its own laws if it wishes; but the "guardian" to the person or to the property of the patient appointed by a state other than that of "settlement" may be discharged by the receiving state or a "supplemental guardian" appointed as the receiving state deems advisable. Thus a tutor or curator appointed in Louisiana for a non-domiciliary could be discharged by action of the receiving state. In the opinion of the writer the compact does not otherwise affect the internal law on the tutorship or curatorship of mental patients, and thus, for example, it is his belief that no interdicted patient, at least, could be sent to another state for treatment without following the procedure outlined in Article 423 of the Civil Code.

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14. Connecticut, Kentucky, Minnesota, New Hampshire, New Jersey, New York, Oregon, and Rhode Island.