

# Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction

John A. Lovett

---

### Repository Citation

John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 La. L. Rev. (2012)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol72/iss4/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction

*John A. Lovett\**

## TABLE OF CONTENTS

Introduction.....	924
I. Preliminary Title: Thinking about Rules and Standards.....	931
A. Rule Based Decision Making.....	931
B. Standard Based Decision Making.....	934
C. Rationales for Rules and Standards .....	937
1. Justification #1: Fairness.....	937
2. Justification #2: Efficiency .....	938
3. Justification #3: Promotion of Democratic Governance .....	939
II. Book One: Marriage and Divorce.....	941
A. Entrance into Marriage.....	941
B. Matrimonial Regimes and Community Property .....	943
C. Exit from Marriage .....	948
D. Community Property Partition.....	951
E. Claims for Interim or Permanent Periodic Support (Alimony).....	955
F. Claims for Contribution to Education and Training .....	961
G. Child Custody .....	963
H. Child Support.....	968
I. A Final Marriage and Divorce Accounting .....	971
III. Book Two: Co-ownership Among Unmarried Co-Habitants .....	973

---

Copyright 2012, by JOHN A. LOVETT.

\* De Van D. Daggett, Jr. Professor of Law, Loyola University New Orleans College of Law. This Article is based on a paper originally presented at the Third International Congress of the World Society of Mixed Jurisdiction Jurists, held at Hebrew University, June 21–24, 2011. The author gratefully acknowledges the helpful comments and suggestions of Kenneth Reid, Ron Scalise, Vernon Palmer, Nestor Davidson, Edward Chase, Markus Puder, Johanna Kalb, Monica Wallace, and Sandra Varnado, as well as the diligent research assistance of Laken Davis. All errors are those of the author.

IV. Book Three: From Forced Heirship to Undue Influence .....	981
A. Claims Against Stepparents .....	987
B. Claims Against Everyone Else: Unmarried Co-Habitants, Other Relatives, Caretakers and Strangers.....	990
C. An Undue Influence Final Accounting .....	992
Conclusion .....	995

#### INTRODUCTION

*Meet Esther and Louis. Esther is 25 years old. She is a recent college graduate and works for a local non-profit organization that operates farmers' markets and supports sustainable farming activities in southeastern Louisiana. Louis is 25 years old. He is a sous-chef at a popular New Orleans restaurant. When Esther and Louis met a year ago, their interests in local cuisine, the indigenous culture of New Orleans, and outdoor recreation drew them together quickly. They cooked dinners for each other. They rode their bicycles across the city. They talked for hours into the night. After three months, Esther and Louis moved into half of a double shotgun house in the Bywater, a thriving Bohemian village downriver from the French Quarter. Three months later, Louis and Esther decided to marry.*

In part, this is Esther and Louis's story. But it is also the story of how the law of the mixed jurisdiction in which they live—Louisiana—governs their life plans and projects. By examining moments when Esther and Louis are confronted with a particularly significant legal choice and are therefore most likely to seek the advice of lawyers, this Article seeks to shed some new light on an old jurisprudential debate.

That jurisprudential debate is grounded in the recognition that the legal directives that govern our lives function in different ways depending on how those directives are designed.<sup>1</sup> Some legal

---

1. In this Article, I draw principally on the following articulations and critiques of the rules versus standards debate: FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 188–202 (2009); Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1987); P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and*

directives—“laws” in more common parlance—take the form of “rules.” A classic rule tells a decision maker to focus her decision-making energy on a narrow set of facts; then, once a factual conclusion has been drawn, the rule supplies a more or less mechanical calculus yielding a particular result. Predictability, certainty, and efficiency are supposed to be the hallmarks of rules. When individuals like Esther and Louis encounter such a rule, their legal advisors should, in theory, be able to assure them with reasonable confidence of the likely consequences of their choices or actions.

Other legal directives take the form of “standards.” A classic standard gives a decision maker more discretion. It allows the decision maker to examine *all* of the relevant facts and circumstances in a given situation in light of a general policy goal and then it directs the decision maker to fashion a remedy that does substantive justice to the parties involved. When individuals like Esther and Louis confront a classic legal standard, according to the typical jurisprudential account, their legal advisors must confess that the ultimate outcome of a dispute may be uncertain and that their fate may depend to a considerable extent on the subjective assessment of a particular judge or handful of judges.

The current version of the Louisiana Civil Code contains more than 3,000 articles.<sup>2</sup> Many of those articles provide classic, mechanistic rules that control or reward individual behavior *ex ante* and cabin judicial discretion. Others announce open-textured standards—that is, general policies that a judge must attempt to realize *ex post* by fashioning a remedy that achieves as much substantive justice as possible given the particular facts and circumstances of any case.

A good number of the Civil Code’s provisions also provide opportunities for what I call “hybrid discretion.” On the spectrum between classic rules and classic standards, these articles lie somewhere in between. Sometimes they combine both rule-like principles and standard-like norms in the same text. Sometimes they consist of relatively flexible rules or more precisely tailored

---

*the Law*, 65 IOWA L. REV. 1249 (1980); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

2. In the 2011 version of the Louisiana Civil Code, there are 3556 numbered articles, but because a sizeable number of articles are in fact “blank,” “reserved,” or “repealed,” the actual quantity of functioning articles is somewhat smaller. For a discussion of why the revised Louisiana Civil Code contains these anomalous gaps, see VERNON V. PALMER, *THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION* 98 (2005).

standards.<sup>3</sup> Frequently, a series of closely related articles function together, in conjunction with a series of jurisprudentially derived rules or statutory sources originating outside the Civil Code, to create complex mixtures of rule-like norms and standard based discretion.

Over the years, numerous scholars working outside of Louisiana have attempted to assess the relationship between rules and standards in broad areas of both private law and constitutional law.<sup>4</sup> Years ago, I addressed the desirability of rule-based and standard-based models of Civil Code decision making, and the virtues of certainty and flexibility, in one corner of property law and in the context of early debates over the nature of our Civil Code.<sup>5</sup> This Article's attempt to apply the rules versus standards paradigm to Louisiana law, however, is principally inspired by the eminent Scottish jurist, Niall Whitty.<sup>6</sup> Writing in the *Edinburgh Law Review* a decade ago, at a time when the international comparative law community was beginning to examine mixed jurisdictions more carefully, Whitty examined the rules versus standards debate in the context of Scotland's uncodified mixed legal system. He found that Scotland had at once accommodated and resisted pressure to replace hard-edged, crystalline rules affording the benefits of certainty and predictability with discretionary standards offering judges the flexibility to craft particularized remedies and provide substantive justice in individual cases.<sup>7</sup>

Professor Whitty's overall assessment of the development in his native jurisdiction was paradoxically both elegiac and optimistic. On one hand, he observed that in many areas of

---

3. See SCHAUER, THINKING LIKE A LAWYER, *supra* note 1, at 189–90 (reflecting on the continuum between rules and standards); Sullivan, *supra* note 1, at 61–62 (same).

4. See generally Atiyah, *supra* note 1 (addressing contract law); Sullivan, *supra* note 1 (constitutional adjudication); Rose, *supra* note 1 (property law).

5. See John A. Lovett, *Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence as Seen Through the Prytania Park Controversy*, 48 LOY. L. REV. 615 (2002); John A. Lovett, *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond*, 63 LA. L. REV. 1397 (2003).

6. Whitty is a Visiting Professor at the University of Edinburgh and for many years was a Law Commissioner of the Scottish Law Reform Commission.

7. Niall R. Whitty, *From Rules to Discretion: Changes in the Fabric of Scots Private Law*, 7 EDIN. L. REV. 281 (2003). Whitty's article was first presented as a paper at the First International Congress of the World Society of Mixed Jurisdiction Jurists in November 2002, at Tulane Law School in New Orleans, Louisiana.

Scottish private law there had occurred “a momentous change from rule-based judicial decision making to a discretionary jurisprudence of justifications,” a change that he believed was “irreversible in many respects,” given the moral attractiveness of allowing judges to work their way to the “right answer in the instant case,” and given that allowing judges this freedom often enables legislatures to avoid making difficult policy choices among competing interests.<sup>8</sup> On the other hand, Professor Whitty also discerned within certain branches of Scottish law—in areas such as protection of family interests upon death, property, trusts, and debt collection—resistance to the Anglo-American trend toward “discretionary remedialism.”<sup>9</sup> This “discretion-scepticism” might be aligned, Whitty suggested optimistically, with the traditional, arguably more civilian vein in Scots law of “allocating rights to people rather than powers to courts, of subordinating the judicial remedy to the substantive law right” and thus might preserve Scottish private law as a “system of rules” and “its virtues of certainty and predictability.”<sup>10</sup>

When I began my own assessment of Louisiana law through the jurisprudential prism that Whitty had constructed so expertly, I expected, based on observations gleaned while teaching Louisiana property law and Louisiana sales and lease law, to find that Louisiana private law had generally undergone a similar shift to discretionary decision making within the realm of the Civil Code, punctuated perhaps with occasional moments of discretion skepticism. What I discovered, however, after focusing most intensively on some of the same substantive areas that Whitty had examined and that would most likely be encountered by our fictitious friends Esther and Louis, was that Louisiana had not evolved so decisively in the direction of standard-based decision-making models. Indeed, in the areas of private law examined in this Article (family law, co-ownership, and the relationship between forced heirship and undue influence claims), I found that Louisiana’s private legal order has been only partially transformed by the trend toward discretionary remedialism that scholars like Whitty have observed occurring in many other legal regimes.

Although some important parts of the Louisiana Civil Code have undeniably embraced open-textured standards (and, of course, some parts of the Civil Code have always depended

---

8. *Id.* at 339.

9. *Id.* at 328–37.

10. *Id.* at 339.

heavily on them),<sup>11</sup> I found that judicial and legislative innovation both inside and outside of the Code has also tended to limit the discretion initially promised by those standards. In addition, I found that, in the areas under examination, Louisiana law increasingly relies on packages of legal directives that combine civil code articles taking the form of either rule-like or standard-like norms with jurisprudential and non-codal statutory sources which modify those civil code directives to create decision making institutions that provide for complex forms of hybrid discretion.

What accounts for this double-edged movement limiting classic standards and institutionalizing hybrid discretion? One explanation may be that lawmakers who desire to make some fundamental change in the law (for instance to incorporate broad new principles like no fault divorce and joint custody as norms in family law or to dramatically cabin forced heirship while opening the door to undue influence claims in the arena of intergenerational wealth transfers) are cognizant that these innovations will simply create too many diverse fact patterns to make highly detailed, precise rulemaking feasible at the outset. Consequently, these lawmakers tend to defer legislating specific rule-based outcomes and allow courts to continue their traditional job of gradually articulating more precise and transparent rules through jurisprudential development. In the end, legislatures can choose whether to codify or modify these jurisprudential rules or simply allow them to dominate the decision-making landscape, a kind of *de facto* codification by silent acceptance.<sup>12</sup>

Another important explanation for why Louisiana has moved more quickly to cabin its more recent legislatively-enacted standards than a jurisdiction like Scotland is simply that Louisiana is more litigious. The widespread availability of lawyers in Louisiana, the relatively low costs of litigation in many parts of the state, the absence of the winner-takes-all English rule regarding attorney fees, and the widespread use of contingency fee arrangements all contribute to make Louisiana a place that produces far more reported judicial decisions than a jurisdiction like Scotland, even though Scotland's population is approximately 600,000 larger.<sup>13</sup> As a result, the Louisiana legal system, whether

---

11. See, e.g., LA. CIV. CODE arts. 667–669 (2011) (obligations of vicinage), LA. CIV. CODE art. 2315 (2011) (delictual responsibility).

12. I am grateful to Kenneth Reid for suggesting this possible explanation.

13. To appreciate the disproportionate litigiousness of Louisiana as compared to Scotland, note that in 2010 alone, volumes 33 through 56 of the Southern Reporter (3d ed.) were devoted to Louisiana state court decisions, which account for 14 large books of the Louisiana edition of the Southern Reporter, each of which contains an average of 1000 to 1300 pages of appellate

the legislature intended it or not, is often able to generate, in relatively quick order, detailed judicial interpretation and refinement of the open-textured standards embedded in our Civil Code. Of course, this means that any litigants (and their lawyers) who confront broad standards just after their enactment bear considerably higher litigation and uncertainty costs than do litigants who confront the same standards 20 or 30 years later, after the courts (and the legislature) have chiseled them down into more crystalline rules.

One more explanation for the movement toward complex blends of hybrid discretion can be found in the placement of Louisiana's mixed legal system within a complex federal system. As we will see with regard to child support disputes, Louisiana's initial gesture toward broad discretion was significantly constrained by the impact of federal legislation that required Louisiana to adopt a much more detailed set of rules to guide judges in making child support awards.

The plan of this Article is straightforward. In the Preliminary Title portion, I provide a brief introduction to the vocabulary, descriptions and justifications typically displayed in jurisprudential debates over rules versus standards. In Books One, Two and Three of the Article, I analyze the extent to which several significant legal regimes in the Louisiana Civil Code—regimes very likely to affect individuals like Esther and Louis in moments of personal crisis—have incorporated open textured standards as a primary form of rule design, have resisted the trend toward discretionary remedialism by remaining tethered to relatively transparent rules, or have produced models of hybrid discretion. In my conclusion, I point to a number of additional concerns that should inform further scholarship that might examine whether Louisiana has assembled the proper mix of rules and standards as a mixed jurisdiction.

---

opinions. This, of course, does not even include reported decisions from federal courts in Louisiana and the U.S. Fifth Circuit Court of Appeals that concern private Louisiana law and also advance Louisiana jurisprudence. By contrast, the 2010 edition of *Scots Law Times*, Scotland's official reporter, contains one thick volume of reports from the Court of Session and other appellate courts, and one slim volume of reports of decisions of the Sherriff Courts of Scotland, the Scottish Land Court, and the Lands Tribunal for Scotland. Similarly, the 2010 edition of *Scottish Civil Law Reports*, published by the Law Society of Scotland, contains only 815 pages. Yet Louisiana has a current population of only 4,574,836, see U.S. CENSUS BUREAU, *Louisiana*, <http://quickfacts.census.gov/qfd/states/22000.html> (last visited Jan. 28, 2012), whereas Scotland has a current population of approximately 5.2 million people. See *Population of Scotland*, SCOTLAND.ORG, <http://www.scotland.org/facts/population/> (last visited Jan. 28, 2012).

\* \* \*

First, a few more words about Esther and Louis are in order. Some readers will naturally wonder why this Article focuses on private individuals like Esther and Louis and the legal problems generated by some of their most private decisions and intimate crises. Put differently, why ignore juridical entities like businesses and firms and the vast world of commercial transactions? I have three answers.

First, in Louisiana (as in France), our leading scholars have always told law students and the community at large that the Civil Code is a kind of everyman's handbook for life.<sup>14</sup> In theory, it tells us what rights and obligations are created at birth. It provides the organizational framework for the family. It tells us how we can acquire and dispose of property during our lives, what kind of contracts we can make, and what can happen to our property and obligations at death. And it supposedly tells us all of this in a non-technical language the average citizen can understand without the need for consulting a lawyer.<sup>15</sup> If this civilian folklore is true,<sup>16</sup> then our Civil Code may indeed have a communicative and signaling function that is more powerful than the guidance provided by statutes or case law in common law jurisdictions that deal with the same subjects. If this is so, it is particularly appropriate to reflect on how our Civil Code structures the behavior-inducing directives it provides for some of these most significant moments in our private lives.

The second reason I have chosen to focus on the largely personal problems of Esther and Louis is that I believe the consequences of a lawgiver's choice between rules and standards in designing a legal order are more important for individuals like them than they are for businesses, corporations, and other sophisticated institutions that can, and frequently do, consult lawyers about their pending transactions and contract around legal directives whose certain (or uncertain) outcomes they do not like. In other words, private individuals have more at stake in the rules versus standards contest, particularly when new rules and standards

---

14. The canonical source for this idea in the modern era is Colonel John H. Tucker, Jr., *Foreword*, THE LOUISIANA CIVIL CODE, LVII (A.N. Yiannopoulos ed., 2011).

15. SHAEL HERMAN, THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES 11 (1993); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 29 (3d ed. 2007).

16. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 15, at 42–47 (commenting on the misleading nature and continuing appeal of the “folklore” of statutory interpretation in the civil law tradition).

are announced, because they are much less likely to engage in the sort of private ordering necessary to achieve an ideal mix between certainty and discretion if law makers fail to achieve it.

My third reason for focusing on the personal and sometimes intimate problems of Esther and Louis is the simplest. Their problems are inherently interesting. And they are interesting because they are so common. They consist of the everyday joys and tragedies that confront many of us throughout our lives.

#### I. PRELIMINARY TITLE: THINKING ABOUT RULES AND STANDARDS

As we begin our journey through the Civil Code in search of rules, standards, and hybrid legal directives, let us take a moment to clarify what exactly we mean when we use these terms and to consider some of the most common normative justifications given for each kind of legal directive. In other words, let us reflect upon what makes a civil code article particularly rule-like or standard-like and why either type of directive might be more or less appropriate in any given part of the Civil Code.

##### *A. Rule Based Decision Making*

A good place to begin to understand the difference between rules and standards is Kathleen Sullivan's observation that a legal directive is "rule-like" when it "binds a decision maker to respond in a determinate way to the presence of delimited triggering facts . . . leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."<sup>17</sup> What Sullivan means is that a *rule-like* directive requires the decision maker to focus her attention on a narrowly circumscribed set of applicable facts and then to take those facts and mechanistically feed them into a precisely engineered calculus. The implicit governing metaphor for a rule-based system of adjudication is that of a machine. The adjudicator serves merely as an engineer who keeps the machine well-oiled and in good repair, and whose own will does not affect the resolution of disputes.<sup>18</sup> A classic rule will thus prevent the decision-maker from bringing her own values and policy judgments to bear on the resolution of a legal problem. In the

---

17. Sullivan, *supra* note 1, at 58.

18. See Jane B. Baron, *The Contested Commitments of Property*, 61 HAST. L. J. 917, 920 (2010) (introducing the metaphor of "the machine" to describe the underlying assumptions of "information theorists" who favor rule-like, exclusion based norms in property law).

language of jurisprudence, a true “rule” is associated with “legal formality” or “formal realizability.”<sup>19</sup>

Rule-like norms are ubiquitous in any legal system, and they are plentiful in the Louisiana Civil Code. Consider the following: article 28 of the Louisiana Civil Code declares that a “natural person who has reached majority has capacity to make all sorts of juridical acts, unless otherwise provided by legislation.”<sup>20</sup> Article 29 adds that “majority is attained upon reaching the age of eighteen years.”<sup>21</sup> Putting aside the complex problem of persons who lose their capacity to make juridical acts because of mental or physical infirmity,<sup>22</sup> and ignoring for the moment any standard-like norms or rule-like exceptions bearing on the same subject that might complicate our analysis,<sup>23</sup> these two articles appear to be create an archetypical rule. Before a person reaches the age of eighteen, no matter how wise she may be, she is generally forbidden from entering into juridical acts. But once a person reaches that magical age, no matter how foolish she really is, any juridical act appears to be possible. And notice how the two rules capture the underlying policy interest—people should be mature enough to appreciate the consequences of juridical acts before they are permitted to make them—in the text of the directives themselves. They spare the judge the task of making an individualized assessment of a particular person’s maturity. The decision making required by rules like these is thus often described as “strict,” “hard,” “tight,” “mechanical,” and “formal.”<sup>24</sup> Further, as these articles illustrate, and as C.J. Morrow, an influential civilian scholar in Louisiana, observed more than 50 years ago, extremely precise rules like these are frequently employed in the Civil Code for many quantitative determinations.<sup>25</sup>

---

19. Sullivan, *supra* note 1, at 58 n.232; Kennedy, *supra* note 1, at 1687–88.

20. LA. CIV. CODE art. 28 (2011).

21. LA. CIV. CODE art. 29 (2011).

22. See the new provisions governing interdiction of persons unable to care for their persons or property found in Book I, Title IX of the Louisiana Civil Code. LA. CIV. CODE arts. 389–99 (2011).

23. See *infra* notes 35–40 and accompanying text (discussing LA. CIV. CODE arts. 365–68 (2011) (providing for judicial emancipation, emancipation by marriage, and limited emancipation by authentic act), and LA. CIV. CODE art. 1923 (2011) (providing that contracts made by an unemancipated minor cannot be rescinded when made “for the purpose of providing the minor with something necessary for his support or education, or for a purpose related to his business”)).

24. Sullivan, *supra* note 1, at 58 nn.231–32.

25. Clarence J. Morrow, *Influence Du Code Civil au Point de Vue de la Technique Juridique: Louisiane*, in LA SEMAINE INTERNATIONALE DE DROIT 15–16 (Paris 1950) (reprinted 1954) (citing age of majority, along with many

Another common way of describing rule-based decision making is to note its emphasis on “categorization”—the process by which legal questions are resolved by identifying “differences in kind.”<sup>26</sup> This trait quickly becomes apparent to Louisiana civil law students who begin their legal educations learning to distinguish between private and public things, movables and immovables, corporeals and incorporeals, real rights and personal obligations, predial servitudes and personal servitudes, and divisible obligations and indivisible ones. Like many civilian jurisdictions, Louisiana loves its categories and, as C.J. Morrow also pointed out, uses seemingly precise rules to enunciate the different species of things, rights, and obligations as well as the modes of creating and terminating rights and obligations.<sup>27</sup>

One more crucial characteristic of rules is their tendency to force decision makers to view situations “ex ante”—to focus on what parties knew or could have known *before* they entered into certain personal or contractual relationships or acquired certain kinds of property.<sup>28</sup> Indeed, an entire school of property law theory extols the virtue of plain, easily applied rules, particularly the fundamental principle that an owner of a thing generally has the right to exclude all non-owners from the sphere of his property. This theory is based on the insight that rules’ great comparative advantage within the universe of legal directives is precisely their ability to organize relationships ex ante, to provide clear signals up front about people’s entitlement to the tangible and intangible realms of property.<sup>29</sup>

Paradoxically, even though classic rule-like norms require judges to analyze disputes from this ex ante perspective, hard-edged rules are also often characterized by their ability to produce strong *future* effects. Rules, we are frequently told, tend to encourage individuals and juridical persons to organize their affairs with greater care and deliberation before they act. Clear and immutable rules have this beneficial “hortatory effect” precisely

---

other provisions, as examples of extremely precise rules dealing with quantitative matters).

26. Sullivan, *supra* note 1, at 59.

27. Morrow, *supra* note 25, at 16.

28. Sullivan, *supra* note 1, at 63 n.259; *see also* Rose, *supra* note 1, at 591 (citing Frank Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10–11, 19–21 (1984)).

29. *See* John A. Lovett, *Progressive Property in Action, The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 746–750 (2010) (discussing the scholarship of Thomas Merrill and Henry E. Smith and their information processing cost theories of property law).

because they are forward looking from both the judge's and the actor's perspective.<sup>30</sup>

### B. Standard Based Decision Making

A legal directive cast in the form of a prototypical standard, Kathleen Sullivan tells us, typically directs a decision maker to visualize a general background principle or policy goal and then asks the decision maker to apply that principle or goal to a particular factual situation taking into account *all* of the relevant facts and circumstances.<sup>31</sup> This kind of decision making has been called “purposive.”<sup>32</sup> Some might call it “pragmatic,” or perhaps lacking in “principle.”<sup>33</sup> Others call it “shapeless” or “muddy.”<sup>34</sup> Before we evaluate these normative labels, let us examine how a typical standard works in practice by looking at a standard that lurks in the shadows of the seemingly direct rule on age of majority we just observed.

Consider recently amended Civil Code article 366, which provides that a court “may order for *good cause* the *full* or *limited* emancipation of a minor sixteen years of age or older.”<sup>35</sup> This legal directive actually contains one mechanistic rule—that children under the age of 16 are ineligible to make juridical acts no matter how mature. But it also gives a judge the power to exercise considerable discretion on two different fronts: (1) whether “good cause” exists to emancipate a 16 or 17 year old; and (2) whether such an emancipation should apply to all juridical acts or just a certain sub-class of them.<sup>36</sup> Thus, the article gives a judge broad authority to consider the needs and circumstances of the minor, as well as the parents or tutor, and to design an emancipation order that is either broad or narrowly tailored to the situation.<sup>37</sup> Curiously, though, the very next provision of the Civil Code,

---

30. Atiyah, *supra* note 1, at 1249–50; Rose *supra* note 1, at 592 (explaining that ex ante oriented rules encourage people “to plan and to act carefully, knowing that no judicial cavalry will ride to their rescue later”).

31. Sullivan, *supra* note 1, at 58–59.

32. *Id.* at 60; *see also* AHAARN BARAK, PURPOSIVE INTERPRETATION IN LAW 88–96 (2005) (emphasizing the fundamental role of discretion in purposive interpretation).

33. Atiyah, *supra* note 1, at 1250–51.

34. Rose, *supra* note 1, at 579–80, 590–95.

35. LA. CIV. CODE art. 366 (2011) (emphasis added), revised by Act No. 786, 2008 La. Acts 2977, 2978–79.

36. LA. CIV. CODE art. 366 (2011).

37. *See id.* cmts. d–e (discussing the scope of “limited” emancipation orders) & cmts. g–i (discussing detailed examples of potential “good cause” warranting emancipation).

article 367, inserts another mechanistic rule into the mix by providing that a minor, regardless of age, “is fully emancipated by marriage.”<sup>38</sup> Finally, article 368 provides that a minor of 16 or 17 may engage in certain juridical acts if he or she is authorized to do so by an “authentic act of limited emancipation” executed by the minor and his or her parents or tutor, without requiring any judicial approval.<sup>39</sup> Adding another layer of complexity is article 1923, which provides that a contract made by an unemancipated minor cannot be rescinded “when made for the purpose of providing the minor with something necessary for his support or education, or for a purpose related to his business.”<sup>40</sup>

The complete rule design picture that emerges, even in this seemingly straightforward area of private law regulation, is thus surprisingly complex. The Civil Code starts off with an apparently lucid rule (articles 28 and 29 establishing eighteen as the seemingly axiomatic age of majority), then muddies it with a zone of judicial discretion (article 366’s provision for judicial emancipation), then cordons off this discretion with two contradictory mechanistic rules (article 366’s specification of age sixteen as a floor for judicial emancipation and article 367’s automatic emancipation through marriage), and tops this all off with a zone for parent and child to emancipate jointly for limited purposes through an authentic act (article 368) and with a provision that provides for a kind of *ex post* ratification for a narrow sub-class of contracts executed by unemancipated minors (article 1923). We will see this pattern re-emerge more frequently and in ever greater complexity as we make our detailed journey in Books One, Two, and Three of this Article.

Of course, open-textured standards have long been prominent features of the Louisiana Civil Code.<sup>41</sup> They are found in the Civil Code’s admonition that “[g]ood faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation,”<sup>42</sup> its parallel requirement that “[c]ontracts must be performed in good faith,”<sup>43</sup> in its maxim that a proprietor of an estate “cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the

---

38. LA. CIV. CODE art. 367 (2011), revised by Act No. 786, 2008 La. Acts 2977, 2979–80.

39. LA. CIV. CODE art. 368 (2011), revised by Act No. 786, 2008 La. Acts 2977, 2980.

40. LA. CIV. CODE art. 1923 (2011).

41. Morrow, *supra* note 25, at 17–18.

42. LA. CIV. CODE art. 1759 (2011).

43. LA. CIV. CODE art. 1983 (2011).

cause of any damage to him,”<sup>44</sup> and its pronouncement that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”<sup>45</sup> A judge applying these elastic standards of good faith and fault, as with the “good cause” standard for judicial emancipation, will typically be engaged in balancing more than categorizing, identifying “differences in degree” rather than “differences in kind.”<sup>46</sup> Her decision making will thus often be described as “flexible,” “soft,” “loose,” “practical,” or “informal.”<sup>47</sup>

Unlike rules’ typical ex ante orientation, classic standards such as Louisiana’s good faith and fault provisions, its obligation of the neighborhood principles, or its judicial emancipation provision, also characteristically allow decision makers to view decisions “ex post.”<sup>48</sup> In other words, they enable decision makers to consider outcomes, to examine how relationships end, to visualize how bargains go awry, and to inquire whether a person’s actions were too risky or reasonable, self-interested or unexceptional, in light of all the circumstances. Paradoxically, although open-ended standards like these permit a decision maker to evaluate the effects of implementing a decision on all the affected parties currently involved in the dispute, some critics of standards suggest that these kinds of directives have the unfortunate effect of absolving the judge of considering the long-term consequences of any particular decision on society at large because each decision will have little or no precedential value.<sup>49</sup> Of course, the same critique could be made of rules. They, too, could be faulted for allowing judges to ignore the immediate social consequences of their rulings and justify individual hardship in the name of long-term net benefits.

Sometimes, too, the operational distinction between classic rules and standards is blurred by the fact that judges are required to engage in detailed and difficult fact-finding in cases calling for the application of otherwise clear rules. In these circumstances, rule-based decision making might feel like standard-based decision making when in reality the judge is doing nothing more than applying an otherwise clear rule to rather muddy facts. A simple example from our consideration of minors and contractual capacity

---

44. LA. CIV. CODE art. 667 (2011).

45. LA. CIV. CODE art. 2315 (2011).

46. Sullivan, *supra* note 1, at 59.

47. *Id.* at 58 n.231.

48. *Id.* at 63 n.259.

49. See Atiyah, *supra* note 1, at 1259 (commenting that “the task of laying down broad rules of behavior for the future is now seen as that of Parliament, and the courts are therefore increasingly relegated to the task of solving disputes”).

would be article 1923, which allows for rescission of contracts made by an unemancipated minor “except when made for the purpose of providing the minor with something necessary for his support or education, or for a purpose related to his business.”<sup>50</sup> A judge might be required to determine whether a particular contract really was necessary for the minor’s support, education or business endeavors. But the rule does not really invite an open-ended consideration of all relevant facts and circumstances and demand elaborate weighing of the relevant parties’ needs and interests. In short, judicial intervention in such cases should not be confused with judicial discretion. Rather, it is merely the planned-for exercise of judicial duty.<sup>51</sup>

### *C. Rationales for Rules and Standards*

One could spend an entire career evaluating all the normative arguments in favor of rules and standards. For purposes of this Article, it will be enough to observe that the most common justifications for each kind of legal directive tend to fall under at least one of three general headings. It is also striking to observe how the justifications tend to mirror one another and dissolve into irreconcilable, and perhaps ultimately rhetorical, conflict.<sup>52</sup>

#### *1. Justification #1: Fairness*

Jurists who endorse rules as the ideal type of legal directive often justify their preference by asserting first and foremost that rules guaranty fairness. The tendency of rules to focus judicial decision making on ex ante conditions, their reliance on neutral categorization, and their self-operating quality all promote fairness and formal equality and avoid the evil of arbitrary and biased decision making. Paradoxically, proponents of standards justify their preference by arguing that standards promote fairness, too—albeit of a different kind. By referring decision makers to ultimate policy objectives, an open-textured standard allows a decision maker to look past merely technical distinctions and treat cases that are substantively alike in similar ways. Standards can thus avoid the potential under-inclusiveness or over-inclusiveness of excessively rigid rules.<sup>53</sup>

---

50. LA. CIV. CODE art. 1923 (2011).

51. I am indebted to Kenneth Reid for this insight.

52. Rose, *supra* note 1, at 610.

53. See Kennedy, *supra* note 1, at 1689; see generally Sullivan, *supra* note 1, at 62–66; SCHAUER, THINKING LIKE A LAWYER, *supra* note 1, at 200–02.

Consider for a moment our provisions concerning the age of majority. Civil Code article 29's bright line specification of 18 as the general age of majority in Louisiana is *fair*, rule proponents will argue, because everyone will know where they stand. Persons 17 or younger will know they lack the capacity to engage in juridical acts, unless they are married or unless they are at least 16 and have been emancipated.<sup>54</sup> Persons dealing with minors will be similarly forewarned. Persons 18 or older will not need to prove anything other than their age to establish their juridical capacity. Case closed.

On the other hand, article 366's provision for judges to emancipate minors between 16 and 18 years of age for "good cause" is *also fair*, standards supporters will claim, because it gives a teenager in difficult circumstances an opportunity to demonstrate individual maturity or why the circumstances require the capacity to make juridical acts. But we can also see how a legal directive that shares both rule-like and standard-like elements (for instance, article 1923's protection of contracts made by unemancipated minors for "the purpose of providing the minor with something necessary for his support or education, or for purposes related to his business") could accomplish some of the same ends as article 366's more classically open-ended standard. In short, we can see that a regard for fairness can justify rules, standards, and norms that operate somewhere in between.

## 2. Justification #2: Efficiency

Another equally common justification for hard-edged rules is that they maximize social welfare by encouraging productive economic activity and conservation of scarce judicial resources. Fixed and stable rules that clearly define contract and property rights *ex ante*, many jurists claim, establish the baseline certainty and predictability that are necessary before we will trade confidently with a stranger or someone beyond our own family or religious community.<sup>55</sup> In a similar vein, clear rules can reduce pre-contract transaction costs for persons planning and executing trades and entering into complex transactions because traders will be more confident that their actions and contracts will trigger certain forms of judicial enforcement if something goes wrong.<sup>56</sup> Post-contract, crystalline rules can also reduce the parties' need to

---

54. See *supra* notes 20–23 and accompanying text.

55. Rose, *supra* note 1, at 592, 601–02; Sullivan, *supra* note 1, at 62–63.

56. See Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 322–23 (1985).

engage in costly monitoring and self-help measures.<sup>57</sup> Finally, clear rules reduce decision making costs for the entire legal system.<sup>58</sup>

But standards can be efficient, too, their admirers point out. A generous and open-textured fault standard can give persons the confidence to go forth into the world, travel, and make purchases and bargains because, if a serious injury or breach occurs, there will at least be some chance that the party actually at fault—another driver, a manufacturer, even a consumer who used a product in an unsafe manner—will be assigned legal responsibility. Similarly, a contractual standard like Louisiana’s imposition of the duty of good faith on the performance of obligations can discourage anti-social and exploitative behavior of sharp dealers who might otherwise try to take advantage of the gullible and naive by skirting up to the edge of what inflexible rules would otherwise allow.<sup>59</sup> Thus, standards can encourage commerce and trade as much as rules.

The inherent flexibility of standards can also enhance efficiency by allowing decision makers to take into account new circumstances and unexpected contingencies and avoid outcomes that produce excessive economic waste or socially intolerable forfeitures.<sup>60</sup> Finally, standards can facilitate investment in productive economic ventures because private actors will be less fearful of being caught on the wrong side of an arbitrarily rigid rule.<sup>61</sup> They allow contracting parties to avoid spending too much time negotiating to cover every possible contingency when reliance on a set of “socially understood conventions”—often associated with mud rules—is simply easier and cheaper.<sup>62</sup> It turns out that both rules and standards can plausibly increase the net efficiency of our private economy, encourage trade, and boost aggregate social welfare if deployed in the right places.

### *3. Justification #3: Promotion of Democratic Governance*

At perhaps the highest level of abstraction, both rules and standards can be justified on the basis that they promote democratic self-government, the very foundation of our ability to make decisions about the nature of our legal order and the type of

---

57. Rose, *supra* note 1, at 591.

58. Sullivan, *supra* note 1, at 63.

59. Rose, *supra* note 1, at 599–600; Sullivan, *supra* note 1, at 63, 66.

60. Rose, *supra* note 1, at 597–600 (drawing on James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1981)); Sullivan, *supra* note 1, at 63, 66.

61. Rose, *supra* note 1, at 600.

62. *Id.* at 609.

society in which we live. Clear and simple rules, we are sometimes told, keep governmental power in check and preserve individual autonomy by limiting the power of unelected, unaccountable judiciaries. They separate law from politics by preventing judges from employing their own private assumptions about different persons' needs and interests.<sup>63</sup> Clear and mechanical rules also might help insulate judges and judicial decision making from the influence of bias attributable to rent-seeking, particularly in a jurisdiction like Louisiana that relies on an elected judiciary and does not impose particularly rigorous limits on judicial campaign contributions, a phenomenon we will address later.<sup>64</sup> In sum, by restricting judges to the role of mechanical arbitrators, rules leave policy making in the only place it can properly reside—the hands of legislators.<sup>65</sup>

Standards, however, can also promote democratic self-governance in different ways. They can, their advocates claim, enhance the potential for distributive justice which, in turn, can make democracies more stable over time. They also allow government institutions and property relationships to respond more dynamically to changing social and economic circumstances.<sup>66</sup> And finally, by enabling judges to make decisions that are more appropriately contextual and by forcing judges to be more transparent about the factors that go into their decision making, they can enhance the accountability and legitimacy of the legal system in general. In short, open-ended standards can promote reasoned dialogue about the common good—an essential ingredient for democratic self-government.<sup>67</sup>

We see then that rules and standards can be and often are justified by the same strands of justifications. The implicit message seems to be that both rules and standards are useful juridical tools in any legal order. The challenge for those responsible for designing a legal system is to deploy rules and standards in just the

---

63. See generally Sullivan, *supra* note 1, at 63–66.

64. See Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributions*, 10 GLOBAL JURIST, ISSUE 3, ART. 4 (2010), discussed *infra* at notes 335–337 and accompanying text.

65. Sullivan, *supra* note 1, at 63–66.

66. Conversely, though, it might be said that when legislation relies heavily on vague standards, this undermines democratic accountability by kicking difficult policy questions out of the legislature's zone of responsibility.

67. See Sullivan, *supra* note 1, at 67–68 (relying on Frank I. Michaelman, *Law's Republic*, 97 YALE L.J. 1493, 1493–1507 (1988); Frank I. Michaelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17–36 (1986); and Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–58 (1988)).

right places. We should deploy clear and simple rules where the need for formal realizeability, ex ante certainty, and predictability is greatest and where we want to privilege legislative choice over judicial flexibility. On the other hand, we should turn to standards where we need more elasticity in results, where the possibility of judicial flexibility provides individuals the necessary confidence to enter into long-term contractual or personal relationships, and where, at the meta-level, promoting reasoned dialogue is the most important republican end.

As we travel through the Louisiana Civil Code with Esther and Louis in the rest of this Article, we can begin to assess whether Louisiana law makers have chosen the right places to deploy classic crystalline rules, open-ended standards, and hybrid innovations.

## II. BOOK ONE: MARRIAGE AND DIVORCE

*When Esther and Louis decided to marry, they assumed marriage was simply a matter of love. The wedding ceremony, after all, was a joyous event. Esther wore a simple white sundress designed by a friend who made costumes for Mardi Gras balls. Louis wore a slightly baggy, second hand tuxedo he had purchased on Decatur Street in the French Quarter.*

*Their guests gathered on the bank of the Mississippi River in front of Jackson Square at sunset. Esther and Louis arrived in one of those horse drawn buggies that tourists hire for an hour. The couple recited their own vows, and a performance artist named Theo, who was also a minister in the Church of Universal Life, pronounced them husband and wife.*

*After the ceremony, Esther and Louis hopped on their old bicycles and rode away as the sun slipped behind the twin spans of the Crescent City Connection. An hour later, they met their families and friends at an old warehouse in the Bywater and danced all night to the sound of a Klezmer jazz band.*

### A. *Entrance into Marriage*

As delightful as all this sounds, lawyers know that Esther and Louis's decision to marry was also a fateful one. From the law's perspective, their decision represented a choice to enter into a civil contract that produces significant legal consequences.<sup>68</sup> Before we begin to assess those consequences, however, we can observe that

---

68. LA. CIV. CODE art. 86 (2011) ("Marriage is a legal relationship between a man and woman that is created by civil contract.").

Esther and Louis were in one respect quite lucky. There was no apparent legal impediment to their decision,<sup>69</sup> and they could thus act confidently without the need to consult any lawyers whatsoever.

Their ease in entering into marriage resulted from several facts. Neither Esther nor Louis was currently married to anyone else.<sup>70</sup> They were members of the opposite sex.<sup>71</sup> They were not related by blood or adoption.<sup>72</sup> They were old enough to enter into juridical acts—and thus marry—on their own.<sup>73</sup> All they had to do was give their mutual consent, freely and with discernment,<sup>74</sup> at a simple ceremony performed by a qualified person at which they were both present.<sup>75</sup> In short, despite its profound emotional,

---

69. See generally J-R Trahan, *Impediments to Marriage in Scotland and Louisiana: An Historical-Comparative Investigation*, in *MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND* 173–207 (Vernon Valentine Palmer & Elspeth Christine Reid eds., 2010).

70. LA. CIV. CODE art. 88 (2011) (“A married person may not contract another marriage.”). Had either Esther or Louis been legally married to someone else at the time they entered into their marriage, this putative marriage would have continued to produce legal effects for the other party, “regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage.” LA. CIV. CODE art. 96 (2011). This important provision on the civil effects of the most common occurrence of a putative marriage itself takes the form of a crystalline rule and avoids any judicial inquiry into the other party’s state of mind.

71. LA. CIV. CODE art. 89 (2011) (“Persons of the same sex may not contract marriage with each other.”).

72. LA. CIV. CODE art. 90 (2011) (prohibiting marriage between ascendants and descendants and collaterals within the fourth degree, whether of whole or half blood, related by consanguinity or adoption).

73. See LA. CIV. CODE arts. 28–29 (2011), discussed *supra* notes 20–23. If either Esther or Louis had been younger than 18 years of age, that person could have sought a limited judicial emancipation for purposes of acquiring the legal capacity to marry. See LA. CIV. CODE art. 366 (2011). Alternatively, they could have sought the consent of both parents, a tutor or custodian of the minor, or a juvenile court judge. LA. CHILD. CODE ANN. arts. 1545 and 1547 (2004).

74. See LA. CIV. CODE art. 87 (2011) (listing as one of the requirements of marriage the “free consent of the parties to take each other as husband and wife, expressed at the ceremony”); LA. CIV. CODE art. 93 (2011) (“Consent is not free when given under duress or when given by a person incapable of discernment.”). The comments to article 93 indicate that “a person who is too young to understand the consequences of the marriage celebration” may be one of those classes of persons “incapable of discernment.” LA. CIV. CODE art. 93 cmt. d. But as discussed in *supra* note 73, a minor can still obtain authorization to marry through other means.

75. LA. CIV. CODE art. 91 (2011). If, for some reason, Esther and Louis’s minister friend, Theo, was not properly qualified to perform marriages, Esther and Louis could have remedied this defect by going to City Hall, presenting a valid marriage license or obtaining a new one, and then waiting three days for a judge or justice of the peace to marry them. LA. REV. STAT. ANN. § 9:241 (Supp.

economic and legal consequences, marriage is a remarkably easy juridical action to undertake in Louisiana—at least for persons like Esther and Louis. Although an alternative and supposedly more deliberative form of marriage, the “Covenant Marriage,”<sup>76</sup> also exists in Louisiana, the standard marriage into which Esther and Louis have entered remains by far the most common choice.<sup>77</sup> In sum, eligibility for marriage and the act of marrying itself are both governed by simple, direct rules. Judicial intervention is generally unnecessary and judicial discretion not a concern.

### *B. Matrimonial Regimes and Community Property*

So what happens now that Louis and Esther are married? How does the law shape their interactions with each other, with their property, and with the world at large? At one time in Louisiana, Louis would have been deemed the “head and master” of the household, would have enjoyed sole authority to administer the marital assets, and could even have alienated their immovable property without Esther’s consent.<sup>78</sup> Today, happily, the head and master rule and its patriarchal bias are only a historical relic. Now, we recognize that Esther and Louis owe each other “fidelity, support and assistance,”<sup>79</sup> that they both “mutually assume the moral and material direction of the family,”<sup>80</sup> that “each spouse acting alone may manage, control or dispose” of most community

---

2011). Even this three-day waiting period could have been waived for “serious and meritorious reasons.” LA. REV. STAT. ANN. § 9:242.

76. Parties entering into a covenant marriage must undergo mandatory pre-marital counseling and must declare their intention to undertake a covenant marriage explicitly. LA. REV. STAT. ANN. § 9:272(A)–(B) (Supp. 2011). In addition, spouses in a covenant marriage are required to take “reasonable steps to preserve the marriage if marital difficulties arise, including marital counseling,” and cannot divorce quite as easily as in a standard marriage. Katherine Shaw Spaht, *What’s Become of Louisiana Covenant Marriage through the Eyes of Social Scientists*, 47 LOY. L. REV. 709, 711 (2001). For a critical appraisal of the counseling requirements for a covenant marriage, see Jeanne Louise Carriere, “*It’s Déjà Vu All Over Again*”: *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1705–17 (1998). For details on the more onerous grounds for divorce under covenant marriage, see Carriere, *supra* at 1718–19, and *infra* notes 113 and 117 and accompanying text.

77. See Spaht, *supra* note 76, at 726 (reporting that only an estimated 5% of couples chose covenant marriage in Louisiana).

78. LA. CIV. CODE art. 2404 (1870), repealed by Act No. 709, 1979 La. Acts 1857, 1857; *Camel v. Waller*, 526 So.2d 1086, 1090–91 (La. 1988).

79. LA. CIV. CODE art. 98 (2011).

80. LA. CIV. CODE art. 99 (2011).

property,<sup>81</sup> and that neither spouse can alienate, encumber, or lease community immovables and other particularly important assets without the other's consent.<sup>82</sup> In short, Esther and Louis entered into a legal community theoretically governed by the principal of spousal equality.<sup>83</sup>

Esther and Louis could in principle choose to enter into a matrimonial regime of "separation of property"<sup>84</sup>—that is, a regime in which each spouse would retain all of the income and fruits of his or her individual labor as his or her own separate property and each spouse, acting alone, could use, enjoy, and dispose of that property without the other's consent.<sup>85</sup> But to arrive at that decision and to implement it in the form of an appropriate prenuptial agreement or separation of property agreement, both Esther and Louis would need considerable assistance from attorneys,<sup>86</sup> ideally separate counsel to advise each of them as to their unique interests. Hasty decisions to enter into separation of property agreements on the eve of a marriage without the advice of separate counsel can easily end in heartache,<sup>87</sup> as can hastily drawn-up pre-nuptial agreements that do not meet the Civil Code's strict requirements as to the necessary formalities.<sup>88</sup>

Because of the time and expense involved in preparing such an agreement, not to mention the doubts about the other's intentions the process might raise, Esther and Louis probably would not take advantage of this option. Instead, by simply marrying, without more, they would fall into Louisiana's default matrimonial regime—the legal regime we call "the community of acquets and

---

81. LA. CIV. CODE art. 2346 (2011).

82. LA. CIV. CODE art. 2347 (2011).

83. See generally Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 91–94 (2004) (discussing the principle of equality in marriage).

84. LA. CIV. CODE arts. 2328, 2329 & 2370 (2011).

85. LA. CIV. CODE art. 2371 (2011).

86. See generally ROBERT C. LOWE, 2 LA. PRAC. DIVORCE §§ 4:1–4:45 and 9:95–9:102 (2d ed. 2012). Lowe cautions that individuals seeking a separate property regime or any kind of prenuptial agreement must be warned of the complex issues involved for all parties. *Id.* at § 4:21.

87. *Weinstein v. Weinstein*, 62 So. 3d 878, 882–883 (La. Ct. App. 3d 2011) (enforcing prenuptial agreement executed by spouses the day before the wedding, even though it was prepared by lawyer–husband, as wife was advised to seek separate legal representation regarding agreement).

88. See *Muller v. Muller*, 72 So. 3d 364, 367–68 (La. Ct. App. 5th 2011) (holding that premarital matrimonial agreement was null and void *ab initio* where wife's signature was not properly witnessed by a notary in compliance with Civil Code article 2331 and agreement was not otherwise duly acknowledged *prior* to marriage).

gains,”<sup>89</sup> *i.e.*, community property. In other words, the simple, initial rule establishing community property as the default marital regime produces powerful legal effects for a couple like Esther and Louis.

Although this is not the place for an exhaustive analysis of Louisiana’s community property regime, its most salient characteristic for our purposes is that its provisions are among the most crystalline, “rule-like” legal directives in the Civil Code. Indeed, it is a regime that hinges almost entirely upon one of the classic rule-based decision making modes—classification. Every potential asset of either spouse must be classified as either community or separate,<sup>90</sup> and the legal consequences that flow from this classification are essentially automatic.

As partners in this legal community of acquets and gains, Esther and Louis will each now acquire a “present undivided one-half interest” in any property classified as “community property.”<sup>91</sup> Most significantly, Louis’s income from his work as a sous-chef as well as Esther’s income from her work as a community organizer will both be considered community property if the income results from either spouse’s “effort, skill or industry” during the existence of the community.<sup>92</sup> This rule reflects the fundamental policy underlying community property—the principle of equality and sharing within the household regardless of either spouse’s role as wage-earner or homemaker. It is a policy whose spirit Louisiana courts have always strived to enforce.<sup>93</sup>

It is true that complex questions related to the proration and classification of various kinds of deferred compensation do arise in the case of fringe benefits, retirement and pension plan benefits, commissions on insurance policies, profit sharing plans, mineral royalties, and stock options, and that these matters may require extensive litigation and judicial subtlety to resolve.<sup>94</sup> Nevertheless, the fundamental principle of equal sharing of compensation earned during the community makes it relatively easy for individuals like Esther and Louis to understand how the fruits of their labor during the existence of the community will be classified.

89. LA. CIV. CODE art. 2327 (2011).

90. LA. CIV. CODE art. 2335 (2011).

91. LA. CIV. CODE art. 2336 (2011).

92. LA. CIV. CODE art. 2338 (2011). Conversely, if income is paid during the existence of the community for work performed before the community was created, it will be separate property. KATHERINE S. SPAHT & RICHARD D. MORENO, MATRIMONIAL REGIMES § 3.3, at n.1 and accompanying text, *in* 16 LOUISIANA CIVIL LAW TREATISE (3d ed. 2007).

93. SPAHT & MORENO, *supra* note 92, § 3.2.

94. *See generally id.* §§ 3.3–3.4.

The other categories of community property are also relatively easy to understand. Any property acquired with the spouses' "community things or with community and separate things," any property donated to the spouses "jointly," any "natural and civil fruits" of their community property, and even "damages awarded for loss or injury" to their community assets, will all be considered community property.<sup>95</sup> Thus, the automobile Esther and Louis will purchase with their community income, the house in Faubourg Marigny they will buy in the second year of their marriage, the furniture they acquire for the house, and the stocks and bonds they buy as investments (along with the accrued dividends and interest payments) will all fall into this shared pool of community property in which they both share an undivided one-half interest. Indeed, any assets in either spouse's possession during the existence of the community will be presumed to be community property, although either spouse could attempt to rebut this presumption.<sup>96</sup>

The only assets *not* falling into the default category of community property would include: (1) things either spouse acquired prior to the marriage (in their case probably very little);<sup>97</sup> (2) property acquired by either with separate things or with separate and community things when the value of the latter is inconsequential (again, probably very little in this case);<sup>98</sup> (3) property acquired by donation to either spouse individually or by inheritance (undoubtedly the most important category of separate things); and (4) most damages awards,<sup>99</sup> including personal injury damages sustained during the existence of the community, unless the personal injury award compensates for the loss of community

---

95. LA. CIV. CODE art. 2338 (2011).

96. LA. CIV. CODE art. 2340 (2011). Although the spouse seeking to rebut this presumption and establish the existence of separate property bears the burden of proof, this burden can be met when there is clear evidence for instance, that immovable property held in the name of both spouses was, in fact, purchased by, paid for, and maintained by one of the spouse's parents for his own interest and that of his children. *Hoover v. Hoover*, 62 So. 3d 765, 770–71 (La. Ct. App. 1st 2011).

97. LA. CIV. CODE art. 2341 (2011).

98. *Id.*

99. *See id.* (classifying as separate property "damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse;" and "damages or other indemnity awarded to a spouse in connection with the management of his separate property").

earnings or expenses incurred by the community as a result of the injury.<sup>100</sup>

This is not difficult classification work. In general, the Civil Code's community property regime is governed by remarkably clear and straightforward ground rules. Fine tuning the degree of ownership of individual assets is generally not allowed. When Esther and Louis's community of acquets and gains eventually terminates (either upon death, divorce, or perhaps a non-divorce termination agreement),<sup>101</sup> their lawyers should be able to classify their assets as either community or separate and determine their eligibility for a community property partition,<sup>102</sup> or for distribution to their respective heirs and legatees,<sup>103</sup> with a relatively high degree of confidence and with little need for extensive research and analysis.<sup>104</sup> Thus, so far in our journey, the Civil Code has lived up to expectations. The rights of spouses are protected by rules, not standards. It speaks in relatively clear language that most reasonably well educated people can understand. Judicial discretion has been kept at bay.

\* \* \*

*After Esther and Louis's marriage, they both continued to work at their old jobs. Eventually, though, Louis went back to college, finished his undergraduate degree, and obtained a new job as a manager of a local restaurant chain. A year later, Louis entered business school full time in pursuit of an MBA. Esther kept working at her old job so that Louis could devote all his attention to his studies. On the weekends, Esther also worked as a waitress at an upscale New Orleans restaurant to earn extra money to cover their living expenses and some of Louis's business school expenses.*

---

100. LA. CIV. CODE art. 2344 (2011). See SPAHT & MORENO, *supra* note 92, §§ 3.20–3.26, at 154–72, for details on the allocation of personal injury awards and their various elements.

101. LA. CIV. CODE art. 2356 (2011).

102. LA. CIV. CODE art. 2369.8 (2011) (providing for right to demand “partition of former community property at any time”). For more on community property partition upon divorce, see *infra* notes 119–34 and accompanying text.

103. For a nice example of the straightforward application of community property principles to a variety of assets claimed by the legatee of a deceased spouse as against a surviving spouse, see Succession of Lefort, 52 So. 3d 999, 1007–08 (La. Ct. App. 3d 2010) (dealing with house, substantial bank accounts, bench, table, and pattern china).

104. SPAHT & MORENO, *supra* note 92, § 3.1, at 71 (characterizing the Civil Code's community property classification scheme as “a relatively simple one that has not changed substantially in modern times”).

*Louis thrived at business school. He enjoyed collaborating with his fellow students, earned coveted internships, and upon graduation was offered a job with a fast growing corporation called Green Earth, which operated high end supermarkets specializing in organic and healthy foods. In his first several years with Green Earth, Louis made rapid progress through the corporate hierarchy.*

*Esther and Louis had their first child, Talia, when Esther was 32 and Louis was 30. Esther stopped working outside the home. She would stay home only until Talia reached school age, Esther thought. After that she might go back to graduate school herself and obtain an advanced degree of her own.*

*Esther and Louis's second child, Joshua, was born two years later. Now it made even more sense for Esther to stay at home and look after the children. Louis was earning good money and getting steady promotions at Green Earth.*

*Time flew by. The children grew. Esther was always busy: organizing the children's activities; managing the household; volunteering at the children's school. She applied for a few jobs, but she was either over-qualified or under-qualified, given that she lacked a professional degree.*

*Meanwhile Louis flourished at Green Earth and was promoted to vice-president. The CEO told Louis he was a leading candidate to take over an entire division. He might even be CEO one day.*

*But then one night after dinner, after the kids had been put to bed, Louis told Esther he wanted a trial separation. He wanted to have more independence. He didn't feel there was any magic in their relationship any more.*

*Esther was not totally surprised. She had suspected something was amiss for months. Esther had overheard Louis speaking to someone on his cell phone on the back porch late at night several weeks earlier. When he came inside Louis had said it was an urgent problem at work.*

### *C. Exit from Marriage*

Let us assume that, after an awkward and painful week of long conversations and tears, Louis moves out of the family home. Esther now goes to see a lawyer. Her attorney's name is Stephanie, a certified family law specialist in Louisiana who has ten years of experience representing individual clients in domestic matters. What advice can Stephanie give Esther based on her experience and knowledge of Louisiana law?

If Esther files a petition for a divorce now, Stephanie will explain, she must wait a year before a divorce will be granted.

Stephanie will state that there are two reasons for this delay: (1) the minor children, and (2) the fact that Esther and Louis have not previously lived separate and apart.<sup>105</sup> In other words, Esther must now wait a year and then she will have to prove that she and Louis have lived separate and apart in the interim.<sup>106</sup> Had there been no minor children, 180 days of living separate and apart would have sufficed.<sup>107</sup>

An immediate divorce, Stephanie will add, is possible in Louisiana but more difficult to obtain. First, if Esther could prove that she and Louis had already been living separate and apart for a year, or for just six months had there been no minor children, at the time she files a petition, a divorce decree could be obtained right away.<sup>108</sup> Second, an immediate divorce would follow if Esther can prove that Louis has either (a) committed adultery or (b) committed a felony and been sentenced to death or hard labor.<sup>109</sup> Louis's suspected transgressions, Stephanie must advise Esther, might have been relevant in a divorce proceeding 50 years ago.<sup>110</sup> Today, however, they will be relevant only in the unlikely event that Louis seeks some form of post-separation financial support from her.<sup>111</sup>

So what can we conclude after Esther's brief initial interview with Stephanie? Divorce is a relatively easy step to take in Louisiana. The ability to exit from marriage is merely a matter of stating a preference, living apart for a limited period of time,<sup>112</sup> and

---

105. See LA. CIV. CODE arts. 102, 103.1(2) (2011).

106. *Id.*

107. LA. CIV. CODE arts. 102, 103.1(1)(a) (2011).

108. LA. CIV. CODE arts. 103, 103.1 (2011).

109. LA. CIV. CODE arts. 103(2)–(3) (2011).

110. Louisiana's fault based regime for divorce began to break down in the 1950s when the legislature added part (9) to Article 138 of the 1870 Civil Code, Act No. 303, 1956 La. Acts 626, 626–27 (allowing for separation from bed and board when husband and wife voluntarily lived separate and apart for one year without reconciliation), amended article 139, and added Section 302 of Title 9 of the Louisiana Revised Statutes, Act. No. 618, 1954 La. Acts 1121, 1121. The cumulative effect of these changes was to allow for divorce upon living separate and apart for more than a year or after a separation from bed and board.

111. See *infra* notes 135–58 and accompanying text.

112. It is noteworthy, though, that Louisiana's six month or one year waiting periods for no-fault divorce are both longer *and* shorter than those found in other states. See DOUGLAS E. EBRAMS ET AL., CONTEMPORARY FAMILY LAW 415–16 (2006) (noting that some states like Kentucky require 180 days of residency in the state and 60 days of living separate and apart, other states like Oregon have no waiting period and no residency requirement, but that Rhode Island, Texas and Utah have the longest separation requirements (three years), along with substantial residency requirements). For a complete listing of waiting periods

then confirming the desire to part ways. There is no requirement for the party seeking the divorce to justify the decision or prove that the other party is at fault. Even for those who choose Louisiana's more demanding covenant marriage regime, exit remains essentially a matter of right. The only difference is that the waiting periods for divorce are slightly longer for these supposedly more committed couples.<sup>113</sup>

Louisiana's legal directives governing exit from marriage are thus classic examples of transparent rules, easy for a lawyer to explain and a layman to comprehend. They are a model of rule-like rules. They typify the Civil Code's predilection for deploying straight forward, sharp edged rules when the quantification of sufficient time for some legal right to accrue is at stake. They provide certainty and predictability and prevent judges from using their own moral or religious values in deciding whether and when a petitioning spouse is entitled to obtain a divorce.

The very immutability and transparency of the Civil Code's rules governing eligibility for divorce are essential for ensuring that marriage resembles what some scholars call a "liberal commons,"<sup>114</sup> a relationship of sharing which can nevertheless be terminated voluntarily, with relative ease and without inquiry into which party is morally blameworthy for the marriage's demise.<sup>115</sup> These crystalline, non-discretionary, rule-like exit rights are clearly appropriate if Louisiana is committed to guaranteeing that marriage remains a liberal commons. Not only do such rules curb the potential for either spouse to act abusively toward the other,<sup>116</sup> they allow spouses who are in fact suffering from emotional,

---

and residency requirements on a state-by-state basis prepared by the staff of the *Family Law Quarterly*, see *Charts*, 43 *FAM. L.Q.* 972, 976 (2009).

113. LA. REV. STAT. ANN. §§ 9:307(A)(3) (2008) (divorce available if non-petitioning spouse in a covenant marriage has abandoned the marital domicile for one year); 9:307(A)(5) (2008) (divorce available in covenant marriage upon proof the spouses have been living separate and apart for two years without reconciliation).

114. See Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L. J.* 549 (2001).

115. The law governing divorce was not always this way. See Atiyah, *supra* note 1, at 1256 (lamenting the disappearance of the hortatory quality of matrimonial and divorce law and the fact that "[a] divorce has come to be treated as though it were an accident in which, generally speaking, the search for someone to blame is largely futile, and the best policy is simply to clear up the mess as painlessly and fairly as possible").

116. See Frantz & Dagan, *supra* note 83, at 93; Dagan & Heller, *supra* note 114, at 568.

mental, or physical abuse to exit from the relationship relatively quickly and safely.<sup>117</sup>

To say that exit from marriage is protected as an absolute right does not mean that divorce is costless or easy. Far from it. Many difficult legal issues can still arise and the legal system can impose substantial burdens on parties like Esther and Louis.

\* \* \*

Let us assume that Esther goes ahead and files a petition for divorce. As long as the two spouses do not appear to reconcile, a circumstance that might necessitate some judicial intervention,<sup>118</sup> a divorce petition will be granted in due course and Esther and Louis's marriage will come to an end.

But what then? What will happen to the family home and the couple's other community property? Will either party owe the other any continuing obligation of support? Will Louis owe Esther any compensation for her contributions to his education and career? Who will have custody of the minor children? And who will be obligated to provide financially for the children's support? As we turn to these issues, we will see that the Civil Code's reliance on crystalline rules begins to break down, but perhaps not as fully as we might have expected.

#### *D. Community Property Partition*

Let us tackle Esther and Louis's community property first. If Esther and Louis could agree on their own plan of partition, it

---

117. Cf. *Carriere*, *supra* note 76, at 1714–17 (discussing how the Louisiana Covenant Marriage Act's requirements of pre-divorce counseling may put women facing spousal abuse in greater physical danger).

118. The Civil Code introduces a note of judicial discretion into the otherwise immutable rules governing divorce when it provides in article 104 that the "cause of action for divorce is extinguished by the reconciliation of the parties." LA. CIV. CODE art. 104 (2011). As the comment to this article explains, reconciliation is a "question of fact to be decided in accordance with established jurisprudential guidelines." *Id.* cmt. As the cases demonstrate, neither acts of kindness nor even occasional sexual encounters are sufficient to constitute reconciliation for most Louisiana courts. *See Woods v. Woods*, 660 So. 2d 134, 135–36 (La. Ct. App. 2d 1995) (wife's affectionate and forgiving behavior did not constitute reconciliation); *Eppling v. Eppling*, 537 So. 2d 814, 819 (La. Ct. App. 5th 1989) (one isolated act of sexual intercourse not sufficient to constitute reconciliation). Reconciliation defenses are pursued primarily to eliminate a fault ground for divorce—and, thus, wipe the slate clean so to speak—for purposes of a permanent alimony claim in connection with a divorce petition. *Noto v. Noto*, 41 So. 3d 1175, 1180 (La. Ct. App. 5th 2010); *Hamsa v. Hamsa*, 668 So. 2d 1209, 1211 (La. Ct. App. 5th 1996).

would be enforced subject to the limitations on any juridical act of this nature.<sup>119</sup> As long as this extrajudicial partition plan does not run afoul of any of the traditional vices of consent for conventional obligations,<sup>120</sup> it would endure. Further, because of the general clarity of Louisiana's community property classification rules, it may in fact be possible for Esther and Louis to achieve an equitable extrajudicial partition without any extraordinary expense and need for litigation.<sup>121</sup> In short, up to now, crystalline rules may still rule the day.

Complexity, considerable judicial discretion, and much more potential for unhappiness, however, will emerge if Esther and Louis cannot agree on their own partition plan. The primary source of this judicial discretion was the 1982 enactment of Louisiana Revised Statutes section 9:2801, a special procedural regime governing judicial partitions of community property between spouses—i.e., other than at death of one of the spouses.<sup>122</sup> With the enactment of this regime, Louisiana turned away from an “item theory” approach to community property partition, in which each individual object of the community had to be analyzed for its suitability to partition, and replaced it with an “aggregate theory” of partition.<sup>123</sup>

Under the new approach, a court must first value all of the community assets and liabilities to be partitioned and adjudicate any outstanding claims between the parties.<sup>124</sup> It must then “divide the community assets and liabilities so that each spouse receives property of an equal *net* value.”<sup>125</sup> Although a court is required to allocate or assign all of the community assets and liabilities, it is given vast discretion to divide a particular asset equally or unequally and to allocate any particular asset to one of the spouses in its entirety.<sup>126</sup> So, for example, a court could award Esther the family home in New Orleans and Louis the most valuable automobile and the vacation condominium in Florida. Then the

---

119. See SPAHT & MORENO, *supra* note 92, § 7.21, at 661–69.

120. See generally *id.* §§ 7.21–7.25, at 661–87.

121. See *supra* notes 90–104 and accompanying text.

122. SPAHT & MORENO, *supra* note 92, § 7.26, at 688–89. Section 9:2801 only applies to partitions of community property between spouses. The general rules of partition govern the partition of former community property owned in indivision by one former spouse and heirs or legatees of the other. *In re Sessions*, 23 So. 3d 954, 959 (La. Ct. App. 1st 2009).

123. SPAHT & MORENO, *supra* note 92, § 7.26, at 688.

124. LA. REV. STAT. ANN. § 9:2801.A(4)(a) (2009).

125. *Id.* § 9:2801(A)(4)(b) (emphasis added).

126. *Id.* § 9:2801(A)(4)(c).

court would divide the couple's investment account more or less evenly, as long as the net values balanced out.

In devising this gross property allocation, the court will be guided only by a short list of discretion-expanding factors: "the nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances the court deems relevant."<sup>127</sup> In the end, the court does not even need to allocate all the assets and liabilities evenly. If the allocation "results in an unequal net distribution," the court can order "the payment of an equalizing sum of money, either cash or deferred, secured or unsecured, upon such terms and conditions as the court shall direct."<sup>128</sup> If the court decides that the allocation of a particular asset to one spouse or the other is inequitable, it can also order the drawing of lots, a partition by private sale, or even a partition by licitation (a judicial sale), although this final option is supposed to be a last resort.<sup>129</sup>

If Esther and Louis's community property consisted only of their house, automobiles, bank accounts, furniture, other movable belongings, and stocks and bonds, the community property partition under this regime would be fairly predictable. But we still have not addressed what might well be the most valuable assets of a couple like Esther and Louis—pension and retirement benefits. To partition these kinds of assets we have to look well beyond the Civil Code and even the Revised Statutes.

In a series of seminal decisions beginning in the 1970s,<sup>130</sup> the Louisiana Supreme Court eschewed what had been a deceptively simple but potentially punitive bright line approach to the classification and partition of pension and retirement benefits and developed a largely equitable, and inherently discretionary, framework. For our purposes it is enough to observe that: (1) federal regulation of employee retirement benefits has significantly

---

127. *Id.*

128. *Id.* § 9:2801(A)(4)(d). What a court cannot do, however, is duck the responsibility of allocating or assigning to one spouse or the other all of the spouse's community property. A community property partition order that fails to allocate an asset will be subject to remand. *Goines v. Goines*, 62 So. 3d 193, 204 (La. Ct. App. 5th 2011). Such an order is also subject to remand if it fails to assign value to all of the assets or liabilities of the community, divide them, and determine whether an equalizing payment is necessary. *Id.*

129. LA. REV. STAT. ANN. § 9:2801(A)(4)(e)–(f) (2009).

130. See *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834 (La. 1975); *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *Hare v. Hodgins*, 586 So. 2d 118 (La. 1991); *Frazier v. Harper*, 600 So. 2d 59 (La. 1992); *Bailey v. Bailey*, 708 So. 2d 354 (La. 1998).

impacted this jurisprudence;<sup>131</sup> (2) pursuant to this jurisprudence, courts now have discretion to choose between a “reserve jurisdiction/fixed percentage” method of classifying the spouse’s interests and an immediate “present cash value” distribution approach; and (3) courts must consider a number of equitable factors in choosing the appropriate valuation and division method.<sup>132</sup>

The court’s work in this area taught Louisiana lawyers and judges to avoid a one-shot, all-or-nothing focus on either the moment when pension benefit rights vested or the moment the community terminated. Instead, judges learned to balance the interests of both the employee and non-employee spouse, to subject both of them to the contingencies of fate (such as sudden unemployment or premature death), and to impose a continuing duty of good faith on the employee spouse who is responsible for managing the pension interests on which both spouses will ultimately depend.<sup>133</sup>

At this point, we have now entered a legal landscape where rules have given way to classic standards. Here, despite the traditional civilian preference for certainty and predictability in dealing with property, the turn to discretionary remedialism orchestrated by the legislature (through the community property partition statute) and by the Louisiana Supreme Court was especially appropriate given the complexity of the decision making task that pension retirement benefit partition presented. The legislature might, of course, have tried to devise a set of fixed rules to govern community property partition in this context. But, perhaps, it wisely left the hard work of devising workable principles and dividing a lifetime of community property interests to individual judges who can consider both spouses’ needs and interests as they move forward in their newly autonomous lives.<sup>134</sup>

---

131. See, e.g., Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426 (1984); Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) (both discussed in SPAHT & MORENO, *supra* note 92, § 7.29, at 725).

132. See SPAHT & MORENO, *supra* note 92, § 7.29, at 733–46.

133. Dian Tooley Arruebarrena, *Applying Louisiana’s Community Property Principles to Pensions*, 33 LOY. L. REV. 241, 265 (1987); SPAHT & MORENO, *supra* note 92, at § 7.29, at 733–46.

134. Perhaps another benefit of this particular turn toward discretion is that it may have encouraged many divorcing couples to accept extrajudicial partition plans to avoid the risk of potentially undesirable judicial solutions.

*E. Claims for Interim or Permanent Periodic Support (Alimony)*

Now that we have analyzed the mixture of predictability and uncertainty that community property partition has in store for Esther and Louis, let us address Esther's next set of urgent questions. As she has not worked full time for years, and as her income earning potential is not particularly great, can Esther demand that Louis share a portion of his substantial salary from Green Earth with her? If so, can she make such a demand only during the pendency of the divorce proceeding? Or can she obtain a share of his income even after the divorce is final? If so, for how long? Will she be required to go back to work before Louis is compelled to share his income with her?

Initially, Esther's lawyer must give Esther cautious answers as all of these issues are addressed by classically open-textured standards in the first instance. However, upon further reflection, Stephanie will draw on her knowledge of Louisiana judicial decisions and describe the evolution of certain judicial norms that function, in some ways, like classical rules. In the end, a fairly clear picture of what Esther can expect in the way of alimony support from Louis will emerge.

Stephanie would first tell Esther that in Louisiana any spouse's ability to claim some kind of periodic support—either during the pendency of a divorce proceeding (“interim periodic support”) or after the divorce is final (“final periodic support”)—fundamentally depends on the claimant spouse's ability to convince a court she is “in need of support” and, for purposes of final periodic support, was also “free from fault” prior to the divorce petition.<sup>135</sup> In Esther's case, establishing freedom from fault is probably not an especially important issue. If Louis were to seek final periodic support from Esther, however, freedom from fault could well be a significant battle ground. A court would then have ample scope to make a highly fact sensitive, contextualized decision about whether some alleged misconduct during the marriage rose to the level of one of the previously existing fault grounds for legal separation and divorce under prior versions of the Civil Code (e.g., adultery, habitual intemperance, excesses, cruel treatment or outrages that made living together insupportable, public defamation, abandonment) and whether that conduct might be a

---

135. LA. CIV. CODE arts. 111, 112 (2011); *Allen v. Allen*, 648 So. 2d. 359, 361 (La. 1994) (“Although no-fault divorce is now available, freedom from fault is still necessary for permanent alimony.”).

legitimate response to the other spouse's fault.<sup>136</sup> But putting aside the question of fault for now, let us examine more closely the primary obstacle to Esther's ability to obtain alimony—establishing her need for support.

If Esther is merely asking for support while her divorce proceeding is pending, Stephanie can advise her that a court will consider not only her need and Louis's ability to pay, but also, happily for Esther, her standard of living during the marriage.<sup>137</sup> At first, this might offer Esther some comfort because it suggests Louisiana courts will ensure that a spouse like her who has not recently worked outside the home will not suffer a dramatic reduction in living standard while she adjusts to an impending termination of her marriage.<sup>138</sup> But Esther's relief may quickly turn to gloom after Stephanie points out that some courts presumptively require a spouse who has not worked outside the home during the marriage due to child care responsibilities to seek work (or at least to seek the training necessary to gain employment), and that a failure in this regard allows the court to determine the spouse's earning capacity and impute that capacity to her for purposes of evaluating her need for interim support.<sup>139</sup> That some courts justify

---

136. LA. CIV. CODE art. 111 cmt. c (2011). *See also* LA. CIV. CODE art. 138 (1870) (Compiled Edition 1978) (listing prior grounds for separation from bed and board); LA. CIV. CODE art. 160 (1870) (Compiled Edition 1978); *Allen*, 648 So. 2d at 362. The requirement of freedom from fault at the time a divorce proceeding is commenced is a classic hybrid legal directive. The temporal requirement of freedom from fault before the divorce petition is filed is rule-like. But the determination of the existence of "fault" requires both objective fact-finding and subjective value judgments. *See, e.g., Allen*, 648 So. 2d at 362–63; *Diggs v. Diggs*, 6 So. 3d 1030, 1032–33 (La. Ct. App. 3d 2009); *LOWE, supra* note 86, § 8:164, at 823–24 (discussing pre-1997 jurisprudence on lifestyle). For a detailed discussion of other fault grounds, see *Lowe, supra* note 86, §§ 8:165–8:173.

137. *See* LA. CIV. CODE art. 113 (2011).

138. *McFall v. Armstrong*, 50 So. 3d 904, 906–07 (La. Ct. App. 5th 2010); *Brown v. Brown*, 31 So. 3d 532, 535 (La. Ct. App. 2d 2010); *Koeniger v. Koeniger*, 10 So. 3d 271, 272 (La. Ct. App. 4th 2009).

139. *See Molony v. Harris*, 51 So. 3d 752, 760–61 (La. Ct. App. 4th 2010) (affirming trial court's imputation of full-time earning capacity to claimant ex-wife despite her reduced work hours resulting from court mandated attendance of Alcoholics Anonymous meetings); *Kirkpatrick v. Kirkpatrick*, 948 So. 2d 390, 393–95 (La. Ct. App. 2d 2007) (affirming imputation of \$2000 income for six months and \$3000 thereafter based on the finding that wife was voluntarily underemployed, had occasionally worked as a licensed counselor ten years before divorce and could have immediately obtained counseling work when her husband filed for divorce); *Richard v. Richard*, 577 So. 2d 110, 112 (La. Ct. App. 1st 1991) (reducing alimony *pendente lite* award by \$800 per month because wife had completed college degree in sociology and been offered two counseling jobs, even though jobs were problematic both professionally and

this practice of earning capacity imputation on grounds of sexual equality in the workplace probably will not make Esther feel any better.<sup>140</sup>

Turning to the question of final periodic support, Esther's attorney would advise that a court's discretion will again be focused on Esther's "need of support" and Louis's ability to pay.<sup>141</sup> Now, however, that discretion is channeled by a list of factors provided by the Civil Code, including:

- (1) The income and means of the parties, including the liquidity of such means.
- (2) The financial obligations of the parties.
- (3) The earning capacity of the parties.
- (4) The effect of custody of children upon a party's earning capacity.
- (5) The time necessary for the claimant to acquire appropriate education, training, or employment.
- (6) The health and age of the parties.
- (7) The duration of the marriage.
- (8) The tax consequences to either or both parties.<sup>142</sup>

The only hard and fast limit to judicial discretion here is the Civil Code's proscription that the amount of any final periodic award Esther can claim cannot exceed "one third of the obligor's [Louis's] net income."<sup>143</sup>

If Esther asks what all of these factors actually mean for her, Stephanie would first admit that a trial court's discretion in applying them is quite considerable,<sup>144</sup> but she could also describe broad trends in the case law interpreting these open-textured standards. Stephanie could explain, for instance, that, as recently as the 1970s, Louisiana courts routinely presumed that a divorced mother who had remained at home to take care of minor children was eligible to receive some kind a permanent alimony award.<sup>145</sup>

---

personally). *But see McFall*, 50 So. 3d at 907 (attributing only minimum wage salary to ex-wife claiming interim support because she had not worked as medical technician since 1995 and her skills were "obsolete or of no use").

140. *See Kirkpatrick*, 948 So. 2d at 393-94.

141. LA. CIV. CODE art. 112(A) (2011).

142. LA. CIV. CODE art. 112(B) (2011).

143. LA. CIV. CODE art. 112(C) (2011).

144. *Earle v. Earle*, 998 So. 2d 828, 836 (La. Ct. App. 2d 2008); *see also Noto v. Noto*, 41 So. 3d 1175, 1181 (La. Ct. App. 5th 2010).

145. *La Hood v. La Hood*, 340 So. 2d 624, 626 (La. Ct. App. 2d 1976); *Ward v. Ward*, 332 So. 2d 868, 836 (La. Ct. App. 4th 1976) (per curiam, on application

By the mid to late 1990s, however, this presumption seemed to have eroded away and even ex-wives with school-age children were often expected to go back to work to support themselves and their children unless there were special circumstances such as medical limitations of a child or spouse.<sup>146</sup>

Yet in a few recent cases involving claims for permanent alimony, courts seem to have become more solicitous toward a spouse who has not worked outside the home for an extended period of time, whose current earning potential may be limited, and who may need time to retrain and adjust to the demands of the current employment market.<sup>147</sup> At the same time, Stephanie will note, the amount of any permanent support award will be focused primarily on what is required for her “maintenance” (that is, items like food, shelter, clothing, transportation, medical and drug expenses, utilities, household necessities, and income tax liability generated by alimony payments) and most likely will not take into account the standard of living the claimant spouse enjoyed during the marriage.<sup>148</sup> On the other hand, it is clear that, in fashioning a

---

for rehearing), *aff'd in part and rev'd in part*, 339 So.2d 839 (La. 1976); Gravel v. Gravel, 331 So. 2d 580, 582 (La. Ct. App. 3d 1976).

146. Glaude v. Glaude, 715 So. 2d 682, 686 (La. Ct. App. 3d 1998) (wife’s failure to complete job application, in absence of medical restrictions, supported finding that she was capable of providing for her own needs, even though she was primary caretaker of young, school age children); Veron v. Veron, 657 So. 2d 156 (La. Ct. App. 3d 1995), *rev'd*, 663 So. 2d 726 (La. 1995) (mem.), *on remand*, 688 So. 2d 1076 (La. Ct. App. 3d 1996) (holding that wife and domiciliary parent who was qualified to work as school teacher did not warrant payment of permanent alimony as there were positions available, she could earn credits during first year of teaching, and teaching job would square with children’s schedule).

147. See, e.g., Bhati v. Bhati, 32 So. 3d 1107 (La. Ct. App. 3d 2010) (final award of \$1000 per month upheld though wife received portion of husband’s retirement accounts, former husband was retired, and wife had received master’s degree in nursing); Patton v. Patton, 856 So. 2d 56 (La. Ct. App. 2d 2003) (wife not precluded from final alimony award as she remained at home during most of their 16-year marriage at husband’s insistence and sought and obtained employment after separation); see also McCarty v. McCarty, 798 So. 2d 195 (La. Ct. App. 4th 2001); Brett v. Brett, 794 So. 2d 912 (La. Ct. App. 1st 2001); Hammack v. Hammack, 778 So. 2d 70 (La. Ct. App. 1st 2000); Goodnight v. Goodnight, 735 So. 2d 809 (La. Ct. App. 3d 1999); Falterman v. Falterman, 726 So. 2d 1023 (La. Ct. App. 5th 1999); Fountain v. Fountain, 644 So. 2d 733 (La. Ct. App. 1st 1994).

148. See, e.g., Hindelang v. Hindelang, 49 So. 3d 1065, 1067–68 (La. Ct. App. 3d 2010); Dufresne v. Dufresne, 992 So. 2d 579 (La. Ct. App. 5th 2008); Earle, 998 So. 2d at 835; Mizell v. Mizell, 942 So. 2d 1191, 1194 (La. Ct. App. 2d 2006); Ward v. Ward, 894 So. 2d 499 (La. Ct. App. 5th 2005). *But see* Knowles v. Knowles, 827 So. 2d 642 (La. Ct. App. 3d 2002) (standard of living

final periodic support award, courts can also take into account any substantial assets Esther might receive in her final community property settlement or partition and can require her to deplete some or all of those assets to provide for her post-divorce support.<sup>149</sup> In the end, given the ambiguity of the Civil Code and the open-ended nature of the discretionary analysis it mandates, courts will still be making highly subjective determinations about the actual “ability to pay” of a potential payor spouse like Louis and the real “needs” of a potential payee spouse like Esther.<sup>150</sup>

Even if Esther is fortunate enough to obtain a post-divorce alimony award for a stipulated period of time, Stephanie must further warn Esther that Louis could return to court and seek a modification or even termination at any time if he can show that the circumstances of either spouse have materially changed or that the award “has become unnecessary.”<sup>151</sup> In determining whether a “substantial change in circumstances” has occurred, a court would again use its substantial discretion to examine all the factors we have previously discussed.<sup>152</sup> Consequently, if Esther does obtain a well-paying job or obtain a master’s degree after the divorce,<sup>153</sup> or if Louis loses his job or takes a lower paying one,<sup>154</sup> it is possible that any permanent periodic support award she obtained from Louis would be substantially reduced or even terminated.

Unfortunately, the only thing Esther can really count on in terms of alimony is that a permanent award will automatically

---

during the marriage may be considered as a relevant factor); *Patton v. Patton*, 856 So. 2d 56, 59 (La. Ct. App. 2d 2003) (same); *Pierce v. Pierce*, 945 So. 2d 908, 910 (La. Ct. App. 2d 2006) (same). See generally *LOWE*, *supra* note 86, § 8:161, at 814–20 (commenting on contradictory judicial treatment of issue regarding the relevance of standard of living during the marriage on final periodic support award).

149. See, e.g., *Wiley v. Wiley*, 58 So. 3d 1104, 1108 (La. Ct. App. 3d 2011); *Loyacano v. Loyacano*, 358 So. 2d 304, 311 (La. 1978), *rev’d on other grounds*, 375 So. 2d 1314 (La. 1979) (listing factors to be considered in determining extent of asset depletion and indicating that determination is “insusceptible of solution by any exact formula or monetary index”).

150. See *LOWE*, *supra* note 86, § 8:161, at 818 (discussing *Prestenback v. Prestenback*, 9 So. 3d 172, 177 (La. Ct. App. 1st 2008)).

151. LA. CIV. CODE art. 114 (2011).

152. *Id.* cmt. b.

153. See *Richard v. Richard*, 577 So. 2d 110 (La. Ct. App. 1st 1991) (finding the attainment of a college degree in sociology was a substantial change in circumstances justifying imputation of earning capacity of social worker to wife and thus reduction in alimony *pendente lite*).

154. See *Williams v. Poore*, 55 So. 3d 953, 959–63 (La. Ct. App. 4th 2011) (reducing final periodic alimony award because ex-husband lost his job and ex-wife’s need was not as great as previously estimated).

terminate if she remarries or if either she or Louis dies.<sup>155</sup> Ironically, although neither death nor remarriage is usually subject to much dispute, even here there is still some scope for a court to engage in contextualized decision making that could well be influenced by moral value judgments. The reason, Stephanie would explain, is that a Louisiana court can also terminate a periodic support award by determining that an “obligee [e.g., someone like Esther] has cohabited with another person of *either sex in the manner of married persons*.”<sup>156</sup> This cohabitation is “a sexual relationship of some permanence regardless of whether the cohabitants are prohibited from marrying,” and not “just acts of sexual intercourse.”<sup>157</sup> So casual sex might not put Esther in any jeopardy of losing her permanent alimony award, however modest the award might be, but a committed relationship with another man or woman would likely bring it to an end.<sup>158</sup>

In summary, it seems Esther’s quest for periodic support, if she decides to pursue it, will become increasingly influenced by the vagaries of judicial discretion as time passes. Initially, her lawyer may be able to assure her of at least some interim periodic support, subject however to the possibility that a court would impute earning capacity to her. But a final periodic support award will be a far more uncertain prospect, involving the consideration of multiple equitable factors and fluctuating judicial assumptions about the proper societal roles of men and women in the family. Finally, a permanent alimony award would remain constantly

---

155. LA. CIV. CODE art. 115 (2011).

156. *Id.* (emphasis added).

157. *Id.* cmt e. The drafters of revised article 115 apparently worried that ex-spouses who had entered into same sex relationships might escape the consequences of cohabitation. Hence the explanation that cohabitation with a person of “either sex” automatically terminates a periodic support award. The ex-spouse, however, can always argue that any sexual encounter—heterosexual or homosexual—was merely casual sex. *Id.*

158. Indeed, Louisiana courts are not afraid to distinguish between random sex and living like a married person and have terminated a handful of support awards when the payor spouse discovers the payee has moved in with a boyfriend or girlfriend. *Compare* Short v. Short, 33 So. 3d 988, 956–96 (La. Ct. App. 5th 2010) (terminating interim spousal support upon finding that wife was engaged in adulterous cohabitation), *and* Arnold v. Arnold, 843 So. 2d 1167, 1171 (La. Ct. App. 1st 2003) (terminating wife’s non-rehabilitative spousal support award upon finding that wife’s boyfriend had moved in with her), *with* Almon v. Almon, 943 So. 2d 1113, 1117–18 (La. Ct. App. 1st 2006) (random acts of sexual intercourse did not extinguish spousal support award); Polk v. Polk, 626 So. 2d 1233, 1237–38 (La. Ct. App. 4th 1993) (conception of illegitimate child is not, in and of itself, grounds for a finding of open concubinage for purposes of terminating permanent periodic alimony award under predecessor to current article 115).

subject to potential revision or termination based on a court's highly discretionary determination of her continuing need, her former spouse's ability to pay, and the propriety of her personal relationships.

*F. Claims for Contribution to Education and Training*

Although most of the issues arising from Esther's pending divorce concern future responsibilities and obligations, Esther is likely to have one potential claim grounded firmly in the past. Putting aside a community property partition and any periodic support claim, Esther is likely to wonder if she is entitled to compensation for the financial contributions she made that allowed Louis to complete his college degree, obtain his MBA, and transform himself from an underpaid sous-chef into a future corporate executive. Stephanie will say the answer is yes, at least in principle. But the chances of prevailing on such a theory in Esther's case are small.

Civil Code article 121 authorizes a court to compensate a spouse like Esther who has made financial contributions during the marriage to the education or training of the other spouse which increased that other spouse's earning power.<sup>159</sup> Such award can even be granted in addition to a periodic support award or to a community property partition award.<sup>160</sup> The article was initially designed to allow Louisiana courts to avoid the difficult question of whether degrees, professional training, or professional licenses can be considered marital property for purposes of distribution on divorce.<sup>161</sup> Despite offering courts some apparent freedom to make equitable determinations about entitlement to contribution awards, Article 121 has not, however, opened the flood gates to wide-ranging judicial discretion.

In general, courts have responded to article 121's initial grant of discretionary authority by delineating several equitable factors to consider when these claims are made. These factors include: "(1) the claimant's expectation of shared benefit when the

---

159. LA. CIV. CODE art. 121 (2011). This cause of action entered the Civil Code as article 161, as enacted by Act 780 of 1986, but is now entrenched in the Revised Civil Code. *Id.* cmt. a.

160. *Id.*

161. *Id.* cmt. f. The leading decision treating degrees and licenses as marital property is *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985). See also *Elkus v. Elkus*, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991) (holding that an opera singer's increased earning potential was attributable to the domestic support and voice coaching efforts of her husband and was thus marital property subject to equitable distribution upon divorce).

contributions were made; (2) the degree of detriment suffered by the claimant in making the contributions; and (3) the magnitude of the benefit the other spouse received.”<sup>162</sup> It would appear these factors would require a court to make precisely the kind of discriminations of the degree of expectation, harm, and benefit that are the hallmark of standard-based decision making. Paradoxically, though, courts have often sidestepped such a wide-ranging inquiry. They have done so by seizing on the statement in article 121 that a contribution claim is allowable only “to the extent that the claimant did not benefit during the marriage from the increased earning power” of the other spouse,<sup>163</sup> and turning that phrase into a kind of bright line principle.

If a claimant spouse like Esther has already been compensated by the increased income her spouse earned during the marriage, and thus also by increased community property accumulation, a claim for contribution to the other spouse’s education and training is usually denied.<sup>164</sup> Thus, from the clouds of article 121’s seemingly broad grant of judicial discretion, a relatively distinct rule seems to have emerged. Consequently, unless a separation or divorce occurs very soon after the benefited spouse completes his study or training (usually within just a few years or less), a claim for contribution to education and training will generally not succeed.<sup>165</sup>

---

162. *Clemons v. Clemons*, 960 So. 2d 1068, 1074 (La. Ct. App. 2d 2007); *Bourgeois v. Bourgeois*, 818 So. 2d 1005 (La. Ct. App. 1st 2002).

163. LA. CIV. CODE art. 121 (2011).

164. It is noteworthy that this cause of action was partially inspired by a desire to avoid the conundrum of whether professional degrees or licenses could be considered community or marital property subject to partition or distribution upon divorce. *See* LA. CIV. CODE art. 121 cmt. f (2011). Indeed, article 121 provides that the sum awarded “may be in addition to a sum for support and to property received in the partition of community property.” *Id.*

165. In several decisions, courts have struck down claims for contribution on just such grounds, thus establishing a presumption that unless the separation or divorce occurred very shortly after completion of the defendant spouse’s education or specialized training, the supporting spouse benefited from the other’s increased income. *See Clemons v. Clemons*, 960 So. 2d 1068, 1074–75 (La. Ct. App. 2d 2007) (reversing contribution award because in the six years since husband graduated from veterinary school, wife was able to benefit from increased income and accumulation of community property); *Bourgeois v. Bourgeois*, 818 So. 2d 1005, 1009–10 (La. Ct. App. 1st 2002) (denying award where wife enjoyed three years of increased income after husband graduated from law school); *cf. Shewbridge v. Shewbridge*, 720 So. 2d 780, 782–84 (La. Ct. App. 2d 1998) (upholding award when separation occurred a year after the husband obtained his commercial pilot’s license); *McConathy v. McConathy*, 632 So. 2d 1200, 1205–06 (La. Ct. App. 2d 1994) (upholding award where spouses separated during final year of husband’s schooling).

Here we find a remedial scheme designed to allow courts to peer back into the past and evaluate the degree of one spouse's uncompensated sacrifice for the other spouse. Yet courts have proven reluctant to do much of that work and have instead retreated to a more mechanical approach that focuses primarily on a single factor—the number of years of marriage since the completion of the education or training—to decide contribution claims. Unfortunately for Esther, given the number of years that have passed since she put Louis through college and business school, her chances of receiving a post-marital award for her prior contributions to Louis's thriving career are slim. There is certainty here for both Esther and Louis, although it will be welcome to only one of them.

### G. Child Custody

Perhaps there is no more contentious and frequently litigated matter resulting from a divorce than custody of minor children. Consequently, Esther will no doubt ask her lawyer Stephanie for advice regarding the custody of Talia and Joshua. Although we might have expected that Stephanie could provide only vague and uncertain answers given the general reputation of this area of the law,<sup>166</sup> she can in fact offer several surprisingly definite predictions.

Louisiana Civil Code article 131 appears to constitute the paradigmatic example of an open-textured standard. As has always been the case in Louisiana, it empowers a Louisiana court to award custody in a divorce proceeding “in accordance with the best interest of the child.”<sup>167</sup> But, in addition to this classic, broad

---

166. See Whitty, *supra* note 7, at 331–332 (noting almost unreviewable “welfare of the child” standard for custody determinations in Scotland, but observing that rule based decision making has won some acceptance in connection with efforts to discourage parental kidnapping for forum-shopping in custody litigation).

167. LA. CIV. CODE art. 131 (2011). Revised article 131 does not change the law, but it simplifies the language used in previous iterations of the Civil Code. The drafters of the current version of the article state that the “best interest” principle dates back at least as far as 1921, when article 157 of the 1870 Civil Code was amended by Acts 1921, First Exec. Sess. No. 38. LA. CIV. CODE art. 131 cmt. a (2011). In fact, this concept dates back to the earliest Civil Codes of Louisiana and to the Code Napoleon, all of which essentially provided that, in cases of separation or divorce, children shall be placed under the care of the party who obtained the separation or divorce, “unless the judge shall, *for the greater advantage of the children*, and with the advice of the meeting of the family, order that some or all of them shall be intrusted to the care of the other

standard, the Louisiana Civil Code now provides a powerful hierarchy of custodial preferences that will very likely lead divorcing parents such as Esther and Louis into a joint custody arrangement.<sup>168</sup> Furthermore, as we shall see, the Louisiana Revised Statutes will also structure the contours of this joint custody relationship with a surprising amount of precision but will then open the door again to substantial judicial discretion should the domiciliary parent seek to modify the original arrangement for purposes of relocation.

Unlike the former custodial presumptions in favor of the parent obtaining a divorce or in favor of the mother,<sup>169</sup> under the Civil Code's new hierarchy of custodial preferences, a court must first defer to an agreement of the parents, unless it does not serve the best interests of the child.<sup>170</sup> In the absence of a parental agreement, or if the agreement is not in the child's best interest, the court must award joint custody to both parents.<sup>171</sup> Sole custody can be granted in favor of a single parent only if "clear and convincing evidence" demonstrates this would serve the best interest of the child.<sup>172</sup> Although a court can in principle award custody to someone other than a parent, it can do so only if an award of joint custody or sole custody to either parent would result "in substantial harm to the child."<sup>173</sup> In short, joint parental custody is now a powerful default rule in Louisiana.<sup>174</sup>

---

party." LA. CIV. CODE art. 157 (1870); *see also* LA. CIV. CODE art. 153 (1825); Digest of 1808, 34, art. 19; CODE CIVIL art. 302 (Fr.) (1804).

168. LA. CIV. CODE art. 132 (2011).

169. Under earlier versions of the Civil Code, the party who obtained a divorce (someone like Esther perhaps) was presumed to be entitled to custody over minor children unless the children would be advantaged by custody in the other parent. *See* LA. CIV. CODE art. 157 (1870), as amended by Act No. 38, 1921 La. Acts 42, 42, and Act No. 74, 1924 La. Acts 114, 114; LA. CIV. CODE art. 153 (1825); Digest of 1808, 34, Art. 19. Formerly, courts also applied a "maternal preference rule," but this presumption, whether based on real life experience or fictitious stereotype, has clearly been abrogated. *See Hill v. Hill*, 777 So. 2d 1263, 1266 (La. Ct. App. 2d 2001); *Dubois v. Dubois*, 532 So. 2d 360 (La. Ct. App. 3d 1988).

170. LA. CIV. CODE art. 132 (2011).

171. *Id.* In the words of one leading divorce expert in Louisiana, "joint custody is no longer just presumed to be in a child's best interest, it is mandated absent an appropriate parental agreement for another custodial arrangement." LOWE, *supra* note 86, § 7:31, at 425.

172. LA. CIV. CODE art. 132 (2011).

173. LA. CIV. CODE art. 133 (2011). This last judicial custody option is probably irrelevant to Esther and Louis but is important when both parents suffer from drug or alcohol abuse problems or if there are other significant threats to the child's well being from parental custody. *See, e.g., Wilson v. Paul*,

Esther and Louis could, of course, ignore the message this codal hierarchy sends and battle each other for sole custody of the children. If they did so, a court would be required to consider many factors to determine what is in Talia and Joshua's best interest.<sup>175</sup> But, assuming that Esther and Louis were convinced to save their resources and consent to a joint custody award, they would probably focus their attention on which parent would be designated as the children's "domiciliary parent."<sup>176</sup>

This domiciliary parent, Stephanie would explain, is the person with whom, according to the Louisiana Revised Statutes, the child "shall primarily reside," subject to a number of provisos designed to promote, to the greatest extent possible, "frequent and continuing contact with both parents,"<sup>177</sup> predictability as to the time periods for each parent's physical custody,<sup>178</sup> and equal sharing of the physical custody.<sup>179</sup> Domiciliary parent status is now one of the two most important custody battlegrounds because the domiciliary parent operates in a real sense as the final decision maker for the child, unless an implementation order provides otherwise.<sup>180</sup> Although the domiciliary parent's decisions are subject to judicial review upon a motion of the non-domiciliary parent, the cost of litigating these decisions, and a statutory

997 So. 2d 572, 574–75 (La. Ct. App. 3d 2008) (affirming temporary custody award to grandparents based on parents' drug abuse and child's frequent absences from school and stomach aches).

174. The inflexible, rule-like structure of this hierarchy was demonstrated in a recent appellate decision which held that a non-parent cannot obtain an order of joint custody from a court even though the minor child had been living in the petitioner's home since birth along with the child's biological mother, and even though the biological mother consented to the joint custody. *In re Melancon*, 62 So. 3d 759 (La. Ct. App. 1st 2010). The petitioning non-parent was not entitled to any custody award, the court held, because (1) article 132 of the Civil Code only provided for joint custody in favor of "legal parents" and (2) she had not made any showing that sole custody in the child's biological mother was causing "substantial harm" as required under article 133 of the Civil Code. *Id.* at 763–64.

175. Indeed, the Civil Code instructs the judge to consider "all relevant factors," including twelve enumerated factors such as the "love, affection and other emotional ties between each party and the child," the capacity of each party to give "spiritual guidance" to the child, and perhaps most problematically, the "moral fitness" of each party, "insofar as it affects the welfare of the child." LA. CIV. CODE art. 134 (2011). For discussion of the complexities of discerning moral fitness, particularly in the context of adulterous relationships engaged in by the feuding parents, see LOWE, *supra* note 86, § 7:42, at 435–36.

176. LA. REV. STAT. ANN. § 9:335(B)(1) (2008).

177. LA. REV. STAT. ANN. § 9:335(B)(2) (2008).

178. See LA. REV. STAT. ANN. § 9:335(A)(2)(a) (2008).

179. See LA. REV. STAT. ANN. § 9:335(A)(2)(b) (2008).

180. See LA. REV. STAT. ANN. § 9:335(B)(3) (2008).

presumption that “all major decisions made by the domiciliary parent are in the best interest of the child,” will give the domiciliary parent effective control over the major choices affecting the child’s life.<sup>181</sup> In the words of one leading commentator, the institution of domiciliary parenthood “effectively destroys true joint, legal, custody.”<sup>182</sup>

The second crucial and frequently litigated custody issue arises when a parent, who is either the “sole or primary custodian” or the “domiciliary parent within a joint custody arrangement,”<sup>183</sup> desires to relocate the child’s principal residence.<sup>184</sup> In these situations, which can frequently arise when employment demands and opportunities change quickly, Louisiana has found it necessary to adopt yet another detailed statutory regime in the Civil Code ancillaries. That regime provides a presumption in favor of maintaining the geographic status quo of the parents and child, but it also allows courts to intervene and approve requests to relocate if the sole custodian or domiciliary parent proves that a “proposed relocation is made in good faith and is in the best interest of the child.”<sup>185</sup> While the relocation statutes retain the “best interest of the child” as the “fundamental principle” governing relocation decisions, the Louisiana Supreme Court has emphasized that it was the legislature’s intent to assign a very heavy burden to the relocating parent in proving that relocation is in the child’s best

---

181. *Id.*

182. LOWE, *supra* note 86, § 7:58, at 443–46. *See also id.* § 7:59, at 446 (noting that, if the domiciliary parent’s decision is presumed correct, the right to contest it “provides little relief”). *But see* Bergeron v. Bergeron, 6 So. 3d 948, 958–959 (La. Ct. App. 2d 2009) (overturning domiciliary parent’s unilateral decision to change children’s school, where children were doing well at prior school, domiciliary parent failed to show new school would be better and failed to consult with father before proposing change).

183. *See* LA. REV. STAT. ANN. § 9:355.1(2) (2008) (defining “parent entitled to primary custody” for purposes of relocation statutory scheme).

184. Either consent of the non-custodial parent or judicial approval is required when the custodial parent seeks to establish a legal residence with the child: (1) anywhere outside Louisiana; (2) if there is no court order awarding custody, somewhere within Louisiana but more than 150 miles from the other parent; or (3) if there is a court order awarding custody, somewhere more than 150 miles from the domicile of the primary custodian at the time the custody decree was rendered. *See* LA. REV. STAT. ANN. § 9:355.1(4)(a)–(b) (2008) (defining “relocation” for purposes of relocation statutory scheme); *see also* Gray v. Gray, 65 So. 3d 1247, 1255 (La. 2011).

185. *See* LA. REV. STAT. ANN. § 9:355.13 (2008) (defining burden of proof for relocation proposals). Louisiana based its remedial scheme on a model act developed in the 1990s by the American Academy of Matrimonial Lawyers. *See* Curole v. Curole, 828 So. 2d 1094, 1096 (La. 2002).

interest.<sup>186</sup> Under the statutory scheme, courts are required to consider a list of 12 detailed factors that focus not only on the quality of the relationship between each parent and the child, but also take into account the developmental stage and needs of the child, the child's preference, the quality of life of both the parent proposing relocation and the child, including financial or emotional benefits and educational opportunities, and of course, the employment and economic circumstances of both parents.<sup>187</sup>

The frequency of reported decisions addressing relocation disputes indicates that this is one of the most commonly litigated matters incidental to divorce today. The importance of these disputes is also reflected by two 2011 Louisiana Supreme Court opinions that sought to fine tune the amount of discretion the relocation statutes grant the trial courts. In the first case, the court concluded that a trial court did not abuse its discretion in denying an ex-wife's request to relocate minor children to the state of Washington.<sup>188</sup> In that case, the court held that a trial court is not required to expressly analyze each statutory factor in its reasons for judgment and, moreover, is free to give whatever weight it deems appropriate in a contested relocation dispute.<sup>189</sup> In the other case, however, the court held that the trial court abused its discretion in denying a domiciliary parent's request to relocate to Kansas and in granting the non-relocating parent's motion to award her domiciliary custody status.<sup>190</sup>

So where does this leave Esther and Louis? It appears that if they cannot agree on who is going to be the domiciliary parent, a court will simply apply the multiple factors set forth in article 134 of the Civil Code to make a domiciliary parent determination in the

---

186. See *Curole*, 828 So. 2d at 1096–97.

187. See LA. REV. STAT. ANN. § 9:355.12 (2008), especially § 9:355.12(A)(1), (2), (4), (6) & (8).

188. *Gathen v. Gathen*, 66 So. 3d 1, 10–13 (La. 2011).

189. *Id.* at 9–10. The court also noted that a “trial court’s failure to expressly analyze each factor does not constitute an error of law that would allow *de novo* review.” *Id.* at 9.

190. *Gray v. Gray*, 65 So. 3d 1247, 1250, 1258, (La. 2011). The complex procedural and factual history in *Gray* demonstrates that relocation disputes are far from simple matters. The complexity here arose in part from the fact that the father, who was requesting the relocation, had previously obtained an order allowing him to relocate to Alabama. The wife was effectively seeking to re-litigate that earlier order in contesting the proposed relocation to Kansas. *Id.* at 1255–56. The Louisiana Supreme Court held that the trial court erred in effectively reconsidering the prior decision allowing relocation outside of Louisiana. *Id.* at 1257–58. On the second issue, the court held that Revised Statutes section 9:355.11 does not create an exception to the heavy burden of proof established in *Bergeron v. Bergeron*, 492 So. 2d 1193 (La. 1986), for a party seeking to modify a considered custody decree. *Gray*, 65 So. 3d at 1258–60.

best interest of the child.<sup>191</sup> Later on, if the parent who is eventually designated as the domiciliary parent wants to make a substantial relocation, that parent will have to convince a court to exercise its discretion and find that the relocation will be in the child's best interest. And so, we are back to discretion, unavoidably perhaps, but the margin for that discretion has been narrowed by special statute and by the Louisiana Supreme Court's emphasis on the relocating parent's burden of proof.

Neither Esther nor Louis could probably avoid a joint custody award here. They are both responsible, sensible, and caring parents. As long as they are each keen on having "substantial" amounts of time with Talia and Joshua, a court will most likely oblige and grant each parent approximately equal amounts of time with the children to the greatest extent possible.<sup>192</sup> Thus, the only custody issue worth litigating for Esther and Louis is who will be the domiciliary parent, a decision that may simply boil down to determining with whom the children are residing at the time the divorce proceeding begins,<sup>193</sup> or which may turn on subtle moral judgments of the trial judge.<sup>194</sup>

#### *H. Child Support*

We turn at last to the question of whether and to what extent either spouse can obtain any financial support from the other spouse to take care of the children. At first glance, article 141 of the Civil Code seems to promise nothing but unmediated judicial discretion on this subject by authorizing a court in a divorce proceeding or thereafter to order either one or both of the parents to provide an "interim allowance" or "final support" for a child

---

191. See *Porter v. Porter*, 74 So. 3d 305, 307 (La. Ct. App. 3d 2011) (applying article 134 factors to review domiciliary parent determination); *Hill v. Hill*, 777 So. 2d 1263, 1266–68 (La. Ct. App. 2d 2001) (same); *Winzor v. Winzor*, 856 So. 2d 107, 111–15 (La. Ct. App. 3d 2003) (applying an article 134 best interest analysis to determine if a material change in circumstances had occurred, sufficient to warrant a proposed change in domiciliary parent designation from a prior consent judgment on custody).

192. See *Barrios v. Barrios*, 32 So. 3d 324, 327–28 (La. Ct. App. 2d 2010) (observing that in determining precise contours of joint custody award as to time splitting, court is not required to make a mechanical evaluation of statutory factors under article 134; "substantial time, rather than strict equality of time, is the objective of joint custody").

193. See *Snowton v. Snowton*, 22 So. 3d 1111, 1113 (La. Ct. App. 4th 2009).

194. See *Porter*, 74 So. 3d at 307–08 (affirming trial court's award of domiciliary parent status to mother in light of father's admission of watching pornography and in spite of mother's alleged extra-marital relationships and friendships with lesbians).

based “on the needs of the child and the ability of the parents to provide support.”<sup>195</sup> This discretion is seemingly amplified by article 142, which allows courts to modify or terminate a child support award if the circumstances of the child or either parent materially change.<sup>196</sup> But once again, and to an even greater extent than with domiciliary parenthood or relocation disputes, this judicial discretion is just the tip of the iceberg. In fact, lurking not far below the surface is a vast, sub-codal, minutely-detailed regime of statutory guidelines regulating child support awards that courts are obligated to apply in an essentially mechanistic fashion.<sup>197</sup>

This tightly restricted regime for determination and enforcement of child support payments, initially enacted in 1989 in response to a federal statute, was comprehensively updated in 2001.<sup>198</sup> Its core provision, Revised Statutes section 9:315, contains 47 sub-parts,<sup>199</sup> detailed schedules for the determination of the basic child support obligation,<sup>200</sup> and detailed obligation worksheets that resemble IRS income tax forms.<sup>201</sup> Under the guidelines, a court’s determination of a child support award is based on a calculation of both parents’ combined gross income, an economic estimate of how much an intact family with the same income and the same number of children would spend on child rearing expenditures, and a pro-ration of these expenditures according to each parent’s income.<sup>202</sup> The court then takes into account shared or split custodial arrangements and voluntary unemployment and underemployment.<sup>203</sup>

---

195. LA. CIV. CODE art. 141 (2011).

196. LA. CIV. CODE art. 142 (2011).

197. LA. REV. STAT. ANN. §§ 9:312, 313 and 315–315.47 (2008 and Supp. 2011).

198. See Act No. 9 (2d Ext. Sess.), 1989 La. Acts 2563 (enacting LA. REV. STAT. §§ 9:315–315.15 in response to the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified as 42 U.S.C. 667(b))); Act No. 1082, 2001 La. Acts 2264 (enacting amended LA. REV. STAT. §§ 9:315–315.22 (2002)). For overviews of the process of enacting and amending Louisiana’s child support guidelines based on an income shares support model, see Sue Nations, *Louisiana’s Child Support Guidelines: A Preliminary Analysis*, 50 LA. L. REV. 1057, 1058–59 (1990); Katherine Shaw Spaht, *The Two “ICS” of the 2001 Louisiana Child Support Guidelines: Economics and Politics*, 62 LA. L. REV. 709, 712–15 (2002).

199. LA. REV. STAT. ANN. §§ 9: 315.1–315.47 (Supp. 2011).

200. LA. REV. STAT. ANN. § 9: 315.19 (Supp. 2011).

201. LA. REV. STAT. ANN. § 9: 315.20 (2008).

202. Spaht, *supra* note 198, at 717–18 (explaining how an income shares child support model works in general); see also LA. REV. STAT. ANN. §§ 9:315.2, 315.3, 315.8 and 315.19–20 (2008 and Supp. 2011) (conforming with Spaht’s explanation).

203. LA. REV. STAT. ANN. §§ 9: 315.9–11 (2008).

In effect, this statutory scheme amounts to an entire child support code providing a highly detailed, “rule-like” administrative framework for establishing and enforcing child support obligations among divorced parents.<sup>204</sup> Previously Louisiana courts fashioning a child support award were “free to consider the totality of the circumstances presented in every case” and a trial court’s decision could be overturned on appeal only for abuse of discretion.<sup>205</sup> Today, however, a child support calculation produced by application of the guidelines is presumed to be correct.<sup>206</sup> Moreover, a trial court that wants to deviate from an award amount “that would have been required under a mechanical application of the guidelines” is required to make specific findings and provide specific reasons on the record to justify why the deviation is “in the best interest of the child” or would not be inequitable to the parties.<sup>207</sup> In short, the tables have been overturned. Discretion appears to be *disfavored* under the new child support guidelines.

This does not mean, however, that all child support issues are solved merely by plugging numbers into a spread sheet. Some of the most difficult issues that arise in the context of periodic alimony disputes are reprised here—for instance, the problem of whether and to what extent a court should attribute earning potential to a spouse who is not currently working.<sup>208</sup> But even on this issue, the child support guidelines offer a more definitive, hard-edged solution than the Civil Code does in the context of alimony. The child support guidelines specify that the imputation of earning potential to a non-working spouse is required for a child support calculation unless: the non-working spouse is involuntarily unemployed or underemployed, absolutely unemployable or

---

204. Of course, important social and economic assumptions and values undergird many of the detailed provisions of the guidelines, but debate about these assumptions and values are now channeled into the legislative rather than the judicial process. *See generally* Spaht, *supra* note 198, at 716–62 (providing a detailed critique of the 2001 revision of the child support guidelines as being too adult focused and not sufficiently child centered).

205. LA. CIV. CODE art. 141 cmt. d (2011).

206. LA. REV. STAT. ANN. § 9:315.1(A) (Supp. 2011).

207. LA. REV. STAT. ANN. § 9:315.1(B) (Supp. 2011). *See also* LA. CIV. CODE art. 141 cmt. d (2011).

208. *See generally* LA. CIV. CODE art. 141 cmt. f (2011) (explaining that certain provisions of the guidelines provide that “unemployment or underemployment of a parent will not diminish his portion of the parents’ total child support obligation below that which would be dictated by his ‘potential income,’ except in specified circumstances”).

incapable of being employed, or caring for a child under the age of five.<sup>209</sup>

What accounts for this general turn away from judicial discretion and toward mechanistic rules in the child support arena? As noted above, the demands of the United States Congress is one simple explanation. Another may be lawmakers' concern that all the parties involved in a child support dispute will benefit by as much certainty and predictability as the legal regime can muster and a concomitant concern that even modest amounts of judicial discretion in this particular arena would allow judges to fashion awards that would be too susceptible to emotion, personal biases, and other irrelevant data. A final factor may be the recognition that the interest of the most innocent party—the child—should not depend on the advantage that a wealthier potential obligor spouse could gain by simply hiring a better lawyer.

### *I. A Final Marriage and Divorce Accounting*

Having worked our way through nearly all the legal issues that would confront Esther and Louis as a result of their looming divorce, we must now ask whether Esther should feel discouraged or uplifted by her lawyer's report on the seemingly broad, discretion-inviting standards pronounced in the Louisiana Civil Code and the curious way that these standards have been modified, supplemented, and even cabined by judicial presumptions emerging in the case law and by the mechanistic regimes appearing in the revised statutes. So, let us take a final accounting.

Recall that we began with two notes of certainty. First, we saw that the Civil Code's legal directives governing the formation of a marriage are both rule-like and permissible.<sup>210</sup> We then observed that the Louisiana Civil Code's provisions on community property are generally crystalline in form and allow a lawyer to calculate which assets and funds acquired by a couple during their marriage will be community and separate property with relative ease.<sup>211</sup> Thus, a couple like Esther and Louis should, by opting for an

---

209. LA. REV. STAT. ANN. §§ 9:315(C)(5)(b), 315.11(A) (Supp. 2011); *see e.g.*, *Kairdolf v. Kairdolf*, 58 So. 3d 527, 530–532 (La. Ct. App. 2d 2011) (applying cited guidelines and holding that the trial court did not err in finding that the father, who had lost job as computer engineer for which he earned \$6,666 per month and who had acquired a new job for which he earned \$2,916 per month, was “voluntarily underemployed as a result of his fault or neglect” and was therefore required to pay child support based on his previous, higher imputed income).

210. *See supra* notes 68–77 and accompanying text.

211. *See supra* notes 89–104 and accompanying text.

extra-judicial partition, be able to avoid the risk and uncertainty of a community property partition in the hands of a judge who could wield the considerable discretion vested in him by Louisiana Revised Statutes section 9:2801 and its aggregate theory of partition.<sup>212</sup> We also noted that judicial innovation in the form of case law establishing equitable approaches to the problem of partitioning pension and retirement benefits was perhaps an unavoidable and largely salutary development.<sup>213</sup>

Next we saw that the likelihood of Esther obtaining any kind of periodic alimony award—whether it be an interim award or a final award—is undoubtedly subject to more judicial discretion. But here the pattern of Louisiana judicial decisions suggest that such an award is likely to provide her with no more than a few years of a partial income subsidy while she goes back to graduate school or looks for a job and that such an award is probably going to take into account her potential earning capacity, despite her absence from the work force for many years.<sup>214</sup> We also discovered Esther is almost certainly *not* going to be compensated for contributing to Louis's education and training given the significant amount of time that elapsed during the marriage since Louis completed his studies.<sup>215</sup> In short, judicial discretion in both of these areas is not as great as it first seems because of subsequent jurisprudential development.

Finally, we realized that Esther and Louis will, in all likelihood, face even less judicial discretion and less room for maneuver in resolving matters relating to their children. A joint custody award in their case is almost a certainty. Esther may well become the domiciliary parent if for no other reason than that the children are residing with her at the time the divorce proceeding gets under way, as long as Louis cannot prove that she is unfit to have domiciliary custody status.<sup>216</sup> Should Esther decide she wants to relocate with the children without Louis's blessing, she will face a difficult, uphill battle in convincing a court that such a move would be in the children's best interest.<sup>217</sup> Esther will almost certainly be entitled to a child support award from Louis. This will be determined mechanistically by the child support guidelines that take into account her ability to work, her current modest income

---

212. See *supra* notes 119–129 and accompanying text.

213. See *supra* notes 130–134 and accompanying text.

214. See *supra* notes 135–158 and accompanying text.

215. See *supra* notes 159–165 and accompanying text.

216. See *supra* notes 167–182, 192–194 and accompanying text.

217. See *supra* notes 183–191 and accompanying text.

earning potential, and Louis's currently much larger income earning potential.<sup>218</sup>

In sum, there are two overriding patterns. On one hand, with community property and community property partition, we see clear, categorical rules modified by a legislatively-created, specialized forum for judicial discretion and by a jurisprudentially-created avenue of discretion for the division of the most complex kinds of marital assets. On the other hand, with alimony, claims for contribution, child custody, and child support, we find broad grants of discretion in the Civil Code, modified by certainty-enhancing judicial presumptions and mechanical, rule-setting regimes established outside the Civil Code. In short, a kind of blurring has occurred. In this crucial legal sphere governing the creation and termination of marriage, we find neither the swamp of discretionary standards some fear, nor a dominion of rules. Instead, we find a blend of both forms of legal directives intermingling in a rough equipoise.

### III. BOOK TWO: CO-OWNERSHIP AMONG UNMARRIED CO-HABITANTS

*Fourteen years have passed since Esther and Louis's divorce. Eventually Esther went back to school, earned a master's degree in counseling and found a job she loves, working as a high school guidance counselor. Meanwhile Louis rose to vice-president of marketing at Green Earth, but eventually grew tired of the corporate grind. Five years ago, he resigned from the company and opened his own consulting firm advising food producers on how to certify and market their organic products. Talia and Joshua graduated from high school, then college, and eventually found jobs of their own. Esther and Louis attended the graduation ceremonies together and treated each other kindly in the glow of their children's achievements.*

*One evening, about a year ago, Esther and Louis ran into each other at a party hosted by a mutual friend. After talking for an hour, they were both struck by how much they still had in common. Louis asked Esther out for dinner the following night. They went to one of their old, favorite restaurants in the Bywater and then walked to Frenchman Street for a drink. They began to date regularly and soon realized they wanted to be together all the time. Yet, chastened by their past experience, neither Esther nor Louis was eager to get married again.*

---

218. See *supra* notes 195–209 and accompanying text.

*After a year of shuttling back and forth between their respective homes, Esther and Louis decided to sell their own houses and buy a house together. They agreed that each would contribute one-half of the down payment and each would be responsible for one-half of the mortgage note, property taxes, insurance, utilities, and regular maintenance expenses. They found a renovated double shotgun back in their old Bywater neighborhood and purchased it together.*

Under Louisiana law, Esther and Louis are hardly unique. Having become co-owners of the Bywater house, they have entered into a form of property ownership known as “ownership in indivision.”<sup>219</sup> Other than community property for married couples, it is the only form of concurrent ownership allowed in Louisiana.<sup>220</sup> This property relationship will be governed by a largely transparent cluster of just 21 articles found in Title 7 of Book II of the Civil Code. These legal directives are among the most commonly applied yet underappreciated articles in the Civil Code. Although these articles provide the foundation for the property relationships of countless Louisiana property owners, they are consciously understood by few.

Why is co-ownership law so omnipresent? First, many people just like Esther and Louis will voluntarily choose to acquire property together as friends, business partners,<sup>221</sup> or unmarried cohabitants.<sup>222</sup> Indeed, for same sex couples in Louisiana, ownership in indivision is the only way to structure a legal relationship of shared property ownership,<sup>223</sup> other than through entity forms of property management such as partnerships, trusts, limited liability companies, or corporations.<sup>224</sup> Another large and growing category of co-owners in Louisiana are formerly married individuals who continue to own their former community property

---

219. LA. CIV. CODE art. 797 (2011).

220. *Id.* cmts. b & d.

221. *See, e.g.,* Bruscato v. Oswalty 975 So. 2d 120 (La. Ct. App. 2d 2008) (applying co-ownership principles to deal with arrangements among attorneys who co-owned office building).

222. According to the U.S. Census Bureau, there has been a 97% increase in the number of unmarried cohabitating couples living in the United States between 2000 and 2010. HARPER’S MAGAZINE, Aug. 2011, at 13, 72.

223. Recall that persons of the same sex may not contract marriage in Louisiana. LA. CIV. CODE art. 89 (2011). Consequently, they are barred from entering into community property regimes. LA. CIV. CODE art. 2325 (2011).

224. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES, 684–85, 801–04, 826–29 (2007) (explaining how various forms of entity ownership allow for specialization of management functions for a complex asset or multiple assets for a number of possessory or non-possessory interest holders).

together for extensive periods of time after divorce. These couples never bother to complete a community property partition or they simply agree to remain as co-owners.<sup>225</sup> Finally, and perhaps most common of all, many individuals become co-owners more or less involuntarily as a result of the operation of Louisiana's intestate succession laws or because they are the recipient of a donation *inter vivos* or *mortis causa*. Even though they may be siblings, relatives, or close friends, such people find themselves thrust into co-ownership relationships that they might not have chosen on their own.<sup>226</sup>

If Esther and Louis live happily ever after in their Bywater home, their co-ownership relationship may never require them to consult a lawyer. This is possible because in many ways Louisiana's legal directives on co-ownership mirror the rules most co-owners would intuitively imagine apply to their relationship. For instance, both Louis and Esther each have a right to use and occupy the object of their co-ownership (the house) "according to its previous destination" (that is, in the way it has historically been used) and neither can prevent the other from continuing that use.<sup>227</sup> In other words, each of them would have an "equal and correlative right" to personally occupy and use every square foot of their co-owned house in ways consistent with its previous use, without regard to the extent of each other's fractional ownership.<sup>228</sup> As a corollary matter, if Esther and Louis ever begin to quarrel, neither

---

225. See LA. CIV. CODE art. 2369.1 (2011) (providing generally for application of co-ownership articles after termination of community property regime for reason other than death); LA. CIV. CODE arts. 2369.2–.8 (2011) (providing more detailed rules for post-community property co-ownership up to and including partition); see, e.g., *Sullivan v. Wallace*, 51 So. 3d 702 (La. 2010) (addressing claims of timber privacy between former married couple who, after their divorce, continued to own a 120 acre tract of timberland as co-owners); *Westcott v. Westcott*, 11 So. 3d 45 (La. App. 4th 2009) (husband and wife each entitled to one-half of insurance proceeds arising from flood damage pending post-divorce partition of community property).

226. Strictly speaking, an heir, legatee, or donee can always refuse to accept such a devise, bequest, or gift, so the entrance into a co-ownership relationship is voluntary in a formal sense. See, e.g., LA. CIV. CODE art. 947 (2011) ("A successor is not obligated to accept rights to succeed. He may accept some of those rights and renounce others."); LA. CIV. CODE art. 1544 (2011) ("A donation *inter vivos* is without effect until it is accepted by the donee."). But, of course, most people do not look a gift horse in the mouth and thus find themselves more or less involuntarily sharing property with others in these situations.

227. LA. CIV. CODE art. 802 (2011).

228. Thomas Harrell, *Problems Created by Co-ownership in Louisiana*, 32 INST. MIN. L. 381, 386 (1985); Symeon C. Symeonides & Nicole Duarte Martin, *The New Law of Co-Ownership: A Komentar*, 68 TUL. L. REV. 69, 126 (1993).

one could block the other's use of any portion of the house, let alone the whole house, by locking a door or creating some other obstruction to use without making himself or herself liable for rent to the other.<sup>229</sup>

In addition to this basic individual right of co-extensive use, each co-owner will also be entitled to share in the fruits and products of the thing held in indivision (such as rental income if Esther and Louis leased the house to a tenant) in proportion to a co-owner's ownership, subject to deduction for external costs of production incurred by one co-owner alone.<sup>230</sup> Similarly and crucially, each co-owner will also have the right to terminate the co-ownership relationship and demand a partition of the co-owned asset at any time, unless the co-owners have contractually agreed not to partition the asset.<sup>231</sup> This clear, imprescriptible right to demand partition<sup>232</sup>—the right to exit from a co-ownership relationship on demand—is essential because it should in theory, and without the need for costly judicial intervention, curb abusive or opportunistic behavior among co-owners and instill in them habits of cooperation and mutual regard.<sup>233</sup>

A co-ownership relationship between individuals like Esther and Louis is most likely to become problematic and litigious when the personal circumstances of one or more of the co-owners change (as in the case of a serious illness or indebtedness of a co-owner), or there is a change in the surrounding circumstances (such as a

---

229. See *Von Drake v. Rogers*, 996 So. 2d 608, 610 (La. Ct. App. 2d 2008) (a co-owner in exclusive possession of a thing held in indivision may be liable for rent to another co-owner but beginning only on the date another co-owner has demanded occupancy and been refused); see also *Symmeonides & Martin*, *supra* note 228, at 126–27 (discussing circumstances in which a co-owner may be liable for rent for exclusive occupancy). The Louisiana Supreme Court has also applied this same rule in the context of former spouses when one ex-spouse obtains exclusive occupancy of the former community property family home prior to a community property partition. *McCarroll v. McCarroll*, 701 So. 2d 1280, 1290 (La. 1997). Special legislation also disallows rent liability for use and occupancy in this context, with some limited exceptions. LA. REV. STAT. ANN. § 9:374(C) (Supp. 2011).

230. LA. CIV. CODE art. 798 (2011). A co-owner who contributes his own labor or services to the production of fruits or products is not entitled to claim compensation under the law of co-ownership but may be entitled to compensation under the law of unjust enrichment. *Id.* cmt. c.

231. LA. CIV. CODE art. 807 (2011). An agreement between co-owners excluding partition cannot last more than 15 years. *Id.*

232. LA. CIV. CODE art. 817 (2011). The only non-contractual limit on a co-owner's exit right is that "[p]artition of a thing held in indivision is excluded when its use is indispensable for the enjoyment of another thing owned by one or more of the co-owners." LA. CIV. CODE art. 808 (2011).

233. See generally *Dagan & Heller*, *supra* note 114.

flood of the home), but a consensus among the co-owners on how to respond to either kind of change proves elusive. Disputes and litigation are likely to arise in these situations precisely because the Civil Code provides an essentially mechanistic set of rules that almost always requires unanimity of all co-owners before any significant change in the co-owned property can occur. For instance, when one of the co-owners wants to make a substantial physical alteration or improvement to the co-owned property, unanimous consent of all the co-owners is required.<sup>234</sup> Unanimity is also required to put the property to any significantly new kind of use, even if this would not entail a substantial, physical alteration or improvement to the property, because any significant use and management decision also requires unanimous consent.<sup>235</sup> Finally, to alienate, lease or encumber the entirety of the property (as opposed to his undivided share),<sup>236</sup> unanimous consent will again be required.

This rigid requirement of unanimity can become a particularly onerous obstacle to co-owners' ability to adapt to quickly changing circumstances when the number of co-owners multiplies (as where original co-owners have transferred their undivided interests in their co-owned home to multiple persons through donations or legacies).<sup>237</sup> No matter how many co-owners are involved, and no matter how large a majority of them would like to see some change take place, a majority preference will not suffice to override a single co-owner who wishes to continue using the property according to its prior destination or who withholds his consent to a proposed change of use or a proposed substantial alteration or

---

234. LA. CIV. CODE art. 804 (2011).

235. LA. CIV. CODE art. 801 (2011). This interpretation of article 801 depends on reading it *in pari materia* with article 802's statement that "[e]xcept as otherwise provided in Article 801, a co-owner is entitled to use the thing held in indivision according to its destination . . ." LA. CIV. CODE art. 802 (2011) (emphasis added). See also Symeonides & Martin, *supra* note 228, at 117–19, 124–25 (linking articles 801 and 802 for purposes of applying the unanimity principle to acts of use and management other than those consistent with the destination of the property and acts of conservation). Imagine, for example, if a co-owner of a house sought to change its use from owner occupancy to a rental unit or a bed and breakfast. He would need his fellow co-owners' unanimous consent even if no physical alterations were required.

236. LA. CIV. CODE art. 805 (2011). See also *Bruscato v. Oswalt*, 975 So. 2d 120, 125 (La. Ct. App. 2d 2008) (recognizing subtle distinction between leasing an entire co-owned thing and one co-owner's share in indivision in context of dispute over payment of monthly fee paid by one attorney to another attorney who co-owned a building with a third attorney).

237. See, e.g., *Succession of Miller*, 674 So. 2d 441 (La. Ct. App. 4th 1996).

improvement of the co-owned property.<sup>238</sup> As a result, Louisiana judges will generally not intervene in the affairs of unhappy co-owners and choose among competing use, development, or management plans for a co-owned asset.<sup>239</sup> In short, Esther and Louis must remember that co-ownership of the house does not produce a democracy. It does not even create a fiduciary duty of the type found in a partnership or trust.<sup>240</sup> Relying on the lucid commands we have just discussed, courts have generally kept a safe distance from most internal co-ownership disputes.

This is not to say that judicial discretion and open-textured standards are totally foreign to the law of co-ownership. Putting aside the issue of the scope of the standard of care that one co-owner generally owes to another co-owner regarding a co-owned asset,<sup>241</sup> in three relatively narrow categories of co-ownership disputes, openings for judicial discretion—or at least more scope for judicial weighing, balancing and fact finding—have appeared in recent years.

---

238. *Butler v. Hensley*, 332 So. 2d 315, 318 (La. Ct. App. 4th 1976) (on rehearing) (majority of co-owners not entitled to block co-owner with very small fractional share from using property for purposes of living in a mobile home); *see also Harper v. O'Neal*, 363 So. 2d 930, 932 (La. Ct. App. 2d 1978) (holding that a co-owner who plowed up the other co-owner's sweet potato crop on portion of farm owned in indivision was liable for damages because planting sweet potato crop was consistent with proper use of the land); *Stinson v. Martson*, 169 So. 436, 439 (La. 1936) (one co-owner cannot enjoin another co-owner of plantation from cultivating it for production of crops ordinarily raised there).

239. *Harrell*, *supra* note 228, at 386–88.

240. *Id.* at 384 (noting that co-owners do not owe each other fiduciary duties to act in each other's best interest); *see also Symmeonides & Martin*, *supra* note 228, at 119–21 (also distinguishing unanimity rule required for use and management decisions in co-ownership from more relaxed management rules for partnerships and spouses).

241. *See* LA. CIV. CODE art. 799 (2011) (specifying that a “co-owner is liable to his co-owner for any damage to the thing held in indivision caused by *his fault*”) (emphasis added); *see also Symmeonides & Martin*, *supra* note 228, at 101–12 (explaining that the standard of care imposed by article 709 is a “prudent man” standard falling somewhere between the high, fiduciary standard imposed under partnership law and the low, “fraud or bad faith” standard imposed on spouses dealing with community property, but still somewhat more lax than the “prudent administrator” standard imposed on usufructuaries); *Lococo v. Lococo*, 462 So. 2d 893, 895 (La. Ct. App. 4th 1984) (recognizing that a co-owner may be liable as a *negotiorum gestor* for a failure to maintain and preserve property under his management and control).

The first opening has arisen in the arena of what some civilian scholars have called “conservatory acts.”<sup>242</sup> Although the Civil Code generally requires unanimous consent for any significant alterations or improvements to co-owned property, it also authorizes an individual co-owner to act unilaterally if he is engaging in “necessary steps for the preservation of the thing that is held in indivision.”<sup>243</sup> As an incident of this unilateral right to engage in conservatory actions, a co-owner who “has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person” can obtain reimbursement from his fellow co-owner.<sup>244</sup> Conflict is inevitable, however, if one co-owner (for example Louis) is prepared to organize a significant conservatory action that he believes is crucial to preserving the property (perhaps putting a new roof on the house), but his fellow co-owners (Esther or her heirs) do not believe the action is really necessary. In this situation, the active co-owner would bear the risk of absorbing the full cost of the conservatory action if it is successfully challenged by the passive co-owner in court.<sup>245</sup>

It was precisely this kind of situation that motivated a Louisiana appellate court to hold recently that one co-owner can file a declaratory judgment action for the purpose of obtaining an advance judicial determination as to whether a significant proposed conservatory action—in this case the construction of a levee around coastal property—is in fact a “necessary expense” under article 806 and thus subject to mandatory cost-sharing.<sup>246</sup> Somewhat surprisingly given the tendency of previous Louisiana courts to shy away from co-ownership management disputes, a majority of the judges on this appellate court panel accepted this judicial oversight authority and went so far as to set forth several factors to be considered in resolving disputes of this nature.<sup>247</sup>

---

242. Symmeonides & Martin, *supra* note 228, at 113 (citing A.N. YIANNOPOULOS, PERSONAL SERVITUDES §3, at 6, *in* 3 LOUISIANA CIVIL LAW TREATISE (3d ed. 1989)).

243. LA. CIV. CODE art. 800 (2011).

244. LA. CIV. CODE art. 806 (2011).

245. Such an expenditure could be deemed a mere “luxury” or even “useful,” but still not be “necessary” for purposes of obtaining reimbursement under article 806. *See* Symmeonides & Martin, *supra* note 228, at 148 (commenting on the cross-reference in the official comment to article 806 to article 527’s distinction between “necessary,” “useful,” and “luxurious” expenses).

246. *Miller v. Seven C’s Properties, LLC*, 800 So. 2d 406, 408–10 (La. Ct. App. 3d 2001).

247. *Id.* at 411 (suggesting that courts consider “the present condition of the property, the type and extent, including the cost, of the proposed repairs, and the benefits to be derived therefrom”).

An even narrower occasion for judicial discretion can arise when the use and management of a thing held in indivision is not determined by a co-ownership agreement *and* partition is not otherwise available. In this situation, article 803 of the Civil Code allows a co-owner to petition a court to determine the use and management of the co-owned thing.<sup>248</sup> In one case, a court exercised this authority to approve a proposed use and management plan providing for limited access to a grand New Orleans home because the co-owners had already commenced the process of partitioning the home by private sale and therefore it was, according to the court, not subject to partition.<sup>249</sup> In essence, the court interpreted article 803's requirement of partition unavailability flexibly, and not at all unreasonably, to avoid the risk of deterioration of a valuable co-owned asset that was already in the process of being partitioned in the most economically advantageous manner possible.<sup>250</sup>

The third potential site for judicial discretion in co-ownership arises when co-owners are parting ways and cannot agree on the precise method of partitioning their property—that is, on whether the partition should be in kind (an actual physical division of the asset) or by licitation (private sale). The Civil Code's basic provision here is that a court “shall decree partition in kind when the thing held in indivision is susceptible to division into as many lots of nearly equal value as there are shares and the aggregate value of all lots is not significantly lower than the value of the property in the state of indivision.”<sup>251</sup> Although this directive seems to call for some discretionary and subjective judgments about the size and value of lots and seems to favor partition in kind, it has given rise to a rule-like line of judicial decisions which sanction partition by licitation in almost all partition disputes except those which might involve large and essentially uniform tracts of rural land—a situation that simply does not arise frequently given the complex geography of Louisiana.<sup>252</sup> In other

---

248. LA. CIV. CODE art. 803 (2011).

249. Succession of Miller, 674 So. 2d 441, 444 (La. Ct. App. 4th 1996).

250. In this case, there was some evidence that the co-owner resisting the judicially authorized use and management plan wanted to exercise his right of co-extensive use of the co-owned house and its furnishings under article 802 in ways that might jeopardize the interests of his fellow co-owners. *Id.* at 442–43.

251. LA. CIV. CODE art. 810 (2011).

252. See, e.g., Ark-La-Miss Timber Co. v. Wilkins, 833 So. 2d 1154 (La. Ct. App. 2d 2002) (ordering partition by licitation of large timberland tract); Entrada Co. v. Unopened Succession, 882 So. 2d 661, 663–65 (La. Ct. App. 2d 2004) (same); Lasseigne v. Baker, 924 So. 2d 1074, 1076–78 (La. Ct. App. 5th 2006) (ordering partition by licitation of small canal side parcel).

words, the potential for judicial discretion in partition disputes has effectively and paradoxically been erased by judicial decree.

*A Co-Ownership Final Accounting:* Other than the three limited and narrow occasions for judicial discretion discussed above, the law of co-ownership remains dominated by general, but nevertheless clear, rights-based rules capable of relatively mechanistic application in the event of a co-ownership dispute. Thus, co-owners like Esther and Louis who voluntarily embark upon a co-ownership relationship together will rarely need to consult lawyers, and, if they do, their consultations will usually be brief. Each co-owner enjoys a unilateral right to equal and co-extensive use and occupancy of their co-owned property according to its previous destination and essentially equal rights to share in its fruits and revenues. Almost all of their other dealings with co-owned property, with a few notable but narrow exceptions, remain subject to the requirement of unanimous decision making and backstopped by an essentially imprescriptible and unwaivable right to demand partition.

If more co-owners are brought into their relationship through succession, gift, or legacy, there is certainly a greater chance for conflict. Yet, unless those conflicts concern the authority to conduct allegedly necessary repairs, management plans pending partition, or methods of partition, the conflicts will still be governed, by rather inflexible rules. Although this rights-based, rule-oriented framework can work well for a couple like Esther and Louis who have freely and voluntarily entered into ownership-in-indivision, it can prove to be especially rigid for larger collections of co-owners who confront rapidly changing circumstances. Here, the very inflexibility of Louisiana's co-ownership regime may reflect a core policy commitment of the Civil Code—to encourage parties who find themselves in unwieldy co-ownership regimes to partition the property.

#### IV. BOOK THREE: FROM FORCED HEIRSHIP TO UNDUE INFLUENCE

*Let's move forward in time and make some new assumptions. Eventually Esther and Louis's relationship experienced yet another rough patch. They separated and partitioned their co-owned house in New Orleans.*

*Two years ago Louis married another woman named Julia. Julia has been a painter and art teacher most of her life. She has two children from her own previous marriage to a local architect.*

*About a year into their new marriage, Julia suggested that Louis update his will. Julia put Louis in contact with her own*

attorney who advised Louis. The attorney wrote a new will for him, which Louis promptly executed.

Under this new will, Louis left specific legacies of \$300,000 each to Talia and Joshua, his children from his marriage to Esther. But he made Julia his residuary legatee. In other words, everything else in Louis's substantial patrimony would belong to Julia upon his death.

Three months later, Louis was diagnosed with advanced colon cancer. The doctors tried chemotherapy and radiation, but nothing worked. Within a year, Louis passed away.

When Talia and Joshua were informed of their legacies under Louis's will, they were initially quite surprised. They had always assumed they would receive most of their father's estate. When they realized the vast bulk of their father's \$4,000,000 estate would belong to Julia, their surprise turned to anger.

Talia and Joshua went to see their mother, Esther. Esther promptly set up an appointment with her old friend and former divorce attorney, Stephanie. When they arrived at Stephanie's office, they explained what had happened and asked Stephanie what could be done.

Stephanie's first task will be to explain that Louis was entirely within his rights to leave almost all of his estate to Julia. The reason, Stephanie would explain, is that Talia and Joshua are both able bodied, mentally competent, and older than 23 years of age. Therefore, neither child is considered a "forced heir" in Louisiana,<sup>253</sup> and consequently neither has any immediate legal entitlement to any portion of their father's estate.<sup>254</sup> Because Louisiana, after a decades-long and often emotional battle in the legislature and courts, has largely adopted the common law principle of "free testation," Louis was entitled to give away his entire estate to any person or institution he desired upon his death.<sup>255</sup> It is indeed ironic, Stephanie might add, that if Louis had

---

253. LA. CIV. CODE art. 1493(A) (2011) (providing that forced heirs are "descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent").

254. LA. CIV. CODE ART. 1497 (2011) ("If there is no forced heir, donations *inter vivos* and *mortis causa* may be made to the whole amount of the property of the donor, saving the reservation made hereafter.").

255. For a detailed history of this struggle, see Kathryn Venturatos Lorio, *The Changing Face of Forced Heirship: A New Louisiana Creation*, in *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION*, 181–211 (Vernon Valentine Palmer ed., 1999). For a detailed analysis of the legal and social ramifications of Louisiana's re-conceptualization of forced heirship, see

died before both Talia and Joshua had reached the age of 24, they would have been legally entitled to share at least one-half of his estate,<sup>256</sup> unless they had so seriously mistreated Louis, so embarrassed him, or ignored him to such a degree that Louis would have been justified in disinheriting them.<sup>257</sup> In short, Stephanie would explain, Talia and Joshua were lucky their father had left them as much as he had. And there was nothing a court could do about it.<sup>258</sup>

*After they had absorbed this news, Talia and Joshua asked Stephanie whether they could bring a lawsuit to annul their father's will on the ground that Julia had manipulated their father and led him to make these dispositions against his better judgment.*

*Stephanie paused now, because she knew her advice was about to become more ambiguous. And, the last thing she would want to do at this point would be to raise false hopes.*

*"Yes," Stephanie would answer. "We can bring a lawsuit claiming that your father's will should be annulled because Julia has exercised 'undue influence' over him. But there is no guarantee of success."*

Before Louisiana began the lengthy process of re-conceptualizing the institution of forced heirship in the 1980s and early 1990s (a process that was finally completed in 1995 as the result of a state-wide referendum amending the Louisiana

Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinheriton, and the Unfinished Business of the Stepparent Usufruct*, 60 LA. L. REV. 637 (2000).

256. LA. CIV. CODE art. 1495 (2011) (specifying amounts of forced and disposable portions). If Louis had been survived by only one forced heir, the forced portion would have only been one quarter of his estate. *Id.* Thus, for example, if Louis had died when Talia was 24, but Joshua was only 22, Joshua would have been legally entitled to one fourth of Louis's estate, while Talia could claim nothing.

257. *See, e.g.*, LA. CIV. CODE arts. 1617–1626 (2011) (providing comprehensive legal framework for disinheriton of forced heirs). Louisiana Civil Code article 1621 enumerates eight specific grounds for a parent to disinherit a child who would otherwise be a forced heir. Most of these grounds entail some form of cruel treatment (striking a parent, attempting to take the life of a parent, using violence or coercion to hinder a parent from making a will). One ground concerns egregious embarrassment (being convicted of a crime punishable by life imprisonment or death). And another stems from lack of attention (an adult child fails to communicate with the parent for a period of two years). LA. CIV. CODE art. 1621 (2001).

258. *See, e.g.*, *In re Succession of Crawford*, 923 So. 2d 642, 649 (La. Ct. App. 1st 2005) (holding that since son was not a forced heir of his mother's estate, he was not entitled to a forced portion and his mother was free to do as she wished with her property by donation mortis causa).

Constitution),<sup>259</sup> Louisiana law generally did not allow disappointed heirs to challenge a will on the ground of undue influence. It is true that a disappointed heir could always challenge a will on the ground that the testator lacked the necessary testamentary capacity at the time of execution.<sup>260</sup> And it is also true that such a person can still do so today, although on slightly different grounds.<sup>261</sup> But until 1991, one of the cornerstones of the Louisiana Civil Code was article 1492's general prohibition against offering proof that a donation was made "through hatred, anger, suggestion or capitation."<sup>262</sup>

This prohibition against offering proof of suggestion and capitation was a product of Louisiana's Roman and French legal heritage. As Professor Ron Scalise has recently shown, although Roman society was very aware of the possibility that persons outside a testator's family and interested heirs might try to use their influence over the testator to capture a legacy ("*captatio*"), Roman law generally did not allow wills to be annulled merely because the recipient of a legacy might have exerted his influence over the testator.<sup>263</sup> Usually something more sinister—such as duress, force, or fraud—was required.<sup>264</sup> Moreover, Roman law's primary response to the threat of capitation was simply to prohibit legacies to those best positioned to unduly influence a testator—witnesses to a will.<sup>265</sup> French law developed a similar approach to the specter of suggestion and capitation by not recognizing these as independent grounds for annulling a will. France permits invalidation of a will only when evidence of suggestion or capitation is combined with evidence of more serious interference,

---

259. Lorio, *supra* note 255, at 186–98.

260. LA. CIV. CODE art. 1475 (1870); LA. CIV. CODE art. 1472 (1870).

261. LA. CIV. CODE art. 1477 (2011) ("To have the capacity to make a donation *inter vivos* or *mortis causa*, a person must also be able to comprehend generally the nature and consequences of the disposition that he is making.").

262. LA. CIV. CODE art. 1492 (1870). Article 1492 of the 1870 Code replicated article 1479 of the 1825 Civil Code and an identical provision in the Digest of 1808. LA. CIV. CODE art. 1492 (West Compiled ed. 1978). Thus the Civil Code's ban on evidence of suggestion and capitation was unchanged from 1808 until its repeal in 1989 when the legislature specified that the only persons who could claim the status of forced heir were individuals 23 years old and younger and those of any age who have been interdicted or are subject to interdiction because of mental incapacity or physical infirmity. *See* Lorio, *supra* note 255, at 196; Katherine Spaht, Kathryn Lorio, Cynthia Picou, Cynthia Samuel & Frederick Swaim, *The New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 LA. L. REV. 409, 452–74 (1990).

263. Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 43–46 (2008).

264. *Id.* at 43–45.

265. *Id.* at 46–47.

such as outright fraud, deception and isolation of the testator.<sup>266</sup> In addition, France also bans gifts to certain persons whose relationship with the donor presents a high risk of potential for undue influence—namely doctors, health professionals, and pharmacists.<sup>267</sup> Because Louisiana courts generally equated evidence of what common law lawyers called “undue influence” with the civilian notion of “capitation,” they used article 1942 to bar undue influence claims for almost 200 years,<sup>268</sup> except in a few narrow cases, none of which involved persons who would have been forced heirs.<sup>269</sup>

Soon after its initial move to restrict the category of forced heirs to children under the age of 24 and children who are permanently incapable of caring for themselves,<sup>270</sup> the Louisiana legislature self-consciously opened the door to claims of undue influence for the very purpose of offering limited means of protection to capable, adult children of testators who make donations to persons that might not seem like “natural” beneficiaries of that testator’s donative intent.<sup>271</sup> Thus, under current article 1479 of the Civil Code, enacted in 1991, a court shall declare a donation *inter vivos* or *mortis causa* “null upon

---

266. *Id.* at 60–63

267. *Id.* at 63–65 (commenting on CODE CIV. [C. CIV.] art. 909).

268. Laurie Dearman Clark, *Louisiana’s New Law on Capacity to Make and Receive Donations: “Unduly Influenced” by the Common Law?*, 67 TUL. L. REV. 183, 221–22 (1992).

269. Those narrow exceptions involved cases in which someone alleged undue influence at the very moment a donation was being executed or when it was offered to show the donor or testator’s lack of mental capacity. *See* Cormier v. Myers, 65 So. 2d 259, 271–72 (La. 1953); Succession of Hamiter, 519 So. 2d 341, 344 (La. Ct. App. 2d 1988) (admitting proof that caretaker of testator exerted influence over testator at time will was executed); *see also* Spaht et al., *supra* note 262, at 453–54 (observing that “the litigation in Louisiana in which allegations were made of fraud and improper influence principally involved collateral relations of the decedent for whom contesting the will was an ‘all or nothing proposition’ and citing cases). *See also* Succession of Gilbert, 850 So. 2d 733, 735 (La. Ct. App. 2d 2003) (observing that in light of the high burden imposed by former article 1492, Louisiana courts “considered evidence of influence only when it affected, or virtually destroyed, the mental capacity of the testator”; citing *Hamiter, supra*).

270. Act No. 788, 1989 La. Acts 2210, 2211; Act No. 147, 1990 La. Acts 474, 476–77. Both acts were declared unconstitutional in *Succession of Lauga*, 624 So. 2d 1156 (La. 1993). *See* Lorio, *supra* note 255, at 196–99 (discussing the detailed provisions of the 1989 and 1990 Acts and the Louisiana Supreme Court’s invalidating decision in *Lauga*).

271. *See* Spaht, *supra* note 255, at 647–48 (noting linkage between 1980–1990 restriction of forced heirship and passage of legislation establishing possibility of undue influence claims); Spaht et al., *supra* note 262, at 452–54 (same).

proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.”<sup>272</sup> This classic substitution theory formulation of the test for undue influence is derived directly from Anglo-American common law sources and represents a distilled, liberalized approach to undue influence in which additional evidence of coercion or fraud is not required.<sup>273</sup>

In establishing undue influence claims, the Louisiana legislature also established the burdens of proof for such claims. Generally, a person who challenges a donor’s capacity on the grounds of fraud, duress, or undue influence must prove his claim by “clear and convincing evidence.”<sup>274</sup> However, if at the time the donation was made or the testament executed, “a relationship of confidence existed between the donor and the wrongdoer *and* the wrongdoer was not then related to the donor by affinity, consanguinity or adoption,” the challenger need only prove fraud, duress or undue influence by a “preponderance of the evidence.”<sup>275</sup> This means that, if a person who allegedly exerted undue influence is someone like a spouse or a natural or adopted child, the claimant must meet the rigorous “clear and convincing” burden of proof.<sup>276</sup> But if the alleged wrongdoer is some unrelated person who nevertheless had a relationship of confidence with the donor, such as a hired caregiver,<sup>277</sup> a lawyer,<sup>278</sup> an accountant,<sup>279</sup> or even an unmarried companion or cohabitant,<sup>280</sup> the claimant would have to

---

272. LA. CIV. CODE art. 1479 (2011), enacted by Act No. 363, 1991 La. Acts 1284, 1293.

273. Scalise, *supra* note 263, at 50–53; Hall v. Hall, (1868) 1 LRP&D (Ct. Prob. & Divorce) (U.K.); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 256 (2d ed. 1953).

274. LA. CIV. CODE art. 1483 (2011).

275. *Id.* (emphasis added).

276. *Id.* cmt c.

277. Succession of Fisher, 970 So. 2d 1048, 1055–56 (La. Ct. App. 1st 2007); Succession of Braud, 646 So. 2d 1168, 1172 (La. Ct. App. 4th 1994).

278. Successions of Tanner, 836 So. 2d 1280, 1283 (La. Ct. App. 4th 2003), *rev’d on other grounds*, 847 So. 2d 1233 (La. 2003); *cf.* Succession of Spitzfaden II, 30 So. 3d 88, 93 (La. Ct. App. 5th 2009) (holding that clear and convincing burden of proof under Article 1483 applied even though an attorney prepared the will for the decedent and was thus in a “relationship of confidence,” and the attorney was a first cousin, and thus a relative, of the decedent).

279. Succession of Linder, 824 So. 2d 523, 527–28 (La. Ct. App. 5th 2002).

280. Succession of Gilbert, 850 So. 2d 733, 734, 737 (La. Ct. App. 2d 2003).

establish undue influence only by the more lenient “preponderance of the evidence” standard.<sup>281</sup>

As we shall see, however, the mere presence of this relaxed burden of proof does not guarantee a finding of undue influence. One reason for this is that courts have established several additional evidentiary presumptions or rules of thumb of their own. For instance, drawing on a statement in the comments to article 1479,<sup>282</sup> many courts have held that undue influence may not be established by evidence of “mere advice, or persuasion, or kindness or assistance.”<sup>283</sup> Some courts routinely insist that before they will annul a testament or donation they must be convinced that the undue influence was operative at the time the testament or act of donation was executed, even though the acts creating the influence may have occurred prior to the moment of execution and even though the person who exerted the pressure may not have been present at the moment of execution.<sup>284</sup> In sum, the map of legal directives relating to an undue influence claim in Louisiana starts with an unmistakable standard imported from the common law. That standard, however, is shaded by one code-based presumption designed to make certain kinds of undue influence claims easier to prove and a number of jurisprudential rules of thumb that seem designed to make findings of undue influence relatively rare.

#### A. Claims Against Stepparents

So what about the particular situation in which Talia and Joshua now find themselves? Can competent, adult children who have been largely or completely disinherited bring a successful undue influence claim against a stepparent who is the principal beneficiary of a decedent’s will? The answer is uncertain.

In *Succession of Reeves*,<sup>285</sup> an attorney and prominent member of a small Louisiana community died with a will that left half of

---

281. In some common law states, a relationship of confidence produces not just a lower burden of proof but an actual presumption of undue influence, particularly if there are other “suspicious circumstances” connected with the donation. Scalise, *supra* note 263, at 56–57.

282. LA. CIV. CODE art. 1479 cmt. b (2011).

283. *Tanner*, 836 So. 2d at 1284 (holding that advice, persuasion, and assistance do not destroy the agency of the donor or substitute for the donor’s volition); *Succession of Anderson*, 656 So. 2d 42, 45 (La. Ct. App. 2d 1995).

284. *Succession of Berman*, 937 So. 2d 437, 441 (La. Ct. App. 4th 2006); *Gilbert*, 850 So. 2d at 736; *Tanner*, 836 So. 2d at 1284. This rule is also drawn from a statement in the comments to article 1479. See LA. CIV. CODE art. 1479 cmt. d (2011).

285. *Succession of Reeves*, 704 So. 2d 252 (La. App. 3d 1997).

his substantial estate to his second, much younger wife and the other half of his estate to nine of his ten children from a previous marriage.<sup>286</sup> When the completely disinherited child sued to invalidate the will on the ground that his stepmother had exerted undue influence over the testator,<sup>287</sup> the trial court agreed.<sup>288</sup> On appeal, however, a divided five-judge panel of the Louisiana Third Circuit Court of Appeal reversed.<sup>289</sup>

Although the majority opinion declined to hold that an undue influence claim “can never be leveled against a surviving spouse who is the main beneficiary of a testament by her spouse of eleven years,” it clearly signaled distaste for such claims and suggested that a surviving spouse is “not the intended target of Article 1479.”<sup>290</sup> According to the majority opinion, the proper “target” of such a claim would be someone *other* than the “the natural object of the testator’s bounty” (someone other than a spouse or child, such as a distant relative or a “paramour”) who uses “devious means” to convince the testator to violate his natural inclinations.<sup>291</sup> The surviving spouse, the majority asserted, should generally be immune from accusations of undue influence because the legal and emotional foundations of the husband and wife relationship require susceptibility to the other’s needs, intimacy, and a desire to promote the other’s interests.<sup>292</sup> The legal and social foundations of a marriage, the court seemed to suggest, render the essential elements of an undue influence claim—susceptibility, opportunity, disposition, and coveted result<sup>293</sup>—essentially “meaningless” when asserted against a spouse.<sup>294</sup>

In the end, the *Reeves* court held that a claim of undue influence against a surviving spouse can succeed only if the

---

286. *Id.* at 253–54. The surviving spouse married the decedent when she was 38 and he was 60 years old. *Id.* at 254.

287. The other nine children of the testator filed a petition alleging that the stepmother’s share of the decedent’s estate exceeded the legally disposable portion. They sought a reduction of the excess donation and recognition of their forced portion free and clear of any usufruct. *Id.* at 254, n.1. As the will was executed in 1992, their claim to forced heirship status was accurate, but the court never reached this issue.

288. *Id.* at 253–54, 257–58.

289. *Id.* at 258.

290. *Id.* at 258.

291. *Id.* at 259–60.

292. *Id.*

293. *Id.* at 259; *see also* Scalise, *supra* note 263, at 55.

294. *Reeves*, 704 So. 2d at 259. In *Reeves*, the appellate court majority specifically rejected the trial court’s finding that the surviving spouse exploited the decedent’s “sexual dependency and fear of abandonment” because it asserted that “love, companionship and intimacy are the primary reasons that people marry, *ergo* the marital imperatives.” *Id.*

challenger shows evidence of physical or emotional abuse, fraud, deceit, or criminal conduct—a particularly high burden of proof<sup>295</sup> reminiscent of that used before the twentieth century at common law and at times in the civil law.<sup>296</sup> Although two judges dissented from the majority ruling,<sup>297</sup> and although the Louisiana Supreme Court granted writs to consider an appeal,<sup>298</sup> the case was voluntarily dismissed as the result of a settlement without any final resolution of the significant legal issues involved.<sup>299</sup>

The majority decision in *Reeves*, it is important to note, has also been sharply criticized by Professor Katherine Spaht for having erroneously grafted onto the Civil Code additional requirements for proving undue influence against a testator's spouse and for undermining the protections that the undue influence articles were designed to provide for vulnerable descendants.<sup>300</sup> In particular, Spaht points out that the legislature's codification of undue influence was motivated by a desire to protect former forced heirs from disinheritance at the hands of strangers as well as stepparents.<sup>301</sup> Spaht also claims that the legislature's intention to protect forced heirs from over-reaching by stepparents, especially stepmothers, is well supported by social science research and common law experience.<sup>302</sup>

It is difficult to discern the impact of the majority opinion in *Reeves* on potential undue influence claims against surviving spouse stepparents. In the only other reported decision involving a similar claim, an appellate court affirmed the dismissal of an undue influence claim asserted by three adult children who had been completely disinherited by their father in favor of a surviving spouse who had been living with the father for twenty years, caring for him in his later years, and whom he secretly married less than a year before his death.<sup>303</sup> Rather than engage the controversial legal conclusions of the *Reeves* majority,<sup>304</sup> the appellate court rested its

295. *Id.*

296. Scalise, *supra* note 263, at 44–53.

297. In dissent, Judges Amy and Yelverton found no legislative basis to establish a safe harbor for surviving spouses from undue influence claims. *Reeves*, 704 So. 2d at 262, 264.

298. Succession of Reeves, 805 So. 2d 185 (La. 1998).

299. Spaht, *supra* note 255, at 649.

300. *Id.*

301. *Id.* at 653–54.

302. *Id.* at 651–52.

303. Succession of Cooper, 830 So. 2d 1087, 1088–89, 1091–93 (La. Ct. App. 2d 2002).

304. See Spaht, *supra* note 255, at 648–55 (offering extended critique of *Reeves*), and at 649 (stating that *Reeves* “erroneously grafts onto the provisions of Civil Code articles 1479 and 1483 additional requirements for proving undue

decision on narrower factual grounds by finding that the limited circumstantial evidence offered by the disinherited children failed to prove undue influence.<sup>305</sup>

Perhaps the majority opinion in *Reeves* deterred some disappointed children from asserting undue influence claims against stepparents. Perhaps Professor Spaht's criticism has caused some stepparent defendants to settle undue influence claims rather than rely on the majority opinion's reasoning. All we can know for sure is that Talia and Joshua, the disappointed descendants of Louis, can no longer rely on the bright line rule of forced heirship that would have guaranteed them a much larger portion of their deceased father's estate. Instead, because Louisiana has erected a new bright-line rule protecting freedom of testation, except when a testator's children are still relatively young or permanently dependent, Talia and Joshua do have a potential remedy through an undue influence claim but that remedy is clouded by jurisprudential uncertainty.

*B. Claims Against Everyone Else: Unmarried Co-Habitants, Other Relatives, Caretakers and Strangers*

Would Talia and Joshua have a better chance of invalidating their father's will if the residuary legatee accused of undue influence had not been his second wife, but someone else—such as an unmarried companion, a caretaker, a distant relative, or another descendant? Let's take each sub-category in turn.

The only reported decision involving an unmarried cohabitant shows that disinherited children like Talia and Joshua still face an uphill battle. In that case, a daughter claimed that her mother's live-in, male companion and caretaker had exerted undue influence on her mother. She sought to annul the mother's will, which left the mother's house and all of her mineral and royalty interests to the companion.<sup>306</sup> Even though the more lenient preponderance of the evidence standard applied due to the relationship of confidence between the caretaker and the testator, the court rejected the daughter's claim despite evidence that the companion caretaker

---

influence whenever the alleged 'wrongdoer' is the spouse of the testator" and suggesting that these "jurisprudential requirements seriously undermine the purpose of these articles").

305. *Cooper*, 830 So. 2d at 1091–92.

306. *Succession of Gilbert*, 850 So. 2d 733, 734–35 (La. Ct. App. 2d 2003).

had made negative comments about the daughter and her siblings.<sup>307</sup>

If the unexpected beneficiary of Louis' will had been a complete outsider, such as a hired caretaker or nurse who had no other relationship with the testator or donor, Talia and Joshua might have a better prospect of success. In one case, an appellate court found that a handyman exerted undue influence over a 101-year-old retired school teacher. Thus, the court nullified a notarial will which had made the handyman the decedent's universal legatee and thus reestablished a local church as the universal legatee under the decedent's previous olographic will.<sup>308</sup> In another case, an appellate court held that the nieces and nephews of a wealthy widow presented sufficient medical and other evidence to show that the widow's hired caregiver had exerted undue influence over the testator. As a result, the court nullified the testator's final will, which had made the caregiver the universal legatee of the testator's \$2 million estate.<sup>309</sup>

But disappointed descendants cannot be completely confident that an undue influence claim against an outsider will succeed. For example, in one case, an undue influence claim against the testator's caregiver, who was named as the sole beneficiary of the testator's final olographic will, failed.<sup>310</sup> In another case, an undue influence claim against a decedent's accountant did not succeed even though the accountant received the most valuable asset in the decedent's estate.<sup>311</sup> In a third outsider case that proceeded all the way to the Louisiana Supreme Court, a claim of undue influence against a decedent's lawyer and executor, who received one-half of the decedent's estate under the challenged will, resulted in a series of inconsistent rulings that ultimately left the issue of undue influence pending for the trial court to resolve.<sup>312</sup>

Perhaps the most common provocation for an undue influence claim is the case of a testator who leaves her estate to someone within the extended family but has preferred one family member

307. *Id.* at 734–37.

308. Succession of Pardue, 915 So. 2d 415, 417, 425–26 (La. Ct. App. 2d 2005).

309. Succession of Fisher, 970 So. 2d 1048, 1055–56 (La. Ct. App. 1st 2007).

310. Succession of Braud, 646 So. 2d 1168, 1171–73 (La. App. 4th 1994). In this case, it may have been material that neither the petitioner nor the legatees under the earlier wills were persons who would have been forced heirs. *Id.* at 1168–69.

311. Succession of Linder, 824 So. 2d 523, 527–28 (La. Ct. App. 5th 2002).

312. Successions of Tanner, 836 So. 2d 1280, 1282–85 (La. Ct. App. 4th 2003) (affirming summary judgment dismissal of undue influence claim), *rev'd*, 847 So. 2d 1233 (La. 2003) (citing genuine issues of material fact).

over another. In one noteworthy case, two sons succeeded in nullifying their father's will, which had completely disinherited them and made a third son the universal legatee, on the ground that this son exerted undue influence by intentionally exacerbating the father's resentment toward the other two sons and had exploited the father's clinical depression, dementia, and propensity toward delusion.<sup>313</sup>

But for every successful undue influence claim asserted within the family circle, there seem to be even more unsuccessful claims. Thus, one court rejected an undue influence claim in the context of a dispute between a decedent's widow and the decedent's first cousin (and attorney) in connection with a will that left a significant portion of the decedent's estate to his first cousin's children rather than to the widow and *her* children from a previous marriage.<sup>314</sup> Other courts have rejected undue influence claims in the context of intra-family feuds between a testator's son and daughter on one hand and the testator's daughter-in-law on the other,<sup>315</sup> a testator's niece and the testator's niece-by-marriage (a love child of the testator's brother-in-law),<sup>316</sup> and the adopted daughter of a testator and the testator's biological daughter.<sup>317</sup> Yet another court rejected an undue influence claim asserted by two brothers against their sister.<sup>318</sup> This record suggests that Tolstoy may have been right: "All happy families resemble one another, each unhappy family is unhappy in its own way."<sup>319</sup>

### *C. An Undue Influence Final Accounting*

As we have seen, the vast majority of undue influence claims (in reported cases at least) have been rejected regardless of whether the alleged wrongdoer is a family member,<sup>320</sup> an outsider,<sup>321</sup> or

---

313. Succession of Lounsberry, 824 So. 2d 409, 413–15 (La. Ct. App. 3d 2002). The court held, in fact, that a testator's pre-testamentary resentment toward plaintiffs does not bar a finding of undue influence. *Id.* at 413.

314. Succession of Spitzfaden, 30 So. 3d 88, 93 (La. Ct. App. 5th 2009).

315. Succession of Deshotel, 10 So. 3d 873, 881–82 (La. Ct. App. 3d 2009).

316. Succession of Polk, 940 So. 2d 895, 898–99 (La. Ct. App. 3d 2006).

317. Succession of Deshotels, 735 So. 2d 826, 828–30, 831–32 (La. Ct. App. 3d 1999).

318. Succession of Berman, 937 So. 2d 437, 441–43 (La. App. 4th 2006). The brothers, who had worked with their father in the family business for decades were disappointed when the father, with his daughter's help, changed his will to equalize distribution of his estate rather than leave significant New Orleans real estate assets housing the family business to the sons alone.

319. LEO TOLSTOY, ANNA KARENINA I (1877) (Oxford Univ. Press 1998).

320. Succession of Spitzfaden II, 30 So. 3d 88, (La. Ct. App. 5th 2009) (rejecting claim of widow of decedent against first cousin/attorney of decedent);

someone sitting uncomfortably on the borderline between relative and non-relative.<sup>322</sup> But, perhaps just often enough to preserve the hopes of disappointed descendants, or perhaps more accurately to encourage their counsel to file lawsuits in the hope of extracting favorable settlements, courts have invalidated testaments finding that undue influence has been exercised by outsiders<sup>323</sup> and even by family members.<sup>324</sup> On the other hand, it does not appear that descendants, who would have been guaranteed forced portions under Louisiana's former forced heirship regime, are privileged when they assert that undue influence has been exerted by stepparents—a class of persons treated as a kind of suspect class elsewhere in the Civil Code.<sup>325</sup>

What has emerged then is a classic example of a hybrid regime of legal directives.<sup>326</sup> Initially, Louisiana, like other civil law systems, chose to protect the interests of those often considered to be the “natural” objects of donative or testamentary intent (principally children and spouses) through the forced heirship regime,<sup>327</sup> community property law,<sup>328</sup> and the marital portion.<sup>329</sup>

*Deshotel*, 10 So. 3d at 881–82 (rejecting claim of son and daughter of decedent against daughter-in-law of decedent and her husband); *Berman*, 937 So. 2d 437 (rejecting claim of two brothers against their sister); *Deshotels*, 735 So. 2d at 828–30, 831–32 (rejecting claim of adopted daughter against biological daughter).

321. Succession of Gilbert, 850 So. 2d 733 (La. Ct. App. 2d 2003) (rejecting daughter's claim against mother's caretaker and live-in companion); Succession of Linder, 824 So. 2d 523 (La. Ct. App. 5th 2002) (daughter, forced heir, loses against accountant who received most valuable asset).

322. Succession of Polk, 940 So. 2d 895, 897–99 (La. Ct. App. 3d 2006). (rejecting undue influence at the hand of a “niece by marriage”).

323. Succession of Fisher, 970 So. 2d 1048, 1055–56 (La. Ct. App. 1st 2007) (caretaker); Succession of Pardue, 915 So. 2d 415, 417, 425–26 (La. Ct. App. 2d 2005) (handyman).

324. Succession of Lounsberry, 824 So. 2d 409 (La. App. 3d 2002) (one son exerted undue influence at expense of two plaintiff sons).

325. See LA. CIV. CODE art. 573(2) (2011) (exempting stepparents from Civil Code's general dispensation of legal usufructuaries' obligation to provide security upon the commencement of a usufruct); LA. CIV. CODE arts. 1499 and 1514 (2011) (establishing similar but narrower rules relating to obligation to provide security for stepparents when naked owners are forced heirs in the context of testamentary usufructs).

326. Sullivan, *supra* note 1, at 61–62.

327. Scalise, *supra* note 363, at 82–86; Lorio, *supra* note 255, at 181–195; Spaht, *supra* note 255, at 640–42.

328. See *supra* notes 91–93 and accompanying text. See also Scalise, *supra* note 263, at 86–92 (suggesting how community property serves as another family protection device).

All of these institutions depended heavily on classic rules. But because Louisiana has now severely restricted forced heirship to protect the power of individuals to freely dispose of their property,<sup>330</sup> we have left individual courts with the difficult task of identifying instances in which some individual has interfered with a testator or donor's free will to such an extent that it is necessary to annul a testament or donation (and perhaps restore the "natural" or "normal" order of donative intent) on the muddy grounds of undue influence.<sup>331</sup>

At the same time, however, the stringent, "clear and convincing evidence" burden of proof established in article 1483 makes it difficult for actual undue influence claimants to prevail in many cases. Furthermore, the legislature has also established a looser burden of proof (the "preponderance of the evidence" standard for non-relative confidants) which encourages some disinherited descendants to try to fit their claims into a narrower category of cases where they may have at least a facially greater chance of establishing undue influence and invalidating an unfavorable testament or donation.<sup>332</sup> And finally, at least one court has established a controversial rule that seeks to prohibit almost all

---

329. LA. CIV. CODE art. 2432 (2011). *See also* LA. CIV. CODE art. 2434 (2011) (establishing the quantum of the marital portion with rule-like precision). But also note that the determination of whether a spouse dies rich in comparison with a surviving spouse under article 2432 is not subject to any bright line test. *See* Succession of Firmin, 38 So. 3d 445, 447–48 (La. Ct. App. 4th 2010) (finding surviving spouse did not prove her husband died rich in comparison to her).

330. Scalise, *supra* note 263, at 58–59.

331. For more on the inter-relationship between undue influence and the policy interest in protecting children from disinheritance, see Ronald Chester, *Should American Children be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405 (1997); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996). Several of these non-Louisiana authors lament Louisiana's evolution from a forced heirship regime to one based on "free testation" and relying primarily on undue influence to protect adult children from unwarranted disinheritance. *See* Chester, *supra*, at 438–441 (describing Louisiana's evolution as moving from a model based on family protection to one based on individualism); Madoff, *supra*, at 618–619 (suggesting ironically that, within Louisiana's former forced heirship regime, there was actually greater freedom of testation within the disposable portion than in the other 49 common law states because of the Civil Code's prior ban on evidence of undue influence).

332. LA. CIV. CODE art. 1483 (2011); *supra* notes 274–84, 306–18 and accompanying text.

undue influence claims against stepparents.<sup>333</sup> In short, we seem to have moved from a landscape governed predominantly by crystalline rules to one in which two principles—free testation and the principle that a donation or testament can be annulled if the donor's volition is impaired by undue influence—are destined to be linked together in uneasy conflict that must be mediated on a case-by-case basis by judges exercising substantial discretion.

#### CONCLUSION

Having reached the end of our journey with Esther and Louis and their descendants and legatees, we can see now that it is impossible to generalize as to whether the most crucial decisions and actions in their private lives will be governed by classic rules or classic standards. Originally, I suspected that Louisiana had moved decisively in the direction of discretionary remedialism, just as Nial Whitty found to have occurred in Scotland a decade ago.<sup>334</sup> But upon further study, I discovered that, if such a movement had occurred in Louisiana, it has at least been partially checked by the resiliency of several traditional rule-based systems (the hard-edged regimes of community property and co-ownership), by the development of relatively fine-tuned jurisprudential rules (with respect to spousal support and claims for contribution for education and training), and by the overlay of many detailed, ruled-based regimes that originate outside of the Civil Code in the Revised Statutes (e.g., with respect to child custody and child support). In one important area (transfer of wealth upon death), however, Louisiana has minimized the importance of a classic rule-based regime (forced heirship) and replaced it with a cause of action for undue influence that is regulated by looser standards that grant judges much more individual discretion.

It is important to recognize that this Article's purpose has not been to determine whether Louisiana's lawmakers have chosen the ideal mixture of rules and standards in each particular area of the law encountered. Answering that question for each area would require complex normative assessments that are beyond this Article's scope. But, if my efforts here lead others to explore the tradeoff between rules and standards in Louisiana law, those inquiries should be sensitive to several additional concerns.

---

333. Succession of Reeves, 704 So. 2d 252 (La. Ct. App. 3d 1997), discussed *supra* in text accompanying notes 285–305.

334. See generally Whitty, *supra* note 7.

First, we should remember that we are living in a period in which concerns about the danger of judicial bias are real. One Louisiana scholar, Vernon Palmer, has recently presented a compelling, though controversial, empirical study that suggests a serious risk of actual bias in the voting patterns of Louisiana Supreme Court justices resulting from judicial campaign donations made by litigants and lawyers and the justices' current practice of non-recusal.<sup>335</sup> Even if not everyone agrees with Palmer's findings as they relate to the current Louisiana Supreme Court,<sup>336</sup> many Louisiana lawyers would probably agree that the combination of an elected judiciary, judicial campaign committees' frequent solicitation of donations from the local bar, and infrequent or non-existent judicial recusal creates at least the perception of actual bias at the trial court and intermediate appellate court level. Until Louisiana addresses this perception of bias by stiffening recusal requirements, prohibiting judicial campaign donations by lawyers or litigants, or moving towards public funding of judicial campaigns or simply to an appointed judiciary,<sup>337</sup> the choices we make between discretion cabining rules and discretionary standards will have a significant impact on the moral authority of judges and the legitimacy of our entire legal system.

Second, as both Whitty and Atiyah have emphasized, we must continue to be sensitive to how certain discretion-based legal regimes can create unequal playing fields in which the wealthiest, best educated, and best represented parties acquire an advantage over less advantaged opponents.<sup>338</sup> In other words, although standards can provide an opportunity for judges to produce outcomes that are consistent with our noblest ideals concerning distributive justice, we need to remember that the formal equality promised by rule-based regimes can be egalitarian as well if they

---

335. See generally Palmer, *supra* note 64; see also Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008).

336. See, e.g., Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009) (pointing out 44 errors out of a total data base of 1100 entries relied on by Palmer & Levendis, *supra* note 335); Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307 (2009).

337. Palmer, *supra* note 64, at 3 (discussing reform efforts under way in other states).

338. Whitty, *supra* note 7, at 303; Atiyah, *supra* note 1, at 1271.

reduce the advantages acquired by better endowed litigants. Perhaps some of the counter-cyclical movement away from pure, open-ended discretion in the areas of family law addressed in Book One reflects an implicit understanding of this tradeoff.

Next, the teaching of the behavioral sciences as to how emotion, personal prejudice, intuition, and cognitive deficits can affect decision making should be taken into account as we address the rule versus standard balance.<sup>339</sup> Perhaps by design, or perhaps by accident, we have created legal regimes in some of the areas examined here that attempt to limit some of the most subjective aspects of judicial decision making, while at the same time allowing judges to do some contextual balancing and thus avoid the tendency of purely rule-based regimes—with their inherently over-inclusive or under-inclusive norms—to produce outcomes that appear substantively unfair. Deeper consideration of social science research may further our appreciation of whether we have struck the right balance between rules and standards in Louisiana.

Finally, as P.S. Atiyah reminded us a generation ago,<sup>340</sup> we should not forget that laws serve not only a dispute resolution function but also a hortatory function—that is, they produce incentives that guide and channel behavior in powerful ways. Our current mix of rules and standards in the Civil Code still guides behavior and endorses a number of powerful social norms.

Marriage under our current Civil Code is a legal relationship governed by the norms of spousal equality and contractual freedom and thus has become a relationship that is easy to forge and almost as easy to sever. The consequences of severing that relationship are guided by a multiplicity of related norms suggesting an underlying faith in equality of marital obligation, individual autonomy after marriage, and immunity from responsibility for a marriage's demise. We believe that each spouse is entitled to share in marital property accumulation equally, without consideration of marital fault. We assume that both spouses have an earning potential determined by their own skill and effort. We view ex-spouses' post-divorce, on-going duties to each other as being quite limited.

---

339. Many legal academics have begun applying these insights to a wide variety of areas of law and governance. *See generally* Ronnie Cohen & Shannon O'Bryne, *Burning Down the House: Law, Emotion and the Subprime Mortgage Crisis*, 45 REAL PROP. TR. & EST. L. J. 677 (2011); Susan A. Bandes, *Foreword: Emotion in Context: Exploring the Interaction Between Emotion and Legal Institutions*, 33 VT. L. REV. 387 (2009); Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073 (2009); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

340. Atiyah, *supra* note 1, at 1249–51.

And finally, we adhere to the principle that child custody and child support obligations should be divided as equally and non-judgmentally as the ex-spouse's incomes and earning potential allow.

Co-ownership is governed by an even simpler set of norms. Co-owners should have equal rights of access to co-owned property. They should have, not merely a voice in decision making, but also the right to veto most important decisions about the use and development of co-owned property. And they are entitled to an unalterable right of exit.

The new law of forced heirship and undue influence illustrates the most dramatic transformation of norms in the areas of law examined. Parents no longer owe a legal duty to share family wealth with competent, adult children. Dispositions of family wealth to outsiders and to distant relatives that result in the complete disinheritance of children or close relatives, however, are still considered to be suspicious enough that we give judges some discretion to declare such dispositions invalid because of undue influence.

In the end, only additional scholarship will enable us to determine whether the current distribution of rules, standards, and hybrid discretion found in the Louisiana Civil Code succeeds in stimulating the kind of behavior that lawmakers may have associated with these norms. For now, private individuals like Esther and Louis have to muddle through the uneasy mix of rules, standards, and hybrid discretion that we have established in and around our Civil Code.