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Private Law: Persons

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THE WORK OF THE LOUISIANA APPELLATE COURTS FOR THE 1963-1964 TERM

PRIVATE LAW

PERSONS

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THE NAME OF THE MARRIED WOMAN

Louisiana does not have legislation on the name of the married woman. Now the Supreme Court, following the general American opinion expressed in *Corpus Juris Secundum*,[1] has declared that the married woman's name *should be* that of her first name and her husband's family name, that she might use her own family name as a "middle name" if she pleases, and that "social custom" permits her to use her husband's first and family names prefixed by "Mrs."[2] The decision goes beyond this, however, for in effect it announces that a married woman may be enjoined from using the traditional and usual, socially acceptable, form of address, if this is likely to inconvenience or mislead others. Here the problem was one of possible confusion of names on a ballot, both husband and wife being candidates for the same office. The tradition of the civil law, heretofore recognized in Louisiana practice and doctrine, is that a woman's legal name does not change on marriage. Justice Sanders, with whom Justice Summers concurred, pointed this out in his dissenting opinion.[3]

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1. Verbo "names" §§ 1, 3, 4.

2. Wilty v. Jefferson Parish Democratic Executive Committee, 245 La. 145, 157 So. 2d 718 (1963), *reversing* 156 So. 2d 800 (La. App. 4th Cir. 1963).

3. 245 La. at 171, 157 So. 2d at 727.

MARRIAGE[4]

The opinion of Judge Tate in *Chivers v. Couch Motor Lines, Inc.*[5] affirms the previous jurisprudence to the effect that a common law (consensual, non-ceremonial) marriage contracted in a jurisdiction where such form of celebration is recognized is to be considered valid in Louisiana. Indeed, the accepted conflict of laws rule is that the state in which the marriage is celebrated has legislative competence to prescribe the form of the ceremony. Moreover, the failure to recognize a marriage contracted in a form authorized by a sister-state's laws would be to deny that state's laws full faith and credit. The opinion in the case also contains a splendid review of the Florida law on common law marriages.

SEPARATION AND DIVORCE[6]

For years our jurisprudence had been to the effect that it is cruel treatment warranting separation from bed and board for one not to provide his wife with a home separate from that of his family, if he could do so, when the latter are hostile or unfriendly to her. Then in 1939 *Cormier v. Cormier*[7] extended this idea to require the husband to provide a home "sufficiently remote from the house of his family so as to remove whatever hostile or unkind influences that this proximity might cause" when (1) it was proved that his family was hostile or unfriendly and likely to cause a disruption in their home and (2) the husband could in fact provide a separate home. Now *Doucet v. Doucet*,[8] misconstruing the *Cormier* case, affirms "there is a *presumption of hostile atmosphere* where the families live proximately" and

4. Melancon v. Sonnier, 157 So. 2d 577 (La. App. 3d Cir. 1963) applied accepted jurisprudentially determined rules on proof of bad faith in putative marriages and on proof of the fact of marriage itself.

5. 159 So. 2d 544 (La. App. 3d Cir. 1964).

6. Separation and divorce decisions not requiring special comment herein are: Breaux v. Breaux, 161 So. 2d 403 (La. App. 1st Cir. 1964) applying the usual rule that mutual fault deprives both parties of cause for separation; Mason v. Mason, 155 So. 2d 216 (La. App. 2d Cir. 1963) affirming that husband's leaving the common dwelling by mutual agreement does not constitute abandonment; Walker v. Walker, 159 So. 2d 344 (La. App. 2d Cir. 1963) applying the rule that he who alleges reconciliation must prove it; Antony v. Antony, 160 So. 2d 765 (La. App. 3d Cir. 1964) applying accepted rules on proof of adultery; LeBlanc v. LeBlanc, 162 So. 2d 838 (La. App. 1st Cir. 1964) affirming previous decisions on the effect of perjured testimony on a judgment of divorce or separation; and Lesnack v. Lesnack, 156 So. 2d 914 (La. App. 4th Cir. 1963) refusing to give effect to a default judgment rendered in the wife's suit for divorce after her suit and the husband's had been consolidated.

7. 193 La. 158, 190 So. 365 (1939).

8. 158 So. 2d 896 (La. App. 1st Cir. 1963).

"his failure" to provide a separate or remote home, where he can, *"is presumed to constitute cruel treatment."* Thus the plaintiff was not required to prove actual hostility on the part of her husband's family, only the nearness of their residences. It is regrettable that the husband did not seek a review of this decision so that the Supreme Court might have had an opportunity to expunge the appellate court's decision, for certainly it extends the notion of cruelty too far. Indeed, if followed literally, every husband able to do so would have to provide a home distant from his family's or be subject to a presumption of cruel treatment toward his wife.

It used to be that the cause for which a divorce was granted, and to whom it was granted, would make a great deal of difference for the subsequent rights of the parties. Thus under article 161 of the Civil Code the party divorced for adultery even now cannot marry his accomplice; under article 157 the party obtaining the divorce (for cause in the nature of fault on the part of the other spouse) is entitled to the custody of the children, unless their welfare demands it be given to the other; and, before the amendment of article 160 in 1964,[9] alimony rights frequently depended on who won the race to court. Now the wife at fault cannot demand alimony in any case under the amended article 160. The Supreme Court has for years construed article 157 to permit application of the presumption that it is better for young children and girls to be placed in the custody of their mothers, and occasionally the legislature will ratify marriages contracted in contravention of article 161. But it is still true that a spouse divorced for adultery may not marry his accomplice, and in this context two decisions are especially interesting. In *Jones v. Floyd*,[10] decided by the Court of Appeal for the Third Circuit, a wife who had obtained a separation on the ground of abandonment filed a reconventional demand for divorce on the ground of adultery, when her husband sought a divorce on the ground of non-reconciliation. In *McCaa v. McCaa*,[11] decided by the Court of Appeal for the Second Circuit, the wife filed a reconventional demand for divorce on the ground of living separate and apart for more than two years when her husband filed suit for divorce on the ground of adultery. The court of the

9. By La. Acts 1964, No. 48. See the discussion of this amendment in *Louisiana Legislation of 1964 — Persons and the Family*, 25 LA. L. REV. 13 (1964).
10. 154 So. 2d 604 (La. App. 3d Cir. 1963).
11. 163 So. 2d 434 (La. App. 2d Cir. 1964).

Third Circuit refused to grant the wife a divorce on the ground of adultery saying that the wife had "no legally recognized interest" to defeat her husband's right to marry his paramour when he is "entitled by law" to a divorce on another ground. On the other hand, the Second Circuit awarded the plaintiff husband a divorce on the ground of adultery even though the wife had reconvened for divorce on the ground of living separate and apart for the required time. Certainly the comparison and appraisal of the cases would be more interesting if the plaintiff's and reconvenor's positions had been reversed in the Third Circuit's case, so that in both cases the plaintiff would have been the party pleading adultery, and the reconvenor the party pleading separation in fact or non-reconciliation. Would the Third Circuit have given the divorce to the spouse reconvening for divorce on the ground of separation in fact or non-reconciliation? If so, the court clearly would have shown "odium" for article 161 (forbidding marriage of the divorced adulterer and accomplice) and "favor" toward the laws providing the other grounds, a practice forbidden by article 20 of the Civil Code. Probably the court of the Third Circuit would not have done this, so we may presume that the decisions may be reconciled as grants of divorce to plaintiffs with cause regardless of the causes alleged in reconvention. Such a reconciliation of the decisions, however, if taken as a rule, would place a premium on the race to the divorce court, a result to be avoided. Clearly divorce for cause and for separation in fact or non-reconciliation ought to be ranked by legislative act to eliminate this possibility. On this ranking, the writer would differ from the judges of the Third Circuit, preferring to grant the divorce to the party proving the adultery of the other, precisely to prevent the latter from ever marrying his or her accomplice. The seriousness of adultery warrants this sanction.

ALIMONY[12]

Alimony *pendente lite* is, as the words imply, alimony pending the outcome of litigation, and the litigation referred to is a

12. Alimony decisions involving domestic law only and not requiring comment herein are: Poydras v. Poydras, 155 So. 2d 221 (La. App. 1st Cir. 1963); Dupuis v. Patin, 155 So. 2d 768 (La. App. 3d Cir. 1963); McNeill v. McNeill, 156 So. 2d 307 (La. App. 4th Cir. 1963); Wilson v. Wilson, 157 So. 2d 590 (La. App. 2d Cir. 1963); Teague v. Teague, 157 So. 2d 595 (La. App. 2d Cir. 1963); Lucas v. Lucas, 157 So. 2d 615 (La. App. 2d Cir. 1963); Gautreaux v. Hebert, 158 So. 2d 277 (La. App. 3d Cir. 1963); Anderson v. Anderson, 158 So. 2d 303 (La. App. 1st Cir. 1963); and Stoltz v. Stoltz, 162 So. 2d 103 (La. App. 4th Cir. 1964).

suit for separation from bed and board or for divorce. Once a decree either granting or denying divorce is final, and once that denying separation is final,[13] the right to alimony *pendente lite* ceases. Furthermore, what has been paid as alimony *pendente lite* cannot be recovered by the husband even if the separation or divorce is not granted, and under similar circumstances amounts due but not yet paid may be demanded by the wife. All this is clear for alimony *pendente lite* claimed in suits for separation or divorce filed in Louisiana. What, however, is to be done in situations in which a wife files suit for separation or divorce in this state and the husband proves that the parties were already divorced (whether in Louisiana or elsewhere), at the time of the wife's suit? Until there is a final judgment in the suit recognizing the validity of the previous divorce the wife clearly should be entitled to receive payment of alimony *pendente lite*, for the truth of the husband's exception cannot be assumed and must be proven. But when the validity of the previous divorce is proven, should the wife be allowed to retain all the payments made as alimony *pendente lite*, or should she be required to return all amounts exceeding those to which she might be entitled as a divorced wife? This was the principal question presented in *Walker v. Walker*.[14] Judges Hood and Culpepper took the first view, affirming that the wife should be entitled to retain the amounts paid as alimony *pendente lite* in any case. Judge Tate, however, suggested that on its being proven that the parties had been divorced the wife should be obliged to return all amounts above what she may be judged entitled to as alimony after divorce, and this on the principle of unjust enrichment. The writer agrees with this latter solution. Our legislation on alimony *pendente lite* certainly was not written for application to cases of this kind. The case calls for a decision by application of article 21 of the Civil Code, and this in effect is what Judge Tate's opinion is.[15]

13. Under the Louisiana jurisprudence alimony *pendente lite* continues after a separation judgment.

14. 157 So. 2d 476 (La. App. 3d Cir. 1963), *writ granted*, 245 La. 582, 159 So. 2d 289 (1964).

15. The same decision also implied that a divorce rendered in another state might, if personal procedural jurisdiction were obtained over both spouses, limit the wife's right to alimony in the future. For a discussion of this aspect of the case see the writer's comments on the amendment to La. Civil Code article 160 by Acts 1964, No. 48, at 25 LA. L. REV. 13 (1964). Other decisions on alimony suits following divorces in other jurisdictions, not commented on here, are Levert v. Levert, 156 So. 2d 284 (La. App. 4th Cir. 1963), *cert. granted*, 245 La. 98, 157 So. 2d 236 (1963), and Folds v. Folds, 160 So. 2d 251 (La. App. 2d Cir. 1964).

There were several other alimony decisions of interest. *Hebert v. Hebert*[16] serves to emphasize the inequity of the rule that alimony payments continue to fall due even though the reason for the alimentary obligation ceases or is suspended. The mother had been deprived of custody pending juvenile court proceedings and during this period the father had in fact supported the child. Nevertheless, because the father had not petitioned for a discontinuance of the alimony, the mother was given judgment for the payments falling due during the period. The rule is not new, but few alimony obligors are aware of its existence, and thus it becomes an instrument of injustice.

In *Vedrenne v. Vedrenne*[17] the court of appeal indicated approval of the practice, which it initiated in 1962,[18] of reducing the husband's liability for alimony by the income the wife's *total assets* (presumably her "means" under article 160 of the Civil Code) would yield if converted to cash. The court did not, however, adhere to the rule strictly, but used its discretion, as is proper, in fixing the final amount of the award. This method of computing the "means" of the wife certainly has not yet been fully tested, and it is difficult to state the extent of its merits and demerits. One of its merits, however, is that it does not require the wife to consume her capital before claiming alimony, and another is that it frankly characterizes "means" in terms of potential income from capital assets. Nevertheless, even as so interpreted, article 160 provides a different standard for alimony than article 148 on alimony *pendente lite*; for there only *actual* income is taken into consideration and under article 160 both actual income from any source and the potential income from capital are considered.

Finally, in *Jefferson v. Jefferson*,[19] the one Supreme Court decision involving an alimony question, it was held that a grandparent may be sued for alimony without establishing that the parents are unable to provide support, the legislation on alimony between ascendants and descendants not ranking the obligations. The writer agrees that under the legislation as it stands the party seeking alimony need not show any factor other than need, and that he need not sue the alimony obligors in any particular

16. 159 So. 2d 537 (La. App. 3d Cir. 1964).
17. 163 So. 2d 853 (La. App. 4th Cir. 1964).
18. In Roberts v. Roberts, 145 So. 2d 669 (La. App. 4th Cir. 1962).
19. 246 La. 1, 163 So. 2d 74 (1964).

order or all of them collectively. It would seem proper, however, to hope for legislation ranking alimentary obligations and permitting the relative sued to compel the joinder of all persons obligated with him or before him so that his own obligation might be fixed as the portion of the total amount needed by the plaintiff and not payable by other persons.

PATERNITY[20]

Burrell v. Burrell[21] and *Melancon v. Sonnier*[22] are two more decisions in the long line of cases demonstrating the substantive injustice worked by the Louisiana judiciary's interpretation of the Civil Code's articles on "proof of legitimate filiation." Here it will be sufficient to consider only the *Burrell* facts and decision. Three children were born to Mrs. *D* while living in open concubinage with Mr. *B* in his home. Had Mrs. *D* been a single woman, the children would have been Mr. *B*'s by application of Civil Code article 209, under which the children of a concubine are those of the man in whose home she lives; but because she was a married woman, the court, consistently with prior jurisprudence interpreting articles 184 to 212 of the Civil Code, adjudged them to be the children of Mr. *D*. Mrs. *D* had sought to prove Mr. *B* was father of the children and to require him to pay alimony for their support. Now, undoubtedly Mr. *D* will have the honor of supporting the children, and treating them, of necessity of law, as his forced heirs. Yet the difficulty does not result so much from the legislation as from its interpretation. Were it recognized that the presumption that the husband of the mother is the father of her children properly has no application when there is no basis for reputing them to be such (as in this case, if the mother is living in another's home as his concubine) then great injustice could be avoided.[23]

ADOPTION

In re Ackenhausen[24] is worthy of note for its interpretation of R.S. 9:422.1, even if only by way of dictum. Under the stat-

20. Cases involving paternity questions not requiring discussion herein are Carter v. Canal Ins. Co., 154 So. 2d 476 (La. App. 1st Cir. 1963) and Ferguson v. Cascio, 158 So. 2d 471 (La. App. 2d Cir. 1963).

21. 154 So. 2d 103 (La. App. 1st Cir. 1963).

22. 157 So. 2d 577 (La. App. 3d Cir. 1963).

23. See the writer's observations on this matter in *Who Is the Papa*, 18 LA. L. REV. 685 (1958).

24. 244 La. 730, 154 So. 2d 380 (1963).

ute, a person married to a child's parent may adopt the child without the consent of the other parent if his spouse has custody and the other parent "has refused or failed" over the period of a year to comply with an order for its support. Under this decision the failure or refusal must not have been "with just cause, and therefore excusable."

MINORS AND INTERDICTS

Jefferson v. Jefferson,[25] already considered in another context,[26] serves to point up as unsatisfactory two rules of law concerning minors. The first is that the minor may not sue his parents during paternal authority. The second is that there is no one authorized to represent the minor if his father (or the mother if the father is a mental incompetent or an absentee) neglects to do so. Here the mother, acting as the child's representative, sued the father and grandparents for alimony. The court upheld the mother's right to represent the child because it found the father to be an absentee,[27] and gave judgment against the grandparents. The court did not give judgment against the father and, although it did not state its reasons, it must be assumed that it did not do so because of the prohibition of suit by a child against his parent in R.S. 9:571, added to our legislation by Act 31 of 1960. Clearly under this new legislation the child cannot sue the father civilly for alimony or anything else as long as his parents are not separated from bed and board or divorced, and the only remedies for the situation would be to urge criminal proceedings against the father under articles 74 and 75 of the Code of Criminal Law (for the *crime* of criminal neglect of family) or for the mother to seek a separation from bed and board. Neither of these actions should be encouraged if it is at all possible to avoid them, and thus the rule of law which does encourage them must be judged undesirable. Moreover, as there is no legislation giving the mother or anyone else the authority of an undertutor, no one can take steps to compel the father to pursue the child's interests against third persons. Legislation on these two points, therefore, would appear to be indicated.

In re Tutorship of La Fauci Children[28] revealed two more

25. 246 La. 1, 163 So. 2d 74 (1964).
26. See *Alimony*, p. 294 *supra*.
27. See LA. CODE OF CIVIL PROCEDURE arts. 683 and 4502 (1960).
28. 156 So. 2d 233 (La. App. 4th Cir. 1963).

legislative deficiencies. Article 39 of the Civil Code, written before the day when parents could be deprived of the custody of their children, provides that "the domicile of a minor not emancipated is that of his father, mother, or tutor." Article 4031 of the new Code of Civil Procedure, apparently ignoring the present practice, provides that petitions for the appointment of a tutor shall be "in the parish where the surviving parent is domiciled." In the instant case the Juvenlie Court in Jefferson Parish had awarded custody of the children to persons domiciled there. The mother, seeking to be confirmed as tutrix, sued in Orleans, the parish of her domicile. The court ruled that the children were domiciled in Jefferson Parish and that article 4031 of the Code of Civil Procedure did not "embrace" this situation, but that under its "rationale" the suit should be initiated at the domicile of the children.

Still a third case illustrating an unsatisfactory element in the law of incapables is *Doll v. Doll.*[29] The court of appeal followed long-standing jurisprudence interpreting articles 389 and 422 of the Civil Code to mean that no one can be interdicted unless *all three* of the following factors are present: incapacity to administer one's affairs, incapacity to care for one's person, and an absolute necessity for the interdiction. The writer submits there is need for ameliorating legislation. One may be perfectly capable of caring for one's person without being capable of administering one's affairs, and interdiction here may be as necessary as tutorship for a teen-age child.

CUSTODY

Three custody decisions were of special interest. In both *Mouton v. St. Romain*[30] and *State ex rel. Rothrock v. Webber*[31] parents had executed authentic acts delivering custody of their children to third persons and consenting to their being adopted by them. In both cases the parents revoked their consent to the proposed adoptions and sought to regain custody. The same

29. 156 So. 2d 275 (La. App. 4th Cir. 1963). In another appeal in the same case, 160 So. 2d 323 (La. App. 4th Cir. 1964), the court ruled that although the person successfully initiating interdiction proceedings could recover for attorney fees, he could not recover for the fees of an associate counsel not employed by him, and thus that such associate counsel could not recover directly from the interdict's estate. Apparently the fee recovered by the primary counsel was in reality for all legal services, and thus the associate counsel should have proceeded against him.

30. 245 La. 839, 161 So. 2d 737 (1964).

31. 245 La. 901, 161 So. 2d 759 (1964).

court of appeal, that for the Third Circuit, had returned the child to the parent in *Mouton*[32] and denied the return in *Rothrock*.[33] The Supreme Court in both cases allowed the parents to regain the custody of their children. In the third case, *Brown v. Ellison*,[34] the court of appeal returned a child to its mother after she had placed it in the care of third persons temporarily, until she could better care for it. Assuming the facts to be well stated by the court of appeal, the *Brown* case poses no difficulty, for parents certainly have the right to delegate to others the care of their children. Nothing in our law requires a parent to care personally for his child, and there is no failure of legal obligation as long as the parent sees to it that his child is cared for properly. Such delegation does not imply either an abandonment or a transfer of custody intended to be permanent. In this kind of situation, therefore, there should be no question of the parent's right to regain the custody of his or her child.

The *Mouton* and *Rothrock* situations, however, pose the problem of the effect to be assigned to transfers of custody apparently intended to be permanent. Actually our written law does not foresee any voluntary parental transfer of permanent custody (and therefore of a portion of paternal authority) to third persons other than one to an *adoption agency* with a view to that agency's placing the child for adoption.[35] Thus it may well be asked whether any other attempt at a permanent transfer of custody can be recognized as operative in itself. It would seem appropriate to regard a parental attempt to give custody permanently to another as a violation of public order, as evidenced by the framework of our law on paternal authority (including its obligations) and supported by sound reason. But, granted this to be so, it is also true that our written law once did, and in one respect still does, evidence the principle that parents who *abandon* their children should not be entitled to regain their custody.[36] Article 213 of the Civil Code, unfortunately now repealed,[37] though probably not with the view to denying this principle, used to provide that parents could not recover a foundling from

32. Mouton v. St. Romain, 153 So. 2d 890 (La. App. 3d Cir. 1963).
33. State *ex rel.* Rothrock v. Webber, 155 So. 2d 763 (La. App. 3d Cir. 1963), *cert. granted*, 245 La. 73, 156 So. 2d 607 (1963).
34. 162 So. 2d 805 (La. App. 4th Cir. 1964).
35. LA. R.S. 9:402, 9:404 (1950).
36. La. Acts 1948, No. 227.
37. The writer suspects that this article was repealed by La. Acts 1948, No. 227, because of its provision permitting *relatives of the child* other than the parents to claim its tutorship and its custody.

those who had taken care of it without showing they had lost the child through "force, fraud, or accident." Today only the juvenile court legislation evidences the notion that custody may be taken from parents for abandonment or neglect.[38] The principle is a sound one, nevertheless, and apparently it was this principle, liberally construed, which was applied in both *Mouton* and *Rothrock*; for in each case the court emphasized that the "surrender" had been made by the parents when they were in effect under a kind of duress from great emotional strain or financial difficulty. The same principle, too, was applied in 1955 in *State* ex rel. *Deason v. McWilliams*,[39] the Supreme Court then denying a return of custody to parents who had surrendered their child even though they were in every way capable of rearing it.

It may well be, however, that in some circumstances the parents should not be allowed to regain custody of their children even though the original surrender was intended to be temporary, as a mere delegation of a portion of paternal authority, or intended to be permanent, but made under pressure of circumstances. Such would be the case where the parents themselves have ceased to be fit or able to provide an *adequate* home for the child, or where the shift of the child from its then home to its parents' home would almost certainly cause it serious emotional harm. Parental right is sacred, but it is no more so than the welfare of the child. This, after all, is the principle underlying juvenile court legislation permitting parents to be deprived of the right to custody after abandonment or neglect of the child. Our written law not being sufficiently explicit in detail, much discretion must be left to the judiciary to appreciate the facts in terms of the principle, and here reasonable men may well differ in their appreciation of the particular circumstances.

A fourth custody decision of interest is *Bush v. Bush*,[40] and this for its strong statement against divided custody decrees. It may be added, too, that divided custody would cause difficulties in the law of tutorship, for tutorhip follows an award of custody to a parent following separation or divorce.[41]

38. LA. R.S. 13:1570(1), 13:1580 (1950).
39. 227 La. 957, 81 So. 2d 8 (1955).
40. 163 So. 2d 858 (La. App. 2d Cir. 1964).
41. LA. CIVIL CODE art. 250 (1870).