

# Minor's Marriage Contract - Absolute Nullity?

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### Repository Citation

Jeanette K. Giddens, *Minor's Marriage Contract - Absolute Nullity?*, 36 La. L. Rev. (1976)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol36/iss3/7>

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proach avoids postponement of the injured party's recovery and affords greater protection to the litigant's right not to be defamed. The integrity of the judicial privilege is not threatened by the *Viera* approach because material allegations may still be made without fear of liability. Furthermore, the *Viera* rule affects only the procedural means to recovery, not the determination of whether a statement is actionable.

Perhaps the most significant advantage provided by the *Viera* rationale is that it discourages irresponsible litigation. Granting a more convenient and economical method of enforcing his cause of action to the defamed party would force the parties in litigation to be more precise and responsible in their pleadings and thus avoid unnecessary injury.

*J. David Garrett*

#### MINOR'S MARRIAGE CONTRACT—ABSOLUTE NULLITY?

A sixteen-year-old unemancipated minor and her future husband executed a prenuptial agreement renouncing the community of acquets or gains.<sup>1</sup> The father of the bride refused to join his wife and daughter in signing the marriage contract. When the husband instituted a divorce action thirteen years later, the wife reconvened for a partition of the community property, alleging that the separate property agreement was invalid due to her minority at the time of its execution and the absence of her father's assistance and sig-

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1. A prenuptial agreement, commonly referred to as a marriage contract, is an agreement entered into by a couple stipulating the financial and property aspects of the marriage. S. LITVINOFF & W. TÊTE, LOUISIANA LEGAL TRANSACTIONS AND THE CIVIL LAW OF JURIDICAL ACTS 77 (1969) [hereinafter cited as LITVINOFF & TÊTE]. LA. CIV. CODE art. 2325 permits couples to stipulate property regimes of their own design provided "they be not contrary to good morals." LA. CIV. CODE art. 2332 provides that the community of gains exists by operation of law when there is no stipulation to the contrary prior to the marriage. Marriage contracts are governed by strict requirements. LA. CIV. CODE art. 2328 provides that they must be by notarial act and article 2329 provides that they cannot be altered after the marriage, except that couples moving to this state are given a one-year period in which to make a marriage contract. LA. CIV. CODE art. 2329. See H. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 118 (1945), in which the writer suggests that post-nuptial contracts would make it possible for spouses dissatisfied with the community property system to change it and thus prevent "possible friction" in their marriage.

nature on the document. The trial court's holding that the marriage contract was an absolute nullity<sup>2</sup> was reversed by the First Circuit Court of Appeal, which held that the contract was valid from its inception.<sup>3</sup> In reversing the first circuit and reinstating the decision of the lower court, the Louisiana Supreme Court *held* that the marriage contract entered into by the unemancipated minor without the consent of both parents was null. *Wilkinson v. Wilkinson*, 323 So. 2d 120 (La. 1975).

Unemancipated minors in Louisiana are under a general incapacity to contract except in certain instances set forth in Civil Code article 1785.<sup>4</sup> The incapacity<sup>5</sup> is based on the presumption that minors are unable to appreciate the consequences of juridical acts,<sup>6</sup> and it protects minors by allowing them to plead their minority and escape liability stemming from contracts entered without the assistance of their tutors.<sup>7</sup> Ordinary contracts of minors are relative nullities and therefore are ratifiable.<sup>8</sup>

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2. *Wilkinson v. Wilkinson*, No. 28,545 (Family Court, Parish of East Baton Rouge, Jan. 2, 1975).

3. *Wilkinson v. Wilkinson*, 312 So. 2d 107 (La. App. 1st Cir. 1975).

4. LA. CIV. CODE art. 1785: "Minors emancipated may contract in the cases already provided by law, and when not emancipated, their contracts are valid, if made with the intervention of their tutors, and with the assent of a family meeting, in the cases where by law it is required. . . . His stipulations in a marriage contract, if made with the consent of those whose authority is in such case required by law, are also valid. . . . In all other cases, the minor is incapacitated from contracting, but his contracts may be rendered valid by ratification, either expressed or implied, in the manner and on the terms stated in this title under the head: *Of Nullity or Rescission of Agreements.*"

5. See LA. CIV. CODE arts. 1864-80 which deal with the relief afforded minors on account of lesionary contracts, and articles 2221-31 which deal with the action of nullity or rescission which can be brought by minors.

6. For an excellent discussion of this presumption, see Comment, *Contractual Incapacity in the Louisiana Civil Code*, 47 TUL. L. REV. 1093 (1973).

7. The term "tutor" encompasses a parent who administers the estate of a minor child. See LA. CIV. CODE art. 221. For cases wherein a minor escapes liability, see *International Accountants Soc'y v. Santana*, 166 La. 671, 117 So. 768 (1928); *LaPorte v. Clesi, Inc.*, 197 So. 2d 419 (La. App. 4th Cir. 1967); *Reeme v. Motors Securities Co.*, 51 So. 2d 833 (La. App. 2d Cir. 1951); *D. H. Holmes Co. v. Rena*, 34 So. 2d 813 (La. App. Orl. Cir. 1948); *Kothe v. Von Behren*, 5 So. 2d 571 (La. App. Orl. Cir. 1942).

8. LITVINOFF & TÊTE at 74; Note, 38 TUL. L. REV. 755 (1964). LA. CIV. CODE art. 1785 provides that a ratification can be express or implied. LA. CIV. CODE art. 2272 provides that an express ratification occurs through a recognitive or confirmative act curing the defect. Implied or tacit ratification occurs through the running of prescription. See LA. CIV. CODE arts. 2221,

Article 1785 specifically provides that a minor's "stipulations in a marriage contract, if made with the consent of those whose authority is in such case required by law, are also valid." Article 2330 elaborates:

The minor, who is capable of contracting matrimony, may give his consent to any agreements which this contract is susceptible of; and the agreements entered into and the donations he has made by the same, are valid, *provided that, if he be not emancipated, he has been assisted in the agreement by those persons whose consent is necessary to his marriage.*<sup>9</sup>

Before the instant case, no decisive jurisprudence interpreted the effect of article 2330 upon the validity of marriage contracts entered into by minors without parental consent.<sup>10</sup> If article 2330 is read literally, marriage contracts executed without assistance by unemancipated minors should be valid because Civil Code article 112<sup>11</sup> allows minors in Louisiana to marry validly without the consent of their parents. Although article 97 requires that minors have parental consent to marry,<sup>12</sup> article 112 provides that a marriage lacking such consent

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3542. There is a conflict as to whether five or ten years is the applicable prescriptive period. The jurisprudence has used both; in *Succession of Sallier*, 115 La. 97, 38 So. 929 (1905) the ten year period was used; the five year period was used in *Whitney Nat'l Bank v. Schwob*, 203 La. 175, 13 So. 2d 782 (1943) and in *Savoie v. Duplantis*, 167 So. 127 (La. App. 1st Cir. 1936). Actions taken by the minor after reaching majority have, in some cases, been construed as an implied ratification. *E.g.*, *Taylor v. Rundell*, 2 La. Ann. 367 (1847); *Navarro v. Kohlmeier & Co.*, 264 So. 2d 691 (La. App. 4th Cir. 1972); *Butto v. Central Fin. Co.*, 73 So. 2d 44 (La. App. Or. Cir. 1954). Also, the plea of minority is available only to the minor or his representative, and the contract produces ordinary effects until it is declared null. *Scott v. Continental Ins. Co.*, 259 So. 2d 391 (La. App. 2d Cir. 1972); *Harris v. Ward*, 224 So. 2d 517 (La. App. 2d Cir. 1969).

9. Emphasis added.

10. In *Succession of Wilder*, 22 La. Ann. 219 (1870), the court dealt with the validity of a minor's marriage contract that had been executed without parental consent. The contract had been executed in Mississippi and the decision as to its validity was grounded upon that state's common law principles.

11. LA. CIV. CODE art. 112: "The marriage of minors, contracted without the consent of the father and mother, can not for that cause be annulled, if it is otherwise contracted with the formalities prescribed by law; but such want of consent shall be a good cause for the father and mother to disinherit their children thus married, if they think proper."

12. LA. CIV. CODE art. 97: "The minor of either sex, who has attained the

cannot be annulled for that cause.<sup>13</sup> The discrepancy stems from the divergence by the Louisiana redactors from the French view, which permits non-consenting parents to bring an action to annul such marriages.<sup>14</sup> By rejecting the French remedy, the redactors of the Louisiana Civil Code apparently chose to make marriages contracted by minors without parental consent valid.<sup>15</sup> If parental consent is not necessary for the validity of a minor's marriage, then under the provisions of article 2330, arguably none should be necessary for the validity of his marital property agreement.

In the instant case,<sup>16</sup> however, the Louisiana Supreme Court rejected that argument, and found that the purpose of article 112,<sup>17</sup> which prohibits the annulment of minors' marriages by non-consenting parents, is solely to implement two public policies: to uphold the validity of marriages whenever possible and to avoid branding children as illegitimate. The court felt that the marital property agreement must be viewed in light of another public policy, that of protecting minors in their contractual relationships, and it stated that article 2330 must be interpreted as "an expression of this state's strong public policy of protecting minors. . . ."<sup>18</sup>

The court's decision that parental assistance is necessary for a minor's marriage contract seems correct. For the court to decide otherwise, it would have had to ignore the basic principle that minors are incapable of understanding the consequences of their juridical acts and are in need of assistance. Although the same principle would seem to require that

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competent age to marry, must have received the consent of his father and mother or of the survivor of them; and if they are both dead, the consent of his tutor. He must furnish proof of this consent to the officer to whom he applies for permission to marry."

13. The parents' only recourse is that LA. CIV. CODE art. 112 allows them to disinherit their children if they marry without consent. *See, e.g.*, *Stephens v. Duckett*, 111 La. 979, 36 So. 89 (1904).

14. Code Napoleon art. 182 was not adopted by the Louisiana redactors. It provides, "A marriage contracted without the consent of the father and mother, of the ancestors, or of the family council, in cases where such consent was necessary, can only be impeached by those whose consent was requisite, or by such of the two married persons as stood in need of that consent" (translation by a Barrister of the Inner Temple; London 1824).

15. The jurisprudence is in accord. *See State v. Golden*, 210 La. 347, 26 So. 2d 837 (1946); *Delpit v. Young*, 51 La. Ann. 923, 25 So. 547 (1899).

16. *Wilkinson v. Wilkinson*, 323 So. 2d 120 (La. 1975).

17. *See* text of LA. CIV. CODE art. 112 in note 11, *supra*.

18. 323 So. 2d at 125.

minors be assisted in contracting marriage,<sup>19</sup> the derogation in article 112 from this principle can be explained by the countervailing public policy of upholding marriages and protecting the legal status of children which, as the court indicated, is not served by the validation of marital property agreements entered into by minors without parental consent. Moreover, it may be inferred from articles 1785 and 2330 that the redactors contemplated parental consent and assistance for a valid marriage contract.<sup>20</sup> Article 1748,<sup>21</sup> which limits the capacity of an unemancipated minor to make donations in a marriage contract, supports this inference. The consent requirement in article 1748 is parallel to that in article 2330, making it susceptible to the same attack that can be made on article 2330, *i.e.*, no parental consent was intended to be necessary because none is needed for a valid marriage. However, article 1748 goes one step further and states that "[i]f the relations, whose consent is necessary be dead, the minor not emancipated can not give without the authorization of a court of justice"; its mandatory language clearly points out that an unemancipated minor cannot act without assistance.<sup>22</sup>

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19. LA. CIV. CODE art. 86 provides: "The law considers marriage in no other view than as a civil contract." The purpose of this article is to remove the institution of marriage from the realm of religious or ecclesiastical law and make it subject only to civil authority. *Hurry v. Hurry*, 144 La. 877, 81 So. 378 (1919).

20. LA. CIV. CODE art. 2330 should be read in conjunction with the other code articles which make reference to minors and marriage contracts. *See, e.g.*, article 2226 which provides: "A minor is not restituable against the engagements stipulated in his marriage contract, if they were entered into with the consent or in the presence of those whose consent is requisite for the validity of his marriage." (The phrase "or in the presence" is an error in the English translation of the French text and should read "with the assistance.") It is arguable that the consent requirement is non-existent because of article 112, but one wonders why the redactors kept referring to a consent requirement. One writer suggests that this confusion is the result of poor drafting and that the spirit of article 2330 should be pursued rather than construing it literally and depriving it of any meaning. *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Matrimonial Regimes*, 36 LA. L. REV. 409, 409-11 (1976).

21. LA. CIV. CODE art. 1748: "A minor, not emancipated, can give only with the consent of those relations whose consent is requisite for the validity of the marriage; and with that consent, he or she can give all that the law permits a married person of full age to give to his or her consort. . . ."

22. For additional analysis of the consent requirement in article 2330, see *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—*

By reinstating the family court judgment,<sup>23</sup> the supreme court apparently held that the Wilkinsons' defective marriage contract was an absolute nullity.<sup>24</sup> However, the court relied heavily on the law and jurisprudence governing the ordinary, relatively null contracts of minors<sup>25</sup> and failed to explain why the contract in question was an absolute nullity. Deciding whether a contract is an absolute or relative nullity is a crucial determination because absolute nullities never possess legal existence and cannot be ratified.<sup>26</sup> The interest being protected is the criterion for deciding the type of nullity. If the law seeks to protect the interests of an individual, for example, a minor or an interdict, then that person's contract is only a relative nullity; if the public interest is at stake, it is an absolute nullity.<sup>27</sup>

In the case of a minor's marriage contract, determining which type of nullity exists is difficult because both interests are present. The purpose of a marriage contract is not only to establish a property regime for the couple, but also to insure stability in property rights. This latter goal is of paramount public interest<sup>28</sup> because persons dealing with a married couple have an interest in knowing what that couple's property regime is for commercial and credit purposes. Planiol

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*Matrimonial Regimes*, 36 LA. L. REV. 409, 409-11 (1976). Professor Pascal stresses that a minor needs the assistance of a mature person having the minor's welfare in mind if he wants to enter into a contract departing from the legal property regime.

23. See text at note 2, *supra*.

24. The supreme court states, "The Family Court decreed that the pre-nuptial contract was absolutely null . . .," and concludes, "Accordingly, the decision of the court of appeal is reversed, and the judgment of the Family Court of East Baton Rouge is reinstated. . . ." 323 So. 2d at 122, 127.

25. The court quotes extensively from *Harris v. Ward*, 224 So. 2d 517 (La. App. 2d Cir. 1969), and repeats the warning, "[O]ne who deals with a minor does so at his peril," from *LaPorte v. Clesi, Inc.*, 197 So. 2d 419, 423 (La. App. 4th Cir. 1967). Both of these cases dealt with the ordinary contracts of minors.

26. LITVINOFF & TÊTE at 74; 1 PLANIOL, CIVIL LAW TREATISE, pt. 1 nos. 326-49 at 218-33 (11th ed. La. St. L. Inst. transl. 1959); Comment, *Contractual Incapacity in the Louisiana Civil Code*, 47 TUL. L. REV. 1093, 1124-30 (1973); Note, 38 TUL. L. REV. 755 (1964).

27. Palmer, *Contractual Incapacity in the Louisiana Civil Code—Introduction*, 47 TUL. L. REV. 1085, 1088 (1973); *Whitney Nat'l Bank v. Schwob*, 203 La. 175, 179, 13 So. 2d 782, 783 (1943). See also *Vaughan v. Christine*, 3 La. Ann. 328 (1848).

28. Comment, *Contractual Incapacity in the Louisiana Civil Code*, 47 TUL. L. REV. 1093, 1132 (1973).

persuasively argued that the marriage contract should not be a relative nullity and thereby have its validity in a state of uncertainty:

Its special nature makes relative nullity impossible. It can be only either fully valid or absolutely void. Also the matrimonial agreement must be clear from the beginning of the marriage. If the marriage contract is valid, it is fully respected; if it is void, spouses are married under the statutory system. The uncertainty created by relative nullity is incompatible with marriage contract.<sup>29</sup>

Thus, although both individual and public interests are involved, the public interest should prevail in determining whether the defective marriage contract is an absolute or relative nullity.<sup>30</sup>

If the court did mean that the contract was an absolute nullity, its discussion of the issues of prescription and estoppel was improper, since it discussed these issues as though the contract with which it was dealing were a relative nullity. The husband's contention was that the wife had lost her right to attack the contract since prescription had run. The court disposed of this contention by finding that she could not have sued her husband to attack the validity of the contract due to the exclusive listing of La. R.S. 9:291,<sup>31</sup> which prohibits a married woman from suing her husband during the marriage except in four specific instances. Whereas the court stressed that prescription does not run against a cause of action that cannot be exercised,<sup>32</sup> it could have simply disposed of the prescription plea with the answer that prescription does not run against absolute nullities.<sup>33</sup>

The husband further contended that the wife was es-

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29. 3 PLANIOL, CIVIL LAW TREATISE, pt. 1 no. 838 at 47 (11th ed. La. St. L. Inst. transl. 1959).

30. See Palmer, *Contractual Incapacity in the Louisiana Civil Code—Introduction*, 47 TUL. L. REV. 1085, 1088-92 (1973).

31. LA. R.S. 9:291 (1960) provides "As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for: (1) A separation of property; (2) The restitution and enjoyment of her paraphernal property; (3) A separation from bed and board; or (4) A divorce." The court reiterated its position that this list is exclusive and not illustrative. See, e.g., *Black v. Black*, 288 So. 2d 611 (La. 1974).

32. 323 So. 2d at 125-26. See, e.g., *Soirez v. Great Am. Ins. Co.*, 168 So. 2d 418 (La. App. 3d Cir. 1964).

33. See authorities in note 26, *supra*.



topped from denying the validity of the contract due to a reconciliation following a separation in 1966, the husband alleging that as part of this reconciliation the wife had admitted the validity of the contract. The court disposed of the second contention by finding that the evidence conflicted and that the husband had failed to prove the elements of an "estoppel in pais" claim.<sup>34</sup> Although speaking of "estoppel in pais," the court actually seemed to be referring to the possibility of a ratification of the contract through actions on the wife's part.<sup>35</sup> Nevertheless, whether the court means "estoppel in pais" or ratification is immaterial, because the proper disposition of this issue is simply that absolute nullities cannot be ratified.<sup>36</sup>

The practical effect of *Wilkinson* is that minors cannot derogate by contract from the community of acquets or gains without parental assistance, even though they can marry without parental consent. If the minor fails to obtain parental assistance, the marriage contract is ineffective and the community property regime takes effect through supplementary law.<sup>37</sup> This unintended result can be avoided if the parties are informed properly before the marriage takes place, and a means of dispersing this essential information can be found in Act 693 of 1975. This act provides that the Attorney General shall prepare a summary of the existing matrimonial regime laws which "shall emphasize the possibility of contracting expressly a regime of one's choosing before marriage . . .";<sup>38</sup> the marriage license clerk must furnish prospective spouses with a copy of this summary. To make it complete, the Attorney General should include a warning to minors that they must have parental consent if they desire to set up a valid property regime of their own design.

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34. "Estoppel in pais" is defined as "the effect of the voluntary conduct of a party whereby he is barred from asserting rights against another party justifiably relying on such conduct and who has changed his position to his detriment as a result of such reliance." *Babin v. Montegut Ins. Agency, Inc.*, 271 So. 2d 642, 645 (La. App. 1st Cir. 1972). The three elements are: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance.

35. Ratification of a contract can occur through actions that evidence an intent to affirm the contract. See cases in note 8, *supra*.

36. See authorities in note 26, *supra*.

37. LA. CIV. CODE arts. 2325, 2332.

38. La. Acts 1975, No. 693.