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## Introduction

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# SYMPOSIUM: FAMILY LAW

## Introduction

*Katherine Shaw Spaht\**

For the past fifteen years societal values and traditional family models have undergone radical change. The ferment and upheaval have uniformly altered conceptions about the relationship of family members to each other and to the rest of the community. The law regulating the family has likewise changed, but until now the reform in Louisiana has been piecemeal. Systematic reappraisal of Book I, "Of Persons," of the Louisiana Civil Code has begun; thus, a colloquium where solutions to current and future problems are proposed is particularly timely.

### LOUISIANA STATE LAW INSTITUTE COMMITTEE

Deliberations of the Persons Committee of the Louisiana State Law Institute<sup>1</sup> provided the impetus for a colloquium to consider issues of family law reform. Charged with the responsibility to revise Book I, "Of Persons," the committee began its deliberations with the articles governing marriage. Committee members include: Professor Katherine Shaw Spaht, Louisiana State University Law Center, Reporter; Justice Fred Blanche of the Louisiana Supreme Court; Eavelyn Brooks, an attorney with the Attorney General's office in New Orleans; Professor Thomas Carbonneau, Tulane University School of Law; Professor Kathryn Venturatos Lorio, Loyola University School of Law; Judge E. Donald Moseley of the Family Court of East Baton Rouge Parish; Cecil Ramey, a practicing attorney from Shreveport; Phillip Riegel, a practicing attorney from New Orleans; Kenneth Rigby, a practicing attorney from Shreveport; Professor Cynthia Samuel, Tulane University School of Law; and Leonard Martin, research associate with the Louisiana State Law Institute.

### ENTRY INTO MARRIAGE

In deliberations on the Civil Code articles governing entry into marriage, the committee decided primarily to clarify and simplify the legislation without making any significant policy changes. For example, the jurisprudence has always recognized that marriage is more than an ordinary civil contract,<sup>2</sup> and such a conclusion is supported by the historical

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1. 1938 La. Acts, No. 166, § 1 (codified at LA. R.S. 24:201 (1975)) (established the Louisiana State Law Institute as the official law revision commission and legal research agency of the state).

2. *Maynard v. Hill*, 125 U.S. 190 (1888); *Rhodes v. Miller*, 189 La. 288, 179 So.

background of article 86.<sup>3</sup> The committee suggested in its revision of that article that marriage be referred to as a relationship created by contract of the parties but governed by special rules. Another proposed article clarified the necessity of a ceremony for a valid marriage, and the committee recommended that provisions relating to requirements other than those of the actual ceremony be removed to the Revised Statutes' Civil Code Ancillaries. Because the jurisprudence<sup>4</sup> has interpreted the restriction on age of the parties as merely directory,<sup>5</sup> the committee also recommended that requirements of parental consent to the marriage of minors be included in the Revised Statutes.

More significant revisions to the articles on capacity to marry were made. Under the proposed legislation, persons of the same sex explicitly<sup>6</sup> have no capacity to marry nor do those related within the fourth degree by consanguinity or adoption.<sup>7</sup> Yet, borrowing from the Quebec Civil Code draft articles on entry into marriage,<sup>8</sup> persons related by adoption in the collateral line within the fourth degree may obtain judicial authorization to contract marriage under the committee proposal. In the comments to the proposed article, the committee directed that the judge should consider whether the policy of preserving family harmony will be advanced or impeded by the proposed union, since maintaining harmony within the family appears to have been one of the major objectives underlying the historical prohibition.<sup>9</sup>

Free consent of the parties to the marriage is required, and the committee delineated those instances in which consent is not freely given: when it is given under duress or by one who is incapable of discernment. The latter instance of defective consent resolves the problem of the insane party who consents to marriage which is not explicitly addressed in the present Civil Code articles.<sup>10</sup> Furthermore, the comments indicate that a person

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430 (1938); *Stallings v. Stallings*, 177 La. 488, 148 So. 687 (1933); *Hurry v. Hurry*, 144 La. 877, 81 So. 378 (1919).

3. R. Pascal & K. Spaht, *Louisiana Family Law Course* 7, 8 (3d ed. 1982).

4. *State v. Golden*, 210 La. 347, 26 So. 2d 837 (1946); La. Civ. Code art. 112.

5. La. Civ. Code art. 92.

6. La. Civ. Code art. 88. Article 88 reads as follows: "Such marriages *only* are recognized by law as are contracted *between a man and a woman* and solemnized according to the rules which the law prescribes." (Emphasis added).

7. Presently, Civil Code articles 94 and 95 do not direct expressly the prohibition against marriages of those related in the direct descending line and in the collateral line to persons related by adoption. If such marriages are prohibited, it is by virtue of Civil Code article 214 which provides that the adopted person is considered for all purposes as the legitimate child and forced heir of the adoptive parents.

8. Que. Civ. Code arts. 405-406 (1981 revision).

9. The other major objective of the prohibition appears to be the perceived harmful genetic effects of such marriages.

10. See La. Civ. Code arts. 91, 1788. See also R. Pascal & K. Spaht, *supra* note 3, at 66, 80-85.

incapable of discernment may include, but is not limited to, a person under the influence of alcohol or drugs, a mentally retarded person, or a person who is too young to understand the consequences of the marriage celebration.

#### NULLITY OF MARRIAGE

The chapter entitled "Of the Nullity of Marriage" provides for the consequences of failure to comply with the requisites of the first chapter. Marriages contracted by those without capacity or without a marriage ceremony are absolutely null.<sup>11</sup> In contrast, marriages contracted by a person under duress or who was incapable of discernment at the time of the ceremony are relatively null.

As to civil effects of an absolutely null marriage, the article originally proposed by the committee provided that civil effects flow in favor of a spouse<sup>12</sup> who contracted the marriage in good faith as long as the spouse remains in good faith. However, to this general principle,<sup>13</sup> the committee proposed an exception. If the marriage were absolutely null because of a spouse's prior undissolved marriage, the marriage would produce civil effects in favor of the other party who contracted it in good faith until the marriage was judicially declared null or he contracted another marriage. The comments explained the exception as follows:

In that situation the party whose prior undissolved marriage is the cause of nullity is the one who has the dispositive power to rectify the nullity (by divorcing his former spouse and remarrying his present one). The other party cannot do so. Thus, in that situation it is unfair to divest the latter of his putative spouse status as of the time that he learns of the cause of nullity. In so doing, the traditional Louisiana rule places the party whose prior marriage is the cause of nullity in a better position than

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11. Under the present jurisprudence, a marriage without a ceremony is absolutely null. See, e.g., *Johnson's Heirs v. Raphael*, 117 La. 967, 42 So. 470 (1906); *Succession of Donohue*, 389 So. 2d 879 (La. App. 4th Cir.), cert. denied, 394 So. 2d 280 (La. 1980); *Anderson v. Thomas*, 19 La. App. 428, 137 So. 378 (Orl. 1931), rev'd on other grounds, 174 La. 721, 141 So. 441 (1932).

12. No reference is made in the proposed article to their children or children born of the union as presently appears in Civil Code articles 117 and 118. Since there will be no distinction in rights accorded illegitimate and legitimate children in the proposed legislation, the children of absolutely null marriages will be afforded a presumption of paternity in the chapter of Book I concerning filiation. This will dispense with the necessity of instituting a suit to establish filiation within a particular time period for children born of such unions.

13. The stated general principle is merely a codification of the jurisprudence interpreting Civil Code articles 117 and 118. See, e.g., *Patton v. Cities of Philadelphia & New Orleans*, 1 La. Ann. 98 (1846); *Howard v. Ingle*, 180 So. 248 (La. App. 2d Cir. 1938); *Evans v. Eureka Grand Lodge*, 149 So. 305 (La. App. 2d Cir. 1933).

the one who took no part in causing it. Accordingly, the second paragraph of this article permits the spouse who has acted in good faith and whose prior marriage was not the cause of the nullity to enjoy the civil effects of marriage even after he ceases to be in good faith. This additional period ends when the party benefited by it contracts a valid marriage (whether with the other party to the null union or with a third party), or when the nullity of the bigamous marriage is judicially recognized, whichever occurs first.<sup>14</sup>

A relatively null marriage produces civil effects as to both parties until it is declared null, which may be at the instance of the party whose consent was not free or his legal representative under the original committee proposal. The committee recommended that the right be extended to a legal representative expressly to insure that the curator of an interdicted spouse, who had married but who was incapable of discernment, be permitted to initiate the action.<sup>15</sup> The minor who married, even though his consent was not freely given, was emancipated<sup>16</sup> and thus had procedural capacity to sue.<sup>17</sup> If the spouse whose consent was not freely given died before initiating the action, nothing could be gained by the institution of the suit for nullity by the succession representative.<sup>18</sup> The civil effects of the marriage were terminated by the death of the spouse; and since the declaration of nullity of a relatively null marriage is not retroactive, the other spouse enjoyed the benefits of a spouse by virtue of rights which vested at death.<sup>19</sup>

Because it is a relative nullity, a marriage to which one of the parties did not freely consent may be ratified by that party upon recovering his liberty or regaining his discernment. Ratification, being a broader term

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14. Louisiana State Law Institute, Revision of the Louisiana Civil Code of 1870, Book I, Title IV, Doc. No. 10-25-3, ch. 2, art. 3, comment (b) (council meeting Jan. 20, 1984) [hereinafter cited as Revision].

15. This article changes present law insofar as it explicitly states what was only implied in certain earlier decisions: that the legal representative of a spouse whose consent to marriage has not been freely given may bring an action of nullity on that party's behalf. See *Stier v. Price*, [214 La. 394, 37 So. 2d 847 (1948)]; *Vincent v. Ledoux*, [146 La. 144,] 83 So. 439 (La. 1919).

Revision, *supra* note 14, ch. 2, art. 2, comment (b). For a discussion of a related problem, the power of a curator of an interdicted spouse to initiate a separation action, see Note, *Omnipotent or Impotent? The Curator's Role in Separation and Divorce*, 43 La. L. Rev. 1019 (1983).

16. La. Civ. Code arts. 379-380.

17. La. Code Civ. P. art. 682.

18. Under article 5251(10) of the Code of Civil Procedure a legal representative includes executors and administrators of estates.

19. La. Civ. Code art. 934.

than cohabitation, which presently appears in article 111,<sup>20</sup> would include an express declaration or the lapse of the applicable prescriptive period in addition to sexual intercourse.

#### EFFECTS AND INCIDENTS OF MARRIAGE

Although numerous articles were offered to the committee which would have more comprehensively regulated the marriage relationship, the committee chose to impose only a few legal obligations upon married persons. Under the committee proposal, married persons owe to each other fidelity, support and assistance, just as under present Civil Code article 119.<sup>21</sup> The committee recommended, furthermore, that the statute barring suit between husband and wife during marriage be amended to permit a spouse to sue the other for support when they are living separate and apart.<sup>22</sup>

No alternative was recommended for Civil Code article 120, which imposes an obligation upon the wife to follow her husband and reside with him wherever he so chooses.<sup>23</sup> In *Crosby v. Crosby*,<sup>24</sup> the article was declared unconstitutional. The committee rejected a proposal to require the spouses to live together, because a majority of the members believed that the Civil Code should remain silent on the subject, given the increasing number of spouses who are prevented from doing so by the demands of their careers and other factors. Under the committee recommendation, the spouses are free to live together as necessary to fulfill their obligation mutually to support and assist each other.

The three basic obligations imposed by the chapter on incidents of marriage are expressly made matters of public order, and thus are not subject to contractual modification by the spouses. Although the article

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20. "In the cases embraced by the preceding article, the application to obtain a sentence annulling the marriage, is inadmissible, if the married persons have, freely and without constraint, cohabited together after recovering their liberty or discovering the mistake." La. Civ. Code art. 111.

21. "The husband and wife owe to each other mutually, fidelity, support and assistance." La. Civ. Code art. 119

22. La. R.S. 9:291 (Supp. 1984) provides:

Unless judicially separated, spouses may not sue each other except for causes of action arising out of a contract or the provisions of Title VI, Book III of the Civil Code; restitution of separate property; for divorce, separation from bed and board, and causes of action pertaining to the custody of a child or alimony for his support while the spouses are living separate and apart, although not judicially separated.

23. "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition." La. Civ. Code art. 120.

24. 434 So. 2d 162 (La. App. 5th Cir. 1983).

proclaiming the imperative character of the obligations is new, it is consistent with jurisprudence interpreting Civil Code article 119.<sup>25</sup>

To resolve a conflict in the jurisprudence concerning the effect of marriage on a spouse's surname,<sup>26</sup> the committee recommended an article which provides that marriage does not change the surname of either spouse; however, a married person may use the surname of either or both.

Regulation in the form of requiring spouses to contribute to the expenses of the marriage in proportion to their respective means,<sup>27</sup> requiring the spouses to choose the principal family residence together, and providing that neither spouse may alienate or encumber the principal family residence without the consent of the other<sup>28</sup> was rejected by the committee. The committee position on regulating the marriage relationship was ultimately to permit the spouses freedom in determining their respective roles and the manner of fulfilling their basic legal obligations.

#### CONTRACTS BETWEEN UNMARRIED COHABITANTS

While discussing obligations of married persons, several committee members raised the related issue of the rights of cohabitants, those who live together without benefit of marriage. Such relationships give rise to problems in adjusting the parties' monetary and property rights, especially when the relationship comes to an end. The traditional approach of leaving the parties in the situation in which they find themselves can create unjust results, especially in situations where cohabitants have worked together as an economic unit pursuant to an implied or express agreement concerning the disposition of the fruits of their labors.

To prepare for meaningful debate concerning the social phenomena and the appropriate legal response, the committee members read extensively and examined foreign legislation. The alternatives formulated ranged from the extreme positions of adopting a positive statement that contracts between unmarried cohabitants were unenforceable to imposing legal obligations upon cohabitants, as in some foreign jurisdictions. Both alter-

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25. *Holliday v. Holliday*, 358 So. 2d 618 (La. 1978); *Favrot v. Barnes*, 332 So. 2d 873 (La. App. 4th Cir.), writ denied, 334 So. 2d 436 (La.), rev'd in part on other grounds, 339 So. 2d 843 (La.), cert. denied, 429 U.S. 961 (1976).

26. Compare *Succession of Kneipp*, 172 La. 411, 134 So. 376 (1931) with *Wilty v. Jefferson Parish Democratic Executive Comm.*, 245 La. 145, 157 So. 2d 718 (1963).

27. The source of the proposal was article 445 of the 1981 revision of the Quebec Civil Code. Cf. La. Civ. Code art. 2373.

28. The source of the proposal was article 452 of the 1981 revision of the Quebec Civil Code. The redactors of the Quebec article had intended it to be a means of checking the right of a spouse to dispose, contrary to the interests of the family, of the family residence even when the family residence was separate property. The committee rejected this proposal because the majority of its members believed that a spouse's right over his separate property should not be thus restricted. See La. Civ. Code art. 2347.

natives were rejected: the former because it was more restrictive than the present Louisiana position; the latter because it would have undermined the legal uniqueness of marriage and imposed on many cohabitants precisely the legal effects that they had sought to avoid by eschewing marriage.

Instead, the committee proposed that contracts between *unmarried*<sup>29</sup> cohabitants be enforceable. Under the Louisiana jurisprudence, contracts between cohabitants, whether express or implied, are null if incidental to the cohabitation.<sup>30</sup> If a business relationship between cohabitants began after the parties' cohabitation, the courts have found that the contract between the parties was incidental to the cohabitation, and thus unenforceable.<sup>31</sup> On the other hand, where the parties' business relationship began before cohabitation, recovery on the contract has been allowed.<sup>32</sup>

The conservative approach taken by the committee in extending to cohabitants the right to contract respecting support and property rights balanced the two considerations of maintaining the uniqueness of marriage and of protecting the reasonable expectations of those cohabitants who intend and agree that their relationship shall have certain consequences.

#### TERMINATION OF MARRIAGE

Initially, the committee decided what policies should be served by divorce legislation. Thereafter, when considering possible divorce alternatives, the committee considered which legislation would accomplish the desired policies. Members of the committee agreed: (1) that dissolution of the marriage should be as amicable and non-adversary as possible; (2) that the law should promote reconciliation between estranged spouses by the imposition of a reasonable waiting period in all divorce actions; and (3) that the law should seek to avoid the adverse effects on the judicial system occasioned by fault-based and complex no-fault schemes.

The committee proposal for divorce legislation eliminates all fault-

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29. "The law favors marriage over cohabitation, and will not permit an arrangement made by an adulterous cohabitant to work to the detriment of a lawful spouse." Revision, Book I, Titles IV & V, ch. 4, art. 1, comment (d) (Marriage-Person Comm. July 27, 1984).

30. La. Civ. Code arts. 11, 1893, 1895.

31. *Sparrow v. Sparrow*, 231 La. 966, 93 So. 2d 232 (1957); *Simpson v. Normand*, 51 La. Ann. 1355, 26 So. 266 (1899); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. App. 5th Cir. 1983); *Guerin v. Bonaventure*, 212 So. 2d 459 (La. App. 1st Cir. 1968); *Foshee v. Simkin*, 174 So. 2d 915 (La. App. 1st Cir. 1965).

32. *Succession of Pereuilhet*, 23 La. Ann. 294 (1871); *Delamour v. Roger*, 7 La. Ann. 152 (1852); *Viens v. Brickle*, 8 Mart. (o.s.) 11 (La. 1820).

33. Sepler, *Measuring the Effects of No-Fault Divorce Laws Across Fifty States: Quantifying a Zeitgeist*, 15 Fam. L. Q. 65, 88-89 (1981); McGraw, Sterin & Davis, *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. Fam. L. 443 (1981-82).

based grounds and substitutes the filing of a petition and a six-month "cooling off" period as the sole ground for divorce. No living separate and apart prior to the filing of the petition is required. Under the proposed legislation, no allegations other than the plaintiff's desire to be divorced from the defendant are appropriate. Grounds such as "irreconcilable differences" and "irreparable breakdown" of the marriage were rejected by the committee as unnecessary and potentially confusing, since under the proposal the judge has no discretion to deny the divorce after the "cooling off" period has elapsed. Furthermore, defenses to an action of divorce were no longer available because fault-based grounds for divorce were eliminated.

Originally, with the purpose of encouraging the spouses to resolve the incidental matters of the divorce, the committee proposed a divorce by mutual consent. The proposal required the filing of a joint petition accompanied by an "implementation plan," analogous to a separation agreement, followed by a three-month "cooling off" period. Subsequently, the committee was convinced that a difference of three months in waiting periods was not a sufficient incentive to accomplish the purpose of encouraging the spouses to resolve the incidents of the divorce between themselves.

Criticism of the committee proposal on no-fault divorce may take the form of allegations that the legislation encourages divorce. However, there is evidence that no-fault divorce laws do not promote divorce in the limited studies undertaken measuring its effects.<sup>33</sup>

Drafting has just begun on the articles which will provide for the incidental matters of divorce, including support for a spouse, child custody, child support, use and occupancy of the family home, and injunctive relief. Once the petition is filed, either spouse may seek a determination of such matters. The incidental matters related to the termination of a marriage will require careful consideration of the various interests involved and successful accommodation of those interests. Problems of implementation of a joint custody decree and effective enforcement of support pose two of the most difficult challenges.

#### CONCLUSION

Obviously, much remains to be accomplished. The committee, composed of academicians, practicing attorneys, and family court judges, consists of individuals with a wealth of experience. Even after the committee completes its work, the proposal must be approved by the Council of the Louisiana State Law Institute before presentation to the legislature. Nonetheless, systematic revision, however tedious, is preferable to yearly amendments to integrated legislation such as the Civil Code for the purpose of solving a particular problem. The law of persons affects every citizen of the State of Louisiana intimately; for that reason, it deserves prompt and orderly revision.