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PERSONS

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LEGISLATION

Wife's Obligation to Follow Her Husband

Two related Civil Code articles were affected by the Louisiana legislature in 1985; one was repealed and the other amended, in part because of concerns over constitutionality. Civil Code article 120 which obligated the wife to follow her husband and reside with him where he chose to live and which reciprocally obligated the husband to support his wife according to his means and condition[1] was eliminated as a legal obligation imposed on spouses by marriage. Since the obligation of the wife to follow her husband was the foundation for the rule that the domicile of a married woman is that of her husband,[2] article 39 was amended as well to delete that clause.

Both articles 39 and 120 had been subject to constitutional scrutiny. In *Crosby v. Crosby*,[3] a constitutional challenge to article 120 was raised in the context of the wife's fault which would bar a claim for permanent alimony.[4] The only evidence of the wife's fault had been her refusal to

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1. The burden imposed upon the husband under this article was more onerous than the obligation of each spouse to support the other under Civil Code article 119. Article 120 imposed upon the husband the obligation "to furnish her [his wife] with whatever is required for the convenience of life, in proportion to his means and condition." In R. Pascal and K. Spaht, Louisiana Family Law Course 122 (3rd ed. 1982), the authors observe:

> The obligation is *greater* than that imposed by Article 119 in that the husband must furnish the wife with the conveniences of life, not merely the necessities of life, and to an extent *proportionate* to his *means* and *condition*. Condition here must be taken to refer to his position in society; means must be understood as his state of material fortune. As a matter of legal rule, then, both the husband's means and his social position must be taken into consideration in appraising his special obligation of support toward his wife.

2. La. Civ. Code art. 39: "A married woman has no other domicile than that of her husband; the domicile of a minor not emancipated is that of his father, mother, or tutor; a person of full age, under interdiction, has his domicile with his curator."

3. 434 So. 2d 162 (La. App. 5th Cir. 1983).

4. La. Civ. Code art. 160.

follow her husband.[5] On appeal, the wife raised the constitutionality of article 120 for the first time,[6] and alternatively, she claimed other valid reasons for failing to follow her husband. The Fifth Circuit Court of Appeal held article 120 unconstitutional under both the fourteenth amendment to the United States Constitution and article I, section 3 of the Louisiana Constitution. The article discriminated against women, according to the court, "by arbitrarily forcing them to follow husbands wherever they chose to live. . . ."[7] The court added, "[W]e cannot envision any 'important governmental objectives' served by Art. 120."[8] In the opinion, the court of appeal cited an earlier Louisiana Supreme Court decision, *Craig v. Craig*[9] declaring Civil Code article 39, which makes the domicile of a married woman that of her husband, unconstitutional.

In the *Craig* case, however, article 39 was declared unconstitutional only for the purpose of the mandatory venue for separation and divorce suits under the Code of Civil Procedure. Article 3941 provides that the proper venue for a separation or divorce action is the parish where either party is domiciled, or the parish of the spouses' last matrimonial domicile, and that the venue is non-waivable.[10] The issue posed for resolution in *Craig* was "whether article 39 is unconstitutional either

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5. La. Civ. Code arts. 138(5), 143-45. If the wife refused to follow her husband and reside where he chose, she was guilty of abandonment unless she could prove lawful cause. See Smith v. Smith, 148 So. 2d 827 (La. App. 4th Cir. 1963), writ refused, 244 La. 143, 150 So. 2d 767 (1963). See also Callahen v. Callais, 224 La. 901, 71 So. 2d 320 (1954); Glorioso v. Glorioso, 223 La. 357, 65 So. 2d 794 (1953).

6. In Craig v. Craig, 365 So. 2d 1298, 1299 n.5 (La. 1978), the court observes:

> In *Johnson v. Welch*, 334 So. 2d 395 (La. 1976) we held that the court of appeal improperly held article 39 unconstitutional as it applied to article 3941 of the Code of Civil Procedure because the constitutionality of article 39 had not been attacked by the pleadings in the trial court and, therefore, the question of its constitutionality was not properly before that court. In addition, we noted that the court of appeal's determination of unconstitutinality was contrary to the settled judicial practice of declining to determine the constitutionality of laws unless such a determination was necessary for disposition of the cause. In *Johnson*, a determination of unconstitutionality was not necessary for disposition of the cause because we found from a review of the record that the husband's misconduct was sufficient to justify the wife in establishing a separate domicile. In the instant case, the constitutionality of article 39, as applied to article 3941 of the Code of Civil Procedure, was attacked by the pleadings in the trial court and the stipulation entered into between the parties precludes a finding that the wife was justified in establishing a separate domicile.

7. 434 So. 2d 162, 163 (La. App. 5th Cir. 1983).

8. Id.

9. 365 So. 2d 1298 (La. 1978).

10. La. Code Civ. P. art. 3941: "The venue provided in this article may not be waived, and a judgment rendered in any of these actions by a court of improper venue is an absolute nullity."

under the state or federal constitutions, insofar as it enables a husband, but not a wife, to establish a separate domicile and there bring an action for annulment of marriage, separation from bed and board, or divorce."[11] The discriminatory treatment of husbands and wives, by the application of Civil Code article 39 in combination with Code of Civil Procedure article 3941, was without a legitimate purpose, according to the supreme court. The court specifically rejected the reasoning of the court of appeal that the classification was adopted "as part of the overall 'pattern of laws designed to protect the marriage, home and family.'"[12] The sole effect of the two articles was to give the husband a "procedural advantage" in an action for separation. Furthermore, the right of the wife to establish a domicile separate from her husband only if she proved he was guilty of fault entitling her to a separation[13] "is in no way reasonably related to the marital obligations mutually owed by the husband and the wife or to the determination of which party prevails on the merits of the action."[14]

Initially, the repeal of Civil Code article 120 raises the question of whether the law imposes any duty upon the spouses to live together, the breach of which would entitle the other to a separation from bed and board on the grounds of abandonment. There is no longer an explicit legal obligation to live together; but Civil Code article 119 implicitly recognizes such a duty by imposing upon the spouses the obligations of support and assistance,[15] which ordinarily require proximity to fulfill. Thus, in the ordinary case where one spouse withdraws from the common dwelling or one spouse excludes or expels the other from the common dwelling,[16] the repeal of article 120 would not change the result that these circumstances constitute abandonment. Absent proof of lawful cause, the spouse who leaves or excludes or expels the other

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11. 365 So. 2d 1298, 1299 (La. 1978).

12. Id. at 1300. The court of appeal opinion in Craig v. Craig is reported at 359 So. 2d 1119 (La. App. 3d Cir. 1978).

13. Johnson v. Welch, 334 So. 2d 395 (La. 1976); Berry v. Berry, 310 So. 2d 626 (La. 1975); Bush v. Bush, 232 La. 747, 95 So. 2d 298 (1957).

14. 365 So. 2d 1298, 1300 (La. 1978).

15. R. Pascal & K. Spaht, supra note 1, at 121:

> Traditionally, assistance includes at last the help or care of an ill or infirm spouse. This is the way in which Planiol construes the identical article of the French Code Civil. . . . It should be construed to include more than such care. The tasks of each spouse, to the extent he or she may not accomplish them alone, are also the tasks of the other, to the extent he or she can be of assistance, in the cooperative society of marriage. (citation omitted).

16. Schirrmann v. Schirrmann, 436 So. 2d 1340 (La. App. 5th Cir. 1983); O'Pry v. O'Pry, 425 So. 2d 986 (La. App. 5th Cir. 1983); Lo Coco v. Lo Coco, 420 So. 2d 459 (La. App. 4th Cir. 1982); Burnett v. Burnett, 349 So. 2d 488 (La. App. 3d Cir. 1977); Robertson v. Robertson, 332 So. 2d 896 (La. App. 2d Cir. 1976).

violates his implicit obligation to live with the other spouse to the extent necessary to fulfill the obligations of support and assistance.[17]

In cases where one spouse has left the common dwelling for professional advancement, however, the repeal of article 120 makes identification of the abandoning spouse more difficult. Before the repeal, if the husband moved for reasons of professional advancement and the wife refused to follow, she was the spouse who quit the matrimonial domicile. Absent proof of conduct sufficient to constitute grounds for separation or divorce,[18] the wife was guilty of abandonment. Likewise, if the wife moved for economic or professional reasons and the husband refused to follow, she was the spouse who had quit the matrimonial domicile and again bore the burden of proving she did so with lawful cause. With the repeal of article 120, the task of identifying the spouse who quit the common dwelling, for the purpose of examining his or her motives for doing so, becomes more difficult. Is the abandoning spouse the one who moved for professional reasons or the one who refused to follow? Such a factual situation should be regarded as an instance in which there is an explicit or implicit agreement to live separate and apart,[19] and thus should not be considered abandonment, which would allow either spouse a separation from bed and board[20] or divorce only after having lived separate and apart for one year.[21]

The amendment to Civil Code article 39 may have more significant impact because of its effect on such procedural issues as venue. With the elimination of the clause specifying that a married woman's domicile is that of her husband, the wife's domicile is proved by residence in fact coupled with an intention to remain indefinitely or permanently.[22] Under Code of Civil Procedure article 42,[23] once the wife has moved to and lives in a parish different from that of her husband, the proper venue for an action against her would be in the parish of her new domicile. Proper venue as to an action instituted against the husband

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17. La. Civ. Code arts. 143, 144.

18. For a current decision reviewing the jurisprudence in this area, see Durand v. Willis, 470 So. 2d 947 (La. App. 3d Cir. 1985). See also, Laurent v. Laurent, 347 So. 2d 312 (La. App. 4th Cir. 1977); Burnett v. Burnett, 324 So. 2d 622 (La. App. 2d Cir. 1975).

19. Sykes v. Sykes, 321 So. 2d 805 (La. App. 4th Cir. 1975). But see criticism of *Sykes* in Durand v. Willis, supra.

20. La. Civ. Code art. 138(9).

21. La. R.S. 9:301 (Supp. 1985).

22. La. Civ. Code arts. 38, 41-44.

23. La. Code Civ. P. art. 42: "The general rules of venue are that an action against: (1) An individual who is domiciled in the state shall be brought in the parish of his domicile; or if he resides but is not domiciled in the state, in the parish of his residence; . . ."

would be in the parish of the old matrimonial domicile, where the husband and wife lived together.

To illustrate the practical problems relating to venue which the amendment to article 39 may make more frequent, consider the following hypothetical: Wife contracts with C while a domiciliary of East Baton Rouge Parish and while living with her husband. Subsequently, she separates form her husband and moves to East Feliciana. Nine months later, C wishes to sue to enforce the contractual obligation incurred by the wife. Code of Civil Procedure article 735[24] makes either the husband or wife the proper party defendant in an action to enforce a community obligation.[25]

The proper venue for an action instituted against the husband, the noncontracting spouse, is East Baton Rouge Parish; however, the proper venue for an action instituted against the wife is East Feliciana Parish. Husband and wife are not solidary or joint obligors, such that Code of Civil Procedure article 73 would permit an action to be instituted against both in any parish of proper venue.[26] The only responsibility incurred by the husband to the creditor is as to his undivided one-half interest in community property.[27] The judgment to be obtained against him is in rem,[28] not personal. In contrast, the responsibility of the wife is personal, and her separate property and her interest in the community may be seized in satisfaction of her obligation. If the creditor sues the husband in East Baton Rouge Parish, as he may under Code of Civil Procedure articles 42 and 735, must he institute a separate action against the wife in East Feliciana?

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24. La. Code Civ. P. art. 735:

> Either spouse is the proper defendant, during the existence of the marital community, in an action to enforce an obligation against community property; however, if one spouse is the managing spouse with respect to the obligation sought to be enforced against the community property, then that spouse is the proper defendant in an action to enforce the obligation. . . .

25. La. Civ. Code arts. 2360-63.

26. La. Civ. Code art. 2345: "A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation." See also, La. Civ. Code art. 2346, comment (b): "This provision does not make each spouse the mandatory [sic] of the other. A spouse who contracts with a third person, when acting alone in the management of community property, does not obligate the separate property of the other spouse. . . ."

27. Id.

28. A case failing to recognize that the judgment is in rem and why it is important was Williams v. First Nat'l Bank of Commerce, No. 79-3185 (E.D. La., March 11, 1981), discussed in Note, Termination of the Community, 42 La. L. Rev. 789, 798 n.51 (1982). For a later decision which fails to articulate the nature of the judgment yet reaches the right result, see Chrysler Credit Corp. v. Nata, 469 So. 2d 11 (La. App. 4th Cir. 1985).

It may be useful under the hypothetical facts outlined above to develop the notion of ancillary venue of *parties* to permit the creditor to sue both husband and wife in either parish. Ancillary venue as to *claims* has been recognized, although not by name, in a series of courts of appeal decisions.[29] In those cases the issue concerned two claims against the same defendant arising out of the same factual pattern, but with different venues. In *Albritton v. McDonald*,[30] the court opined:

> We agree with the holding in Smith that where a plaintiff has the right to institute an *action* on two or more claims arising out of one factual circumstance and that where venue is proper as to one claim, the disposition of which would affect the second claim as to which, if standing alone, venue might not be proper, the court has the venue of the *action* to decide both claims in the interest of efficient judicial administration, and the court therefore should overrule an exception to the venue.[31]

The same laudable goals of judicial efficiency and consistency in judgments can be accomplished in the hypothetical situation by adopting the concept of ancillary venue of *parties*. It involves *one* claim against *two parties* arising out of *one factual circumstance*. The Code of Civil Procedure adopts this concept in article 73 by permitting solidary obligors to be sued in any parish where venue is proper as to one of them. The redactors of the Code of Civil Procedure could not foresee that with matrimonial regimes reform a spouse might be responsible to a creditor only to the extent of his interest in community property; and furthermore, that either spouse would be the proper party defendant in an action to enforce a community obligation.

Although the amendment to Civil Code article 39 did not create the problem of different venues for suits against two parties arising out of the same factual circumstance,[32] it may increase the frequency of such problems. Absent legislative attention to the articles that specify the venue for actions, the concept of ancillary venue of *parties* may prove useful in resolving the potential problems that the amendment to article 39 has exacerbated.

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29. Albritton v. McDonald, 363 So. 2d 925 (La. App. 2d Cir. 1978), writ refused, 366 So. 2d 561 (La. 1979); Smith v. Baton Rouge Bank and Trust Co., 286 So. 2d 394 (La. App. 4th Cir. 1973).

30. 363 So. 2d 925 (La. App. 2d Cir. 1978), writ refused, 366 So. 2d 561 (La. 1979).

31. Id. at 928.

32. Problems existed without the amendment if the wife could prove that she was living separate and apart from her husband due to fault on his part sufficient to entitle her to a separation and divorce. See cases cited supra at note 18.

Reestablishment of the Community by Reconciliation

Although it has been observed that the comprehensive matrimonial regimes legislation of 1979[33] failed to remedy the problems resulting from the requirement of an authentic act to reestablish the community upon reconciliation of the spouses,[34] the Legislature did respond by amending Louisiana Civil Code article 155.[35] In fact it was scholarly criticism of the inability to reestablish the community upon reconciliation that originally led to the amendment to article 155 in 1943. This amendment permitted a matrimonial agreement to be executed by the spouses. Requiring a matrimonial agreement of the spouses was, however, only an alternative suggestion. Professor Harriet S. Daggett originally proposed that "the community be not dissolved by judgment of separation of bed and board in cases where reconciliation has taken place."[36] Even then, Professor Daggett foresaw the shortcomings of her alternative proposal for those spouses who were unaware of the remedy provided by the matrimonial agreement.[37]

This all too familiar scenario has been repeated many times since 1943: husband and wife reconcile after a judgment of separation and years later discover that, with one notable exception, the reconciliation terminated the effects of the judgment.[38] Contrary to what the ordinary

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33. 1979 La. Acts Nos. 709 and 711.

34. La. Civ. Code art. 155 reads in part: "Upon reconciliation of the spouses, the community may be re-established by matrimonial agreement, as of the date of filing of the original petition in the action in which the judgment was rendered."

> It is significant that in spite of criticism of the requirement of a formal act reestablishing the community which has resulted in apparent inequities where the spouses were unaware of the requirement, the Legislature has not seen fit to change the requirement. The requirement of a formal act was continued in the comprehensive revision of marital laws by the provision of Article 155 that the community may be reestablished by a matrimonial agreement, and the provision of Article 2331 that a matrimonial agreement must be "an act under private signature duly acknowledged by the spouses."

Freeman v. Freeman, 430 So. 2d 673, 676, n.1 (La. App. 2d Cir. 1983), noted in 45 La. L. Rev. 163 (1984).

35. 1985 La. Acts No. 525.

36. Daggett, Suggestions for the Consideration of the Council of the Louisiana State Law Institute, 5 La. L. Rev. 377, 395 (1943). The history of this proposal, as well as that of article 155, is detailed in Note, Reconciliation Trap: Civil Code Article 155, 45 La. L. Rev. 163 (1984).

37. The only danger may be to those who are not aware of this effect of the judgment of separation nor of the new remedy. . . . [They] may suffer the same surprise and discomfort attendant upon the final discovery as has often been the case in the past. Particularly is this true, of course, of the wife.

Daggett, Louisiana Legislation of 1944—Matters Pertaining to the Civil Code, 6 La. L. Rev. 1, 3 (1944).

38. See La. Civ. Code art. 152; Moody v. Moody, 227 La. 134, 78 So. 2d 536 (1955); Reichert v. Lloveras, 188 La. 447, 177 So. 569 (1937). See also R. Pascal & K. Spaht, supra note 1, at 172-73.

layman might assume, the community of acquets and gains was not reestablished by the reconciliation. The illogic of the result has led one author to describe the scenario as the "reconciliation trap."[39]

Recognition of the injustices created by article 155, which were described in testimony before legislative committees, resulted in an amendment which reestablishes the community as between the spouses as of the date of reconciliation. Reconciliation requires proof of a mutual intention to voluntarily resume the life in common.[40] The existence of this mutual intention is to be determined by all the factual circumstances, sexual intercourse constituting strong evidence that the relationship has been resumed.[41] Because mutual intention is proved by factual circumstances, the precise moment of reconciliation may be difficult to establish.

Although it may not be necessary in many cases to establish the precise moment of reconciliation, there are two legal issues dependent upon that determination: whether a matrimonial agreement to establish a separation of property regime requires court approval and whether the legislation applies to couples who reconciled before its effective date.

As to the first issue, the new legislation provides that should spouses considering reconciliation desire to continue to live under a separation of property regime, they may execute a matrimonial agreement *prior to reconciliation* without court approval. In effect, the legal consequences of a reconciliation upon the community have been reversed, the difference being that couples who desire to maintain a separation of property regime must execute an agreement to that effect. Those couples enjoy a privilege that other married couples generally do not, the capacity to execute a matrimonial agreement establishing a separation of property regime without court approval. However, the "capacity" to contract without court approval, which determines the validity of the matrimonial

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39. Note, supra note 36.

40. Seymour v. Seymour, 423 So. 2d 770 (La. App. 4th Cir. 1982); Jordan v. Jordan, 394 So. 2d 1291 (La. App. 1st Cir. 1981); Halverson v. Halverson, 365 So. 2d 600 (La. App. 1st Cir. 1978).

41. Hickman v. Hickman, 227 So. 2d 14 (La. App. 3d Cir. 1969). But see Levine v. Levine, 373 So. 2d 1380 (La. App. 4th Cir. 1979), where the court concluded that the husband and wife had reconciled although there had been no sexual intercourse:

> After a two-week stay, he came back home and they reconciled to the extent of sleeping in the same bed again, although they still did not have sexual relations. . . . It is clear from the record that the parties had effected a reconciliation, even though they still were not having sexual relations. Arthur seems to have accepted Renee's refusal of intercourse, at least insofar as he did not raise it against her as a ground for separation. Renee clearly led Arthur to understand, during the time he was away, that she agreed to his suggestion that they try again when he returned.

Id. at 1383-84.

agreement,[42] is dependent upon establishing the moment of reconciliation.

The legislative assumption that the moment of reconciliation *could be* established is even more important when considering the second issue, whether the new legislation applies to couples judicially separated and reconciled before the effective date of the amendment. If the legislature assumed that reconciliation was a juridical act[43] occurring at a fixed moment rather than a continuing act, there is no legislative expression that the new law applies to couples reconciled before the effective date of the act. Absent that legislative direction, it can be argued that the new legislation applies only to those couples whose reconciliation occurs after September 6, 1985.[44] It cannot be forcefully argued that the legislative change is merely procedural, thus applying retroactively absent a declaration of legislative will to the contrary.[45] The juridical act of

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42. This "capacity" is even present where a spouse legally separated from the other spouse is contemplating reconciliation and subsequent to the agreement does not reconcile with the other spouse. The term *capacity* is chosen by the author to describe the necessary prerequisites to this agreement because if the spouses are reconciled when they execute such an agreement, it is relatively null. The agreement executed by spouses during the marriage to establish a separation of property regime requires court approval under Civil Code article 2329 or it is null (La. Civ. Code art. 2029 (eff. Jan. 1, 1985)). Under La. Civ. Code art. 2031 (eff. Jan. 1, 1985):

> A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A contract that is only relatively null may be confirmed.
>
> Relative nullity may be invoked only by those persons for whose interest the ground for nullity was established, and may not be declared by the court on its own initiative.

43. "Those acts which are performed solely in order to bring about one or several legal effects are called juridical acts. They are said to be juridical on account of the nature of their effects." 1 M. Planiol, Traite Elementaire de Droit Civil, No. 265, at 187 (12th ed. La. St. L. Inst. transl. 1959). "To perform a juridical act, there must be, in principle, at least two persons. The reason for this is that most juridical acts are contracts, that is to say, a meeting of minds between two or more persons." Id. Nos. 267-269, at 189. However, despite the possibility of considering reconciliation as a juridical act under Planiol's definition, it could be argued that reconciliation results from the relationship of the parties, not from the uniting of their wills with the intention of producing an act with legal effects. "Relationship, which is a natural fact, confers different rights, such as the right of succession. And it imposes burdens, such as the duty to provide alimony." Id. No. 265, at 188.

44. La. Civ. Code art. 8, interpreted and applied in Tullier v. Tullier, 464 So. 2d 278 (La. 1985); Spragio v. Board of Trustees of State Employees Group Benefits Program, 468 So. 2d 1323 (La. App. 1st Cir. 1985); and Graham v. Sequoya Corp., 468 So. 2d 849 (La. App. 1st Cir. 1985). See also La. R.S. 1:2 (1973); Johnson, Developments in the Law 1983-1984—Legislation, 45 La. L. Rev. 341 (1984).

45. Wall v. Close, 201 La. 986, 10 So. 2d 779 (1943); Shreveport Long Leaf Lumber Co. v. Wilson, 195 La. 814, 197 So. 566 (1940); State v. Bezett, 158 La. 309, 104 So. 55 (1925); Johnson v. Fournet, 387 So. 2d 1336 (La. App. 1st Cir. 1980); Manuel v. Carolina Cas. Ins. Co., 136 So. 2d 275 (La. App. 3rd Cir. 1962).

reconciliation has legal effects which concern substantive rights—ownership of property.[46] Planiol, when considering the retroactivity problem as it affects juridical acts, stated that "[j]uridical acts . . . usually require for their performance but a very short space of time. They take place entirely during the duration of a single law. They should be governed exclusively by the law in force at the moment they occur."[47]

However, should reconciliation be considered a continuing series of acts, it can be argued that the statute is not retroactive merely because it operates upon antecedent, present, and future facts.[48] A similar conclusion has been reached in instances where the legislature has enacted new grounds for divorce. For example, in *Hurry v. Hurry*[49] the court permitted a spouse to obtain relief under new legislation which provided that a divorce could be obtained where the parties lived separate and apart for seven years.[50] The parties had lived separate and apart for twelve years at the time suit was filed, but the years had elapsed before the effective date of the new legislation. In his treatise on French law, Planiol described such circumstances as follows:

> A law may modify the future effects of acts or even of acts prior to it, without being retroactive.[51] [I]f the intervention of a court is necessary to bring about a new juridical situation (for example, divorce or separation of property) there will be no retroactivity and the court will apply the law in force at the time judgment is pronounced.[52]

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46. In Rico v. Vangundy, 461 So. 2d 458, 462 (La. App. 5th Cir. 1984), the court described a vested right as one where:

> [A] right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete and unconditional, independent of a contingency, and a mere expectancy of future benefit or contingent interest in property. . . does not constitute a vested right. Tennant v. Russell, 214 La. 1046, 39 So. 2d 726, 728 (1949); Draughn v. Mart., 411 So. 2d 1188 (La. App. 4th Cir. 1982).

47. 1 M. Planiol, supra note 43, No. 245, at 175:

> All that touches upon either the conditions of validity, the forms or the means of proof of a juridical act, is to be dealt with solely according to the law in force the day it took place and not according to subsequent laws. It would be altogether unjust to blame the parties for not having respected a law not yet in existence. . . .

48. State v. Alden Mills, 202 La. 416, 12 So. 2d 204 (1943); Henry v. Jean, 115 So. 2d 363 (La. 1959); Churchill Farms, Inc. v. La. Tax Comm'n, 338 So. 2d 963 (La. App. 4th Cir. 1976); Louisiana Ins. Guaranty Ass'n v. Guglielmo, 276 So. 2d 720 (La. App. 1st Cir.), writ denied, 279 So. 2d 690 (La. 1973).

49. 141 La. 954, 76 So. 160 (1917). See also Stallings v. Stallings, 177 La. 488, 148 So. 687 (1933); Mason v. Mason, 399 So. 2d 1272 (La. App. 4th Cir. 1981).

50. 1916 La. Acts No. 269.

51. 1 M. Planiol, supra note 43, No. 243, at 174-75.

52. Id. No. 243A, at 175.

The distinction between reconciliation as a continuing act and cases such as *Hurry* lies in the fact that the *act* of reconciliation has legal consequences without the intervention of the judicial system. The legal consequences attach at the moment of reconciliation, creating substantial property rights, not mere expectancies. If one does not characterize reconciliation as a continuing act, one avoids the difficult legal questions posed where the initial reconciliation (if a series of continuing acts) occurred before the effective date of the amendment to article 155. For example, should situations where neither spouse was aware a matrimonial agreement was necessary to reestablish the community regime be distinguished from those where one spouse was aware but the other was not, or where both spouses verbally agreed not to execute a matrimonial agreement but continue to live under a separate property regime?[53]

The issue of retroactivity of the new legislation will ordinarily arise in a contest between the spouses incident to a divorce action where a partition of "community property" is sought. The reconciliation, if proved and if it occurred after September 6, 1985, only affects the characterization of the property *as between the spouses.*

For the reestablishment of the community to have effect as to third parties, i.e. creditors and third party purchasers, notice that the community has been reestablished must be filed in the conveyance records of the parish where immovable property is situated to affect immovables and in the conveyance records of the parish where the spouses are domiciled[54] to affect movable property.[55] The legislation neither prescribes

53. The same problems would arise should a court consider the new legislation retroactive, even if not made expressly so by legislative direction. It could be argued that the Legislature impliedly intended to make the legislation retroactive by taking into consideration the testimony elicited before the House Committee on Civil Law and Procedure and the Senate Committee on Judiciary A. Nothing in either the state or federal constitutions prohibits explicitly retroactive laws. The basic approach in examining the constitutionality of a retroactive law has been first to consider whether the law was unreasonable. In the past the factors identified as important in determining whether a law was unreasonable were: (1) the nature and strength of the public interest served by the law, (2) the extent the law abrogates prior rights, and (3) the nature of the prior rights abrogated. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). Recently, however, the analysis has been simplified. See Pension Benefit Guaranty Corp. v. Gray and Co., 104 S. Ct. 2709 (1984).

For an excellent discussion of the retroactivity of legislation and constitutional guarantees in the context of community property legislation see generally Samuel, The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality, 39 La. L. Rev. 347 (1979). See also Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Cal. L. Rev. 216 (1960).

54. Comment (b) to La. Civ. Code art. 2332 suggested that the spouses might have different domiciles, a proposition which, of course, is now permitted under 1985 La. Acts Nos. 271-72. See discussion in text at notes 1-34.

55. La. Civ. Code art. 2332.

a particular form for the notice nor refers specifically to the unilateral character of the notice. There is no doubt that the notice may be filed by either spouse, in contrast to the prior law which required the consent of both spouses expressed in a matrimonial agreement. As a unilateral act with important community property consequences, it is analogous to the unilateral reservation of natural and civil fruits of separate property.[56] The significant difference, however, is that the unilateral notice of reestablishment requires a reconciliation of the spouses, whereas the unilateral reservation of fruits of separate property is a right that can be exercised by a spouse at any time.

Consider a husband who purchases immovable property with earnings acquired after a judgment of separation from bed and board. A third party, interested in purchasing the property, approaches the husband. The wife files a notice of reestablishment of the community although there has been no reconciliation factually under the jurisprudence. The wife may know there has been no reconciliation and choose to file the notice of reestablishment to harrass the husband, or she may genuinely believe there has been a reconciliation. Third persons who *validly* acquired rights *prior to filing* of the notice are protected from the retroactive effect of the reconciliation,[57] but the third party in our hypothetical situation did not. If there has been a reconciliation, the husband's earnings are retroactively reclassified as community property,[58] and thus the property purchased with those funds is also community property.[59] The wife's concurrence is required for the alienation of community immovable property absent a declaration in the act of acquisition that the husband was acquiring the property with separate property for his separate estate.[60] The husband must file suit seeking a mandatory injunction against the wife[61] and, at the hearing, offer proof

56. La. Civ. Code art. 2339.

57. La. Civ. Code art. 155 (as amended by 1985 La. Acts No. 525): "The reestablishment of the community shall not prejudice the rights of third persons validly acquired prior to filing notice of the reestablishment nor shall it affect a prior community property partition between the spouses."

58. La. Civ. Code art. 2338.

59. Id.

60. La. Civ. Code art. 2342, para. 2. However, the wife may controvert the declaration in the act of acquisition if she did not concur in the act and if the property is still owned and unencumbered by the husband.

61. Under La. R.S. 9:291 (eff. Jan. 1, 1980), the spouses, if judicially separated, are not precluded from suing each other. This assumes the permissibility of filing suit utilizing the "unless judicially separated" language until the other spouse can prove a reconciliation occurred. The suit instituted by the husband would be analogous to a suit to cancel a mortgage. See also La. Civ. Code arts. 3372 and 3373. After a mandatory injunction is obtained by the husband, he could seek relief against the Clerk of Court by a writ of mandamus. See Billot v. Sea Life, Inc., 384 So. 2d 1023 (La. App. 4th Cir. 1980).

that there has been no reconciliation. If he is successful, his remedy for the wrongful filing is damages, including the costs of filing suit to enjoin.

The opportunity provided by the new legislation to file a unilateral notice of reestablishment of the community in bad faith, when weighed against the old legislation's unacceptable alternative requiring an agreement executed by both spouses, seems the lesser evil.