Revision of the Law of Marriage: One Baby Step Forward

Katherine Shaw Spaht
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Introduction

After six years of drafting and redrafting, the Louisiana Law Institute completed work on a proposal revising the law on entry into, nullity and the personal effects of marriage. The proposal was introduced and ultimately enacted at the 1987 legislative session. Act Number 886 revised Civil Code articles 86 through 136 and the corresponding provisions of the Civil Code Ancillaries.¹

The process employed by the Law Institute is lengthy and deliberative. In addition to serious questions of policy, the Institute is concerned with assuring that amendments to the Civil Code use terminology and concepts consistent with usage in other parts of the Code. Research is conducted and preliminary drafting done by the Reporter² with the assistance of a research attorney.³ The preliminary draft of proposed articles and the accompanying comments are then submitted to the Committee.⁴ After the Committee finally approves the proposed legislation, it is presented to the Council of the Law Institute.⁵ The Council may approve, reject or recommit the legislation to the Committee. Once

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   2. The Reporter for the Persons Committee of the Louisiana Law Institute is the author of this article.
   3. The research attorney for the Persons Committee of the Institute is Leonard W. Martin.
   4. Members of the Persons Committee of the Louisiana Law Institute are primarily responsible for the quality of the provisions of 1987 La. Acts No. 886. They are Justice Fred A. Blanche, Eavelyn T. Brooks, Professor Thomas E. Carbonneau, Professor Kathryn V. Lorio, Judge E. Donald Moseley, Professor Cynthia A. Samuel, Philip R. Reigel, Jr. and Kenneth Rigby.
   5. The Council of the Institute is its governing body and presently consists of 39 ex-officio, 31 elected, and 31 appointed members. The list of members is found in The Twenty-Fourth Biennial Report of the Louisiana State Law Institute to the Legislature of Louisiana (April, 1986). The Louisiana Law Institute was created by 1938 La. Acts No. 166, § 4, para. 9.
the legislation has received final Council approval, it is submitted to the Coordinating Committee for specific considerations of language and conceptual consistency. Thereafter, the proposed legislation with a report from the Coordinating Committee returns to the Council of the Institute for final approval.

The three principal chapters of the Civil Code that were revised were marriage, nullity of marriage, and incidents and effects of marriage. In the chapter of the Civil Code regulating entry into marriage, the Committee decided that the Civil Code articles should only contain the essential requirements of a valid marriage. Any provision that did not affect the validity of the marriage was removed to the Louisiana Revised Statutes. In the chapter entitled "Nullity of Marriage" the focus of the Committee was to simplify, clarify and, in one special case, change the law. The chapter of the Code that imposes personal obligations upon the spouses is virtually identical to the corresponding chapter effective before January 1, 1988, reflecting the Committee view that the law should regulate, to the least extent possible, the personal relationship created by marriage.

In addition to the Civil Code articles, the provisions of the Civil Code Ancillaries regulating the same subject matter were amended. The Committee was concerned with reorganizing the Louisiana Revised Statutes in a logical pattern and eliminating duplication. One new Code of Civil Procedure article was enacted to implement a change in the

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6. Professor Cary DeBessonet is Reporter of the Coordinating Committee. Assisting him as members of his committee are Shael Herman, Carlos E. Lazarus, Professor Allain Levasseur, Professor Saul Litvinoff, and Professor A. N. Yiannopoulos. Stan Raborn serves as secretary for the Committee.

The functions of the Coordinating Committee are (1) to coordinate the activities of the Institute Committees, including determining whether the language, rules and underlying policies of the revision proposals are consistent with each other and with retained portions of the Civil Code, and (2) to evaluate revision proposals for style, internal logical consistency and perspicuity.


law affecting the marriages of collateral relations. The only transitional provision of Act Number 886 also concerned the marriages of collateral relations.

**Entry Into Marriage**

Marriage is defined in Civil Code article 86 as "a legal relationship between a man and a woman that is created by civil contract." The predecessor to Article 86 described marriage as a civil contract. The historical reasons for this description of marriage no longer exist; furthermore, the philosophical underpinning of contract as a source of all human institutions has been either forgotten or long since accepted. The jurisprudence has always accepted the proposition that marriage is not simply a contract, but rather a legal relationship that differs markedly from other contractual relationships. It creates a "social status that

11. La. Civ. Code art. 90 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): "Nevertheless, persons related by adoption, though not by blood, in the collateral line within the fourth degree may marry each other if they obtain judicial authorization in writing to do so."

12. 1987 La. Acts No. 886, § 5 (eff. Jan. 1, 1988): "Notwithstanding the provisions of Civil Code Articles 90 and 94, or of any other provision of this Act, marriages between collateral relations contracted prior to September 11, 1981, shall continue to be legal and of full effect on and after the effective date of this Act."

The collateral marriages to which section 5 refers are those ratified by periodic amendment (the last effective on Sept. 11, 1981) to La. Civ. Code art. 95 (1870), which was effective before January 1, 1988, and which read: "All such marriages [between collateral relations] heretofore made in contravention of the above provisions shall be considered as legal."


16. Pascal and Spaht, Louisiana Family Law Course 7 (4th ed. 1986): Why the term "civil contract", however, and not "civil institution" or "secular institution"? The explanation may be the fact that the prevailing philosophies of the eighteenth and early nineteenth centuries considered all human institutions, even law itself, to have their roots in contract. The philosophies of Locke and Rousseau are examples.

17. See, e.g., Stallings v. Stallings, 177 La. 488, 148 So. 687 (1933); Hurry v. Hurry, 144 La. 877, 81 So. 378 (1919). In the Hurry case, the court described the differences between marriage and other contracts as follows:

The consent of the parties is required, but it can only be contracted between
affects not only the contracting parties, but also their posterity and the
good order of society."18 Because it is a state governed relationship
created by a civil19 contract, marriage is regulated, for the most part,20
by "special rules prescribed by law."21

a male and a female; the parties must be able to contract, not in the sense of
having attained their majority, for a male of 14 and a female of 12 may marry
under the law of this state; but they must not at the time be lawfully married
to any one else, and must not be of those classes which the law prohibits from
marrying, such as close relatives, persons of the black and white races, etc.
Unlike other contracts, it can be made with but one person at a time, and
cannot be dissolved by the consent of the parties. 144 La. at 885, 81 So. at
380-81 (1919).
The fact that it can be contracted only between a man and a woman led to the inclusion
of that descriptive prepositional phrase into the definition of marriage prior to 1988 (La.
Civ. Code art. 88 (1870) and thereafter in La. Civ. Code art. 86 (as amended by 1987
La. Acts No. 886, § 1 (eff. Jan. 1, 1988)). For an interesting observation as to why that
is necessary, see Adams v. Adams, 357 So. 2d 881 n.1 (La. App. 1st Cir. 1978).
See also La. Civ. Code art. 86, comment (c) (as amended by 1987 La. Acts No. 886,
§ 1 (eff. Jan. 1, 1988)).
18. La. Civ. Code art. 86, comment (c) (as amended by 1987 La. Acts No. 886, §
1 (eff. Jan. 1, 1988)).
1, 1988)).
In particular, the import of Article 86 of the Civil Code of 1870 remains
unchanged: the law views marriage as purely a civil matter, and not as one
subject to the operation of religious or ecclesiastical law. The term "civil" in
former Article 86 has been retained in order to emphasize that continuity of
policy.
Id. comment (a).
La. Civ. Code art. 86 (1870) before its amendment and reenactment read simply: "The
law considers marriage in no other view than as a civil contract." See also supra notes
15 and 16.
20. There are occasions where it will be necessary to resort to general obligations
principles to resolve questions unanswered
by
the special rules in Chapters I or 2 of Title
IV of Book I of the Civil Code. Since marriage is created by a civil contract, it is
appropriate in many instances to do so.
The minutes of the meeting of the Persons Committee of the Law Institute on October
30, 1981, reflect the following discussion: "Several members . . . agreed that such an
absolute bar [against resort to general obligations principles] was unwise, but disapproved
adopting the converse provision that obligations principles could always be applied unless
their use was explicitly disapproved."
However, it must be remembered, as comment (b) to La. Civ. Code art. 86 (as amended
revision, as a general rule, are not intended to overrule the established jurisprudence
holding that certain laws regulating marriage and the relationship of husband and wife
are matters of public order from which the parties may not derogate by contract."
21. La. Civ. Code art. 86 (as amended by 1987 La. Acts No. 886, § 1 (eff Jan 1,
1988)). The special rules referred to are those in Title IV of Book I of the Civil Code
and Chapter I of Code Title IV of the Civil Code Ancillaries in Title 9 of the Louisiana
Revised Statutes.
The second article of Chapter 1 contains the essential elements of a valid marriage. There must be no legal impediment, a marriage ceremony, and the free consent of the parties "to take each other as husband and wife, expressed at the ceremony." After much discussion, the Committee concluded that any provision that did not directly affect the validity of the marriage did not belong in the Civil Code. As a consequence, provisions of the Code addressing the marriage of minors and ceremonial requirements, such as a marriage license, the seventy-two hour waiting period, and the number of witnesses at the ceremony were shifted to the Revised Statutes.

Impediments to Marriage

As comment (b) to article 87 explains, "[a] person may contract marriage if he is not prohibited from doing so ...." The articles which follow contain the impediments to marriage—an existing marriage, the same sex, and relationship by consanguinity or by adoption. By omission, it is clear that minority is not an impediment to marriage.

22. La. Civ. Code art. 87 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan 1, 1988)). Comment (a) explains that the three listed requirements are the only necessary prerequisites to a valid marriage: "Physical consummation is not necessary."
a marriage.\textsuperscript{32} Just as under prior law, the officiant is directed not to perform a marriage in which a party is a minor unless "... the minor has the written consent to marry of both of his parents, or of the tutor of his person, or of a person who has been awarded custody of the minor."\textsuperscript{33} If the minor is under the age of sixteen,\textsuperscript{34} he or she must also obtain judicial authorization to marry.\textsuperscript{35} The choice to continue the present jurisprudential rule concerning the marriage of minors was conscious. The Committee chose to preserve the validity of such marriages because, given the frequency of the marriage of minors, serious social problems could result from a law pronouncing the nullity of such a marriage.

A person who is presently married may not contract another marriage. If the first marriage is absolutely null, however, it does not constitute an impediment to a second marriage.\textsuperscript{36} It is unnecessary under article 94 to first obtain a declaration of nullity if the first marriage is

\begin{itemize}
  \item \textsuperscript{32} La. Civ. Code art. 87 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)):
  
  This rule applies to minors as well as majors, in the sense that once a minor has contracted marriage that marriage is valid. This revision does not change the prior jurisprudential rule that the Louisiana statutory provisions imposing an age requirement for marriage in general and special third-party consent requirements for marriages of minors are only directory to officiants. State v. Golden, 210 La. 347, 26 So. 2d 837 (1946).

  \textsuperscript{33} Id. comment (b).


  \textsuperscript{35} Compare La. R.S. 9:211(B) (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)) with La. Civ. Code art. 92, which directed the celebrant not to marry a female under the age of sixteen and a male under the age of eighteen. The distinction drawn on the basis of sex was probably unconstitutional. See Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976), and Bilbe, Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime, 19 Loy. L. Rev. 373 (1972).

  \textsuperscript{36} La. R.S. 9:211(B) (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)): "A minor under the age of sixteen must also obtain written authorization to marry from the judge of the court exercising juvenile jurisdiction in the parish where the minor resides or the marriage ceremony is to be performed."

  Furthermore, the provision that follows section 211 permits a judge to authorize the minor's marriage regardless of his age without parental consent "when there is a compelling reason why the marriage should take place." La. R.S. 9:212 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)).


  An undissolved marriage is an impediment to either spouse's subsequent marriage. A bigamous, incestuous, or otherwise absolutely null union is not. A party to such a union may lawfully marry even though the nullity of his prior union has never been judicially pronounced. Coon v. Monroe Scrap Material Co., 191 So. 607 (La. App. 2d Cir. 1939).
absolutely null; thus, the theoretical distinction between absolute and relative nullities is maintained.

When both parties are of the same sex, the second impediment to a marriage arises. The prohibition of same sex marriages is consistent with prior legislation and jurisprudence. However, the new revision addresses the impediment in a separate article rather than as a part of the definition of marriage. The same sex marriage is absolutely null and, furthermore, is incapable of producing civil effects. Thus, even though a party to a same sex marriage may believe that there is no impediment to his marriage, and for that reason be considered in good faith, civil effects will not flow in his favor. This choice by the Council of the Law Institute was based upon the fact that what had been contracted could not be considered a marriage. Left unanswered is the question of the transsexual, who is genetically a member of one sex but by virtue of surgery and hormone treatments is anatomically a member of the other sex.

37. La. Civ. Code art. 94 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): "A judicial declaration of nullity is not required, but an action to recognize the nullity may be brought by any interested person."
41. No Louisiana jurisprudence ever recognized the validity of a marriage between persons of the same sex, despite the footnote in Adams v. Adams, 357 So. 2d 881 n.1 (La. App. 1st Cir. 1978) which reads: "This language once unnecessary, is used because of nondiscriminatory legislation, the import of which allows marriages between persons of the same sex, a relatively new phenomenon in our society."

42. See supra note 41.
46. See, e.g., Note, Transsexual Marriages: Are They Valid Under California Law? 16 Sw. U.L. Rev. 505 (1986); Note, Is He or Isn't She? Transsexualism: Legal Impediments to Integrating a Product of Medical Definition and Technology, 21 Washburn L.J. 342 (1982).

The problem of the transsexual who marries another unsuspecting party might have
More significant changes were made in the Civil Code article that prohibits marriages on the basis of the parties' relationship. Under prior law it was unclear whether the prohibition applied to those related by adoption, or only those related by consanguinity. Before deciding whether the article should explicitly extend to those related by adoption, the Persons Committee explored the reasons for the prohibition. The prohibition probably was founded upon "empirical observation of the harmful genetic effects of such marriages" and "moral considerations growing out of the need to preserve peace within the family and to expand family fortune and influence through intermarriage with other family or tribal groups . . . ."

If both reasons were the bases of the prohibition against the marriage of related persons, then the Committee reasoned that the impediment should exist as to relationships created by adoption.

Those persons related in the ascending and descending line or in the collateral line within the fourth degree may not marry. "Within the fourth degree" includes collateral relations through first cousins.

been considered solved by using the language in La. Civ. Code art. 91 (1870): "mistake respecting the person." That phrase has been eliminated from La. Civ. Code art. 93 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)). However, the court is not precluded from resorting to general principles of obligations law, such as error, La. Civ. Code arts. 1949-1950, to dispose of unanswered problems. See supra note 20 and infra text accompanying notes 94-97.

47. La. Civ. Code arts. 94 and 95 (1870) were not explicit. La. Civ. Code art. 214 (1870) provides that an adopted person "is to be considered for all purposes as the legitimate child and forced heir of the adoptive parent or parents . . . ." (emphasis added). See comment (e) to La. Civ. Code art. 90 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)).


49. Id.


51. La. Civ. Code art. 90 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): The following persons, whether legitimate or illegitimate, may not contract marriage with each other:

Ascendants and descendants.

Collaterals within the fourth degree, whether of the whole or of the half blood.

The impediment exists whether the persons are related by consanguinity or by adoption. Nevertheless, persons related by adoption, though not by blood, in the collateral line within the fourth degree may marry each other if they obtain judicial authorization in writing to do so.

52. La. Civ. Code art. 901:

The series of degrees forms the line. The direct line is the series of degrees between persons who descend one from another. The collateral line is the series
However, as to collaterals related by adoption, the article permits the parties to obtain judicial authorization to marry. The provision was borrowed from the Quebec Civil Code. The authorization may be obtained from the district judge in the parish of either party's domicile. The article does not specify whether the authorization is to be obtained in advance of the ceremony or thereafter. The comments do suggest that in deciding whether to authorize such a marriage, the judge "should consider whether the policy of preserving family harmony will be advanced or impeded by the proposed union."

The predecessor article which contained the prohibition against intermarriage of collateral relations had been periodically amended to "ratify" marriages contracted in contravention of its provisions. The consensus of the Persons Committee was that the "ratification" provision should be included as a separate section of the bill to protect persons whose marriages had been declared legal (those celebrated before September 11, 1981). However, the Committee approved the enactment of degrees between persons who do not descend one from another, but who descend from a common ancestor.

In the direct line, the number of degrees is equal to the number of generations between the heir and the deceased. In the collateral line, the number of degrees is equal to the number of generations between the heir and the common ancestor, plus the number of generations between the common ancestor and the deceased. See also La. Civ. Code art. 90, comment (b) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): "The phrase 'collaterals within the fourth degree' includes aunt and nephew, uncle and niece, siblings, and first cousins."

53. La. Civ. Code art. 90 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): "Nevertheless, persons related by adoption, though not by blood, in the collateral line within the fourth degree may marry each other if they obtain judicial authorization in writing to do so" (emphasis added).

The parenthetical "though not by blood" recognizes the possibility that a person may adopt another person to whom he is related by consanguinity—i.e., a parent's illegitimate child (La. R.S. 9:434 (3) (4) (Supp. 1987)) or a grandparent's grandchild (La. R.S. 9:434 (5) (Supp. 1987)). The two instances mentioned concern adoption in the direct line which may create an adoptive relationship where a blood relationship already existed in the collateral line.

54. Quebec Civ. Code art. 406 (rev. 1981): "In cases of adoption, the court may, according to circumstances, permit a marriage in the collateral line."


58. La. Civ. Code art. 95 (1870): "All such marriages heretofore made in contravention of the above provisions shall be considered as legal."

59. 1987 La. Acts No. 886, § 5 (eff. Jan. 1, 1988): "Notwithstanding the provisions of Civil Code Articles 90 and 94, or of any other provision of this Act, marriages between collateral relations contracted prior to September 11, 1981, shall continue to be legal and of full effect on and after the effective date of this Act."
of a prohibition against marriages of collaterals, with simultaneous ratification of such marriages contracted by persons who had chosen to either ignore the law or flaunt it.

Ceremony

The second prerequisite to a valid marriage is a marriage ceremony at which the parties are physically present.60 A “marriage” without a marriage ceremony is absolutely null.61 Physical participation by the parties eliminates the possibility of marriage by telephone or other telecommunication device, which an earlier Attorney General’s opinion suggested was possible,62 or by procuration, which is expressly prohibited.63 The reason for the requirement of physical presence at the ceremony is to permit the officiant to examine the parties to determine if consent is freely given.64 Another possibility eliminated by the requirement of the parties’ physical presence is that the ceremony might be performed in stages with the prospective spouses making the necessary avowals at different times not in each other’s presence.

The third person who performs the ceremony must be either qualified, or reasonably believed by the parties to be qualified. Qualification consists of (1) membership in a class of religious personnel and (2) registration.65 In addition, judges and justices of peace66 may perform

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60. La. Civ. Code art. 91 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): “The parties must participate in a marriage ceremony performed by a third person who is qualified, or reasonably believed by the parties to be qualified, to perform the ceremony. The parties must be physically present at the ceremony when it is performed.”


64. La. Civ. Code art. 92, comment (b) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)).

65. La. R.S. 9:202 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)): “A marriage ceremony may be performed by:

(l) A priest, minister, rabbi, clerk of the Religious Society of Friends, or any clergyman of any religious sect, who is authorized by the authorities of his religion to perform marriages, and who is registered to perform marriages . . . .”

See also La. R.S. 9:204 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)):

An officiant, other than a judge or justice of the peace, may perform marriage ceremonies only after he registers to do so by depositing with the clerk of court of the parish in which he will principally perform marriage ceremonies, or, in the case of Orleans Parish, with the office of the state registrar of vital records, an affidavit stating his lawful name, denomination, and address.

66. La. R.S. 9:202 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)): “A marriage ceremony may be performed by . . . (2) A judge or justice of the peace.”
marriages within certain territorial limits.67 "[A] person reasonably believed by the parties to be qualified" does not require that the officiant be factually qualified, only that the parties are reasonable in believing that he is. The change in statutory language to encompass such a celebrant was in response to the fact that a Louisiana officiant not authorized by law to perform marriage ceremonies did so and no one was certain that the marriages were valid. The comment to article 91 expresses the opinion that a person reasonably believed to be qualified would include "any member of the class of persons generally recognized as empowered to perform such ceremonies, whether or not properly registered to do so."68 The same comment to the article states: "The expression [person who is reasonably believed by the parties to be qualified] may be broadly construed to prevent the annulment of marriages for technical reasons reasonably beyond the control of the intended spouses."69

Other ceremonial requirements, which do not affect the validity of the marriage, appear in the Louisiana Revised Statutes. The officiant may not perform a marriage without a marriage license70 issued upon presentation of a certified copy of each party's birth certificate, a medical certificate,71 and the consent for a minor to marry, in writing72 or by court authorization,73 or both, if required.74 The provisions of the Revised Statutes which concern the medical certificate were also amended by Act Number 830 to require testing for acquired immune deficiency

69. Id.
70. La. R.S. 9:205 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)): "A. (1) An officiant may not perform a marriage ceremony until he has received a license authorizing him to perform that marriage ceremony."
73. La. R.S. 9:211(B), 212 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)).

The documents (birth certificates, medical certificates, etc.) mentioned in the text are to be accompanied by an application containing the following information:

1. The date and hour of the application;
2. The full name, residence, race, and age of each party;
3. The names of the parents of each party;
4. The number of former marriages of each party, and whether divorced or not; and
5. The relationship of each party to the other.

syndrome (AIDS) antibodies.\textsuperscript{75} If the tests are positive as to either party, the couple may still marry after obtaining an affidavit from a licensed physician that he has informed the parties of the test results and has counseled them about AIDS.\textsuperscript{76} The only confusion caused by this additional legislation is raised by the fee for the examination and certificate, which section 232 states shall not exceed two dollars.\textsuperscript{77} Section 232 did not contemplate the fact that testing for AIDS is far more expensive than two dollars. Thus, application of the fee limit to AIDS testing would create a statutory conflict. The legislature probably did not intend for section 232 to apply to AIDS testing.\textsuperscript{78}

The officiant is prohibited from performing the ceremony until seventy-two hours after issuance of the license,\textsuperscript{79} unless there is a judicial waiver.\textsuperscript{80} The ceremony is to be performed in the presence of two witnesses,\textsuperscript{81} and a marriage certificate (marriage act) is to be prepared in triplicate and signed by the parties, witnesses and officiant.\textsuperscript{82} Opposition to the marriage may be made by an oath of the party, and, if the reason is sufficient by the judge, there will be a hearing.\textsuperscript{83} If the opposition is overruled, the objecting party bears the costs.\textsuperscript{84} The legislation concerning opposition to the marriage previously appeared in


An exception is made for persons who object to the tests on religious grounds as long as the objection is that of both parties. La. R.S. 9:230(B) (4) (as amended by 1987 La. Acts No. 830, § 1 (eff. Jan. 1, 1988)).

\textsuperscript{76} La. R.S. 9:230(B) (2) (as amended by 1987 La. Acts No. 830, § 1 (eff. Jan. 1, 1988)).


\textsuperscript{78} La. R.S. 9:232 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)) provides: "If the applicant is indigent, a physician who is the coroner or a health officer shall provide the examination and certificate at no charge to the applicant."

Yet, La. R.S. 9:230(B) (1) (as amended by 1987 La. Acts No. 830, § 1 (eff. Jan. 1, 1988)) provides: "The costs of tests required under this Subsection shall be paid by the applicants." Subsection B applies only to AIDS testing, not that for gonococci, syphilis, and other venereal diseases mentioned in subsection A.


\textsuperscript{80} La. R.S. 9:242 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)): "A judge or justice of the peace authorized to perform the marriage may waive the seventy-two hour delay upon application of the parties giving serious and meritorious reasons. His certificate authorizing the immediate performance of the ceremony must be attached to the marriage license."

\textsuperscript{81} La. R.S. 9:244 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)).

\textsuperscript{82} La. R.S. 9:245 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)).

\textsuperscript{83} La. R.S. 9:261 to 262 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)).

\textsuperscript{84} La. R.S. 9:263 (as amended by 1987 La. Acts No. 886, § 3 (eff. Jan. 1, 1988)).
the Civil Code, but was removed to the Civil Code Ancillaries for the same reason that the other ceremonial requirements were moved. New sections appear in the Ancillaries reflecting the current practice of record keeping by the state registrar of vital records. A consolidated form which contains the application for the marriage license, content of the marriage license authorizing the officiant to perform the marriage, and the marriage certificate is authorized.

**Free Consent**

The third essential element of a valid marriage is free consent of the parties to take each other as husband and wife, expressed at the ceremony. The specific content of the consent, that being "to take each other as husband and wife," was added to insure that future ceremonies would make clear to the parties that marriage is what they are contracting, rather than some informal union terminable at the pleasure of either party.

"Consent is not free when given under duress or when given by a person incapable of discernment." Article 1819, prior to its amendment in 1984, described consent as resulting from the deliberate and free exercise of the will; thus, if consent were produced by error, fraud, violence or threats, there was no consent at all. In the corresponding article of the Civil Code which concerned consent to marriage, the term free consent was also used. Although the articles on conventional obligations rarely use the term free consent, the article which lists reasons

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89. La. Civ. Code art. 1819 (1870):
Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by—
Error;
Fraud;
Violence;
Threats.
90. La. Civ. Code art. 91 (1870):
No marriage is valid to which the parties have not freely consented.
why consent may be vitiated includes duress with error and fraud.\textsuperscript{91}

The predecessor to new article 93 contained a list of circumstances under which consent was considered not freely given.\textsuperscript{92} The first two circumstances mentioned, consent given to a ravisher and consent extorted by violence, were replaced by one word in article 93—duress. That word permits resort to articles 1959-1964 in the title "Conventional Obligations" to resolve questions of what constitutes duress.\textsuperscript{93} Analogy to the predecessors of the same articles occurred under prior law.\textsuperscript{94}

The third example of defective consent listed in old article 91 was that of a mistake respecting the person.\textsuperscript{95} There is no corresponding provision in article 93. The Committee felt that "mistake respecting the person" had been so narrowly interpreted by the jurisprudence that it

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Consent is not free:
1. When given to a ravisher, unless it has been given by the party ravished, after she has been restored to the enjoyment of liberty;
2. When it is extorted by violence;
3. When there is a mistake respecting the person, whom one of the parties intended to marry.

\textsuperscript{91} La. Civ. Code art. 1948 (as amended by 1984 La. Acts No. 331, § 1 (eff. Jan. 1, 1985)): "Consent may be vitiated by error, fraud, or duress."

But, La. Civ. Code art. 2031 (as amended by 1984 La. Acts No. 331, § 1 (eff. Jan. 1, 1985)), does refer to free consent: "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."

\textsuperscript{92} See supra text of La. Civ. Code art. 91 at note 90.


As used in this Article, "duress" includes not only executed violence, but also threatened violence, if the threat is pending at the time consent is given. This usage is in keeping with the jurisprudence decided under the source provisions, Articles 90 and 91 of the Civil Code of 1870. . . . Threats of criminal prosecution, as well as of violence, may render the consent procured thereby ineffective. . . . Applying by analogy Articles 1856 and 1857 of the Civil Code of 1870, the courts have traditionally drawn a distinction between charges warranted by the facts and those not: only marriages contracted under threat of the latter have been invalidated . . . . Threats to reputation or fortune may be sufficient to invalidate a marriage under this Article.

\textsuperscript{94} La. Civ. Code arts. 1850-1859 (1870); see LaCoste v. Guidroz, 47 La. Ann. 295, 16 So. 836 (1893); Grundmeyer v. Sander, 175 La. 189, 143 So. 45 (1932); Pray v. Pray, 128 La. 1037, 55 So. 666 (1911).

\textsuperscript{95} See supra text of La. Civ. Code art. 91 (1870) at note 90.
was obsolete. In *Delpit v. Young*,\(^9\) this phrase was interpreted to include only mistakes in *physical* identity. There was no Louisiana case in which a marriage was annulled for mistake respecting the person. An argument can be made that article 93 does not declare that the reasons for defective consent are exclusive. Therefore, an aggravated case involving a mistake in physical identity could be resolved by resort to the general articles on error.\(^9\) A justification for resorting to those articles is that article 86 defines marriage as a relationship created by civil contract.\(^9\) The words civil contract were used for two reasons: (1) To demonstrate the historical assertion of jurisdiction over marriage by secular authorities and (2) To permit analogy to the law of conventional obligations when appropriate.

Another instance of defective consent to a marriage occurs when consent is given by a person incapable of discernment.\(^9\) A person incapable of discernment includes "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."\(^9\) The terms "incapable of discernment" were borrowed from the Quebec Civil Code,\(^9\) as were the examples that appear in the comment to article 93. Although absent from the illustrative list, an insane person is mentioned in another comment as an example of a person who does not

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\(^9\) No one suggested that error be extended to include the errors described in *Delpit*, 51 La. Ann. 923, 25 So. 547, as "when the one party mistakes the character, the social standing, the pedigree, the acquirements, the pecuniary means, the habits, the temperament, or the religion of the other, or when the one party, after the marriage, discovers 're-dhibitory' vices in the other . . . ." Id. at 550. See La. Civ. Code arts. 1948-1952.
\(^9\) No one suggested that error be extended to include the errors described in *Delpit*, 51 La. Ann. 923, 25 So. 547, as "when the one party mistakes the character, the social standing, the pedigree, the acquirements, the pecuniary means, the habits, the temperament, or the religion of the other, or when the one party, after the marriage, discovers 're-dhibitory' vices in the other . . . ." Id. at 550. See La. Civ. Code arts. 1948-1952.
\(^9\) Quebec Civ. Code art. 425 (rev. 1981): "A marriage contracted by a person incapable of discernment may be declared null upon the application of his curator or of either spouse."
freely consent to marriage. Under prior jurisprudence the insanity of a party was considered as an instance where his consent to the marriage was not freely given. The consequence of such a conclusion was that the marriage of the insane person was a relative nullity. Had insanity created a lack of capacity to marry, the marriage would have been absolutely null. Continuing to characterize the marriage of an insane person as relatively null due to a defect in consent was considered socially desirable. Furthermore, expanding the language to encompass mentally retarded persons and those under the influence of alcohol and drugs resolved unanswered questions under prior law. Since there is no minimum age below which a marriage of minors will be considered null, the Committee considered it advisable to permit the court to examine the consent to marriage by a minor to determine if he was too young to understand the consequences of the celebration.

Absolutely Null Marriages

Marriages declared absolutely null by article 94 include those contracted "without a marriage ceremony, by procuration, or in violation of an impediment." Under prior law, a marriage without a marriage ceremony was considered as no marriage at all and as contracted "under the other incapacities or nullities enumerated in the second chapter of this title . . ." The latter quoted language also encompassed marriages


In comment (c) to La. Civ. Code art. 93 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)):

As under prior jurisprudence, under this Article insanity is viewed as creating a lack of free consent, rather than a lack of capacity to contract marriage; so only the insane spouse may seek annulment of such a marriage. Under Article 95, infra, the spouse of a person of unsound mind has no standing to bring an action to have the marriage annulled.


106. See discussion in Pascal and Spaht, Louisiana Family Law Course 70-74 (4th ed. 1986). The title of the section which introduces the subject matter of the validity of such marriages is "Questionable marriages not clearly declared null by the legislation."


to which there was an impediment.\textsuperscript{110} However, it was not clear under article 113 if a marriage contracted by procuration was absolutely null, since the prohibition appeared in the third chapter rather than the second.\textsuperscript{111} New article 94 clarifies the law in that respect.

The theoretical differences between absolute nullities and relative nullities were maintained in the revision. Article 94 provides that if the marriage is absolutely null no judicial declaration of nullity is required.\textsuperscript{112} There are cross references to article 94 in the comments under the articles prohibiting marriages by one already married,\textsuperscript{113} by persons of the same sex,\textsuperscript{114} and by persons related within the prohibited degrees.\textsuperscript{115} Because the absolutely null marriage is considered as if it never existed, it does not prevent another marriage by one of the parties.\textsuperscript{116} Even though no declaration of nullity is required, an action to recognize it may be brought by any interested person,\textsuperscript{117} or it may be raised collaterally to assert a claim or as a defense to a claim by another.\textsuperscript{118} Rather than providing examples of “interested persons” who may bring the action to recognize the nullity as prior law did,\textsuperscript{119} the interpretation of the words is left to the judiciary with the following admonition that appears in comment (c) of article 94: “Because the prohibitions giving

\begin{footnotes}
\footnotetext[110]{La. Civ. Code arts. 93-95 (1870) appeared in Chapter 2 of Title IV—Of Husband and Wife.}
\footnotetext[111]{La. Civ. Code art. 113 (1870).}
\footnotetext[114]{La. Civ. Code art. 89, comments (b) (c) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)).}
\footnotetext[116]{La. Civ. Code art. 88, comment (c) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): “An undissolved marriage is an impediment to either spouse’s subsequent marriage. A bigamous, incestuous, or otherwise absolutely null union is not. A party to such a union may lawfully marry even though the nullity of his prior union has never been judicially pronounced.”}
\footnotetext[117]{La. Civ. Code art. 94 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)). There is no longer a reference to the possibility of the action being instituted by the Attorney General as there was in La. Civ. Code art. 113 (1870). The Council of the Law Institute voted to eliminate it.}
\footnotetext[119]{La. Civ. Code arts. 114, 116 (1870).}
\end{footnotes}
rise to absolute nullity are matters of public order the class of persons who may raise the issue is broadly defined."

Under prior law the article declaring marriages absolutely null contained two additional provisions: (1) a retroactive validation of marriages between those related within the prohibited degrees, if contracted in another state where such marriages were not prohibited, and (2) a prospective invalidation of marriages between Louisiana domiciliaries to which there was an impediment under Louisiana law, if contracted in another state where such marriages were valid without first acquiring a domicile there. As to the first provision, which was similar to but more narrow in scope than the provision in old article 95, the Committee decided to protect those persons whose marriages previously had been declared legal, but not to continue the practice. The second provision was considered unnecessary because of article 15 of the Civil Code. Under the second paragraph of article 15, an act passed in one country to have effect in another "is regulated by the laws of the country where such acts are to have effect." The example given by the redactors of the Civil Code of 1825 supports the view that the second paragraph of article 15 applies to marriages: "Thus, a marriage made in a foreign country between two inhabitants of this state, who have not lost their domicile here, and who afterwards return here to

A bigamist may assert the nullity of his bigamous union. Clark v. Clark, 192 So. 2d 594 (3d Cir. 1966); Burrell v. Burrell, 154 So. 2d 103 (1st Cir. 1963). The same right is extended to either party to a marriage that is invalid by reason of the existence of any of the other listed impediments. See Rhodes v. Miller, 189 La. 288, 179 So. 430 (1938); 1 M. Planol, supra, no. 1035.

121. La. Civ. Code art. 113 (1870): [H]owever, first, that marriages heretofore contracted between persons related within the prohibited degree either or both of whom were then and afterwards domiciled in this State, and were prohibited from intermarrying here, shall nevertheless be deemed valid in this State, where such marriages were celebrated in other States or countries under the laws of which they were not prohibited; second, that marriages hereafter contracted between persons either or both of whom were domiciled in this State and are forbidden to intermarry shall not be deemed valid in this State, because contracted in another State or country where such marriages are not prohibited, if the parties after such marriage, return to reside permanently in this State.


reside, ought to be governed by our laws and not by those of the country where the marriage was celebrated."\textsuperscript{126}


civil effects of absolutely null marriage

for the purpose of protecting the innocent party and children of an absolutely null marriage, Louisiana has always recognized the application of the "putative marriage" doctrine.\textsuperscript{127} Consistently with prior law, article 96 provides that the civil effects of a marriage flow in favor of the party who contracted it in good faith "for as long as that party remains in good faith."\textsuperscript{128} Furthermore, a marriage contracted by a party in good faith produces civil effects "in favor of a child of the parties."\textsuperscript{129} As a general proposition, the Committee accepted as desirable social policy the protection of (1) the children of a good faith marriage and

\textsuperscript{126} Projet of Civil Code of 1825, at 2 (La. St. L. Inst. transl. 1937). See also La. Civ. Code art. 94, comment (d) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)). The comment continues by observing: "There is no reason to apply a different rule to a fugitive marriage performed in another state, rather than a foreign country."


\begin{quote}
That rule [civil effects cease with bad faith] is not consistent with French law under Articles 201 and 202 of the Code Napoleon, of which Articles 117 and 118 of the Civil Code of 1870 were literal translations. French courts hold that civil effects cease to flow from a putative marriage only from the moment that the parties' contractual marriage is declared null. . . . The contrary rule followed in Louisiana had its source in Spanish law.
\end{quote}


The child extended the benefits of the civil effects of marriage, including the presumption of legitimacy (La. Civ. Code art. 184), legitimation by subsequent marriage (La. Civ. Code art. 198) and the rights and obligations owed by parents to children (La. Civ. Code arts. 215-237), must be that of the two parties.

In its discussions, the Committee expressed sympathy for the child of an absolutely null marriage when both parties are in bad faith. The concern prompted the following Committee proposal, ultimately rejected by the Committee: "An absolutely null marriage produces its civil effects in favor of any child conceived or born during the marriage." Minutes of Committee Meeting of October, 1982. Later Committee deliberations revealed the difficulty of distinguishing absolutely null marriages contracted without a marriage ceremony from informal unions (or common law marriages). The result under the proposal is that children would have been considered legitimate even though the parents may have never intended to marry. The Committee ultimately decided to consider the status of the offspring of absolutely null bad faith marriages in the revision of the law of filiation, possibly exempting such children from the necessity of instituting the filiation action required by La. Civ. Code art. 209.
(2) the spouse who contracted the marriage in good faith, but only so long as he remains in good faith. Termination of the civil effects of marriage with bad faith forces the spouse or spouses to do something to cure the nullity or to end a relationship which society does not condone.

A prerequisite to the application of the putative marriage doctrine is **contracting** the marriage in good faith. The word contracting suggests a ceremony, which would mean that a marriage that is absolutely null because of no ceremony would never produce civil effects. The predecessor to article 96 also used the word contracted, but the jurisprudence extended the doctrine in *Succession of Marinoni* to protect a good faith spouse to a marriage even though there was no ceremony, only the issuance of a marriage license. The comments explain the current state of the jurisprudence and conclude with the following statement: “The ultimate decision whether to follow *Succession of Marinoni* in preference to the two contrary cases previously cited, however, is left to the discretion of the court under this revision.”

“Good faith” is not defined by the legislation, and the comments explain that article 96 was not intended “to disturb the prior jurisprudence construing the term ‘good faith’ in this context.” Good faith means “an honest and reasonable belief that the marriage was valid, and there existed no legal impediment thereto.” It is a question of fact and must be decided according to the circumstances of each case.

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132. La. Civ. Code art. 96, comment (e) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): “That holding [Succession of Marinoni, see supra note 131] could, in a proper case, form the basis for the application of the putative marriage doctrine to a marriage that was absolutely null under Article 94, supra, because contracted without a ceremony.”
See also La. Civ. Code art. 96, comment (d) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): Such a good faith belief may arise from an error of law, as well as of fact. *Succession of Pigg*, 228 La. 799, 84 So. 2d 196 (1955) (putative wife relied upon husband's fraudulent divorce from first wife); *Funderburk v. Funderburk*, 214 La. 717, 38 So. 2d 502 (1949) (putative wife relied upon null divorce obtained in a court of improper venue).
135. *Succession of Chavis*, 211 La. 313, 29 So. 2d 860 (1947); *Gathright v. Smith*, 368 So. 2d 679 (La. 1978); *Succession of Gordon*, 461 So. 2d 357 (La. App. 2d Cir.)
Consistently with prior law, good faith is presumed, except if a spouse was a party to a prior undissolved marriage. In the latter case, the spouse bears the burden of proving his good faith.

The change that article 96 makes in prior law is an exception to the general proposition that civil effects cease simultaneously with good faith. Under the second paragraph of article 96, "[w]hen the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage." The special extension of civil effects to a spouse in bad faith is limited to a marriage that is absolutely null by virtue of a prior undissolved marriage. The article does not extend the benefits of civil effects to a bad faith spouse if the marriage is absolutely null because of the relationship of the parties or because the marriage was contracted without a ceremony or by procuration. Originally, the Committee had proposed extending the special rule to a...
marriage that is null because there is no ceremony. However, members of the Committee ultimately decided that the relevant events which would result in the termination of civil effects were too vague, and thus potentially productive of extensive litigation.

The special extension of civil effects favors only the party whose spouse had a prior undissolved marriage. Because it is an extension, the spouse who seeks the benefit of the second paragraph of article 96 must first prove he or she contracted the marriage in good faith. Thereafter, upon discovery of the impediment (the prior undissolved marriage of the other spouse) civil effects continue to flow. The other spouse whose prior marriage created the impediment does not enjoy the continuation of civil effects. The Committee felt that the spouse whose impediment caused the nullity should remain motivated to cure the defective marriage, either by remarrying the putative spouse once the impediment is removed or by obtaining a judicial declaration of nullity. The other “innocent” spouse can only rectify the defect by obtaining a judicial declaration of nullity. Furthermore, if civil effects cease upon receiving information concerning the impediment, the spouse whose

1. The Committee proposal read:

Also, when a marriage is absolutely null because contracted without a ceremony or by procuration, a party who contracts the marriage in good faith and who is willing to contract a legal marriage is entitled to the civil effects of marriage until the marriage is declared null or until the other party is willing to contract a legal marriage.

Minutes of Committee Meeting of July, 1982 (emphasis added).

The italicized language was simply too vague a standard to use in identifying the date upon which civil effects would cease. Considering the absolutely null marriage to which the provision applied, it would be difficult to establish the moment civil effects began. Furthermore, how was a party to prove he had been willing to contract a legal marriage. The Committee ultimately concluded that the situation to which the provision would apply was exceptional (good faith if no ceremony) and an attempt to protect the few innocent parties would run the risk of creating problems of proof and increased litigation.


This Article abrogates the traditional Louisiana rule in one very specific situation: where a party has acted in good faith in contracting a marriage that is absolutely null because the other party was already married at the time of contracting. 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 placed the party whose prior marriage was the cause of nullity in a better position than the one who had had no part in causing it.
impediment caused the absolutely null marriage may control the flow of civil effects to the other spouse. These equitable considerations persuaded the Committee to extend civil effects to the "innocent" spouse even after this spouse is in bad faith, until there is a judicial declaration of nullity obtained by either spouse or until the "innocent" spouse contracts another marriage with either the "bad faith" spouse or a third person.

Since the special extension changes the law, the question of retroactivity may arise. Nothing in the Act gives any direction about retroactivity, and it thus can be argued that the new provision applies to parties to an absolutely null bigamous marriage who are in good faith on January 1, 1988. The legislative change is not merely procedural, thus applying retroactively absent a declaration of legislative will to the contrary. Bad faith has legal effects which concern substantive rights, those of ownership of property under a community property regime. The legal consequences attach at the moment of bad faith. However, "the moment" suggests a finite point in time at which the law denies to a spouse the civil effects. Good and bad faith are factual questions and are dependent in many cases upon an accumulation of facts. However, similar problems of retroactivity occurred when article 155 was amended to provide that the community of acquets and gains is reestablished between judicially separated spouses upon a factual reconciliation. In that instance, the jurisprudence has refused to apply the amended version of the article to couples reconciled before the effective date of the Act.

145. La. Civ. Code art. 96, comment (b) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)). The civil effects terminate when the "innocent" spouse contracts another marriage, whether with a bad faith spouse or with a third person. Cessation of civil effects with a legal marriage to another was designed to prevent the possibility of "double dipping" into two community regimes.


Relatively Null Marriages and Their Civil Effects

A marriage is relatively null if the consent of one of the parties is not free, that is, obtained by duress or given by a person incapable of discernment. As in the case of other relatively null contracts, only the person whose consent was not freely given may seek to have the marriage declared null. However, the person whose consent was not freely given will be barred from annulling the marriage if he confirms the marriage "after recovering his liberty or regaining his discernment." Thus, the law pertaining to relatively null marriages did not change substantially.

The word confirm was substituted for cohabitation as a means of curing the relatively null marriage. The choice was purposeful. The broader term confirm permits evidence of acts other than sexual intercourse to prove an intention to cure the defective marriage. For example, by resort to general obligations theory, "under Civil Code Article 1842 (rev. 1984) a party who had married under duress could confirm the marriage by express declaration."

Although article 95 had originally included the clause "or his legal representative," it was eliminated by the Council of the Institute. The purpose of the clause was to permit such an individual to annul the marriage of the party who did not freely consent. The Committee had proposed the language to afford relief from the civil effects of the

153. La. Civ. Code art. 95 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): "Such a marriage may be declared null upon application of the party whose consent was not free."
158. La. Civ. Code art. 1842:
Confirmation is the declaration whereby a person cures the relative nullity of an obligation.
An express act of confirmation must contain or identify the substance of the obligation and evidence the intention to cure its relative nullity.
Tacit confirmation may result from voluntary performance of the obligation.
159. La. Civ. Code art. 95, comment (c) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)).
relatively null marriage\textsuperscript{160} to the person who was incapable of discernment and might lack procedural capacity.\textsuperscript{161} Identical language had been used by the court in \textit{Stier v. Price}.\textsuperscript{162} However, when the language "or his legal representative" was considered by the Council, the quoted words were removed by amendment. There was concern expressed that the language was simply too broad and could include an executor or administrator of a spouse's estate after his death.\textsuperscript{163} The additional observation was made that the curator of an interdict would have the power to institute the nullity action under the Louisiana Code of Civil Procedure articles specifying the powers of the curator.\textsuperscript{164} Subsequent attempts by the Committee to define the legal representative more broadly than a curator yet more narrowly than a legal representative after death were unsuccessful.

As under prior law, "[a] relatively null marriage produces civil effects until it is declared null."\textsuperscript{165} A relatively null marriage always has been treated as valid until annulled by judicial declaration, despite theoretical objections.\textsuperscript{166} One result of such a rule is that a relatively null marriage, unlike one that is absolutely null, does create an impediment to a subsequent marriage.

\textbf{Incidents and Effects of Marriage}

The Committee decided early in its deliberations to reject greater regulation of the marital relationship.\textsuperscript{167} As under previous law, once

\begin{itemize}
  \item \textsuperscript{160} La. Civ. Code art. 97 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)).
  \item \textsuperscript{161} La. Code Civ. P. arts. 428, 682, 684.
  \item \textsuperscript{162} 214 La. 394, 37 So. 2d 847 (1948). In that opinion, the court made the following statement:
    As to plaintiff's contention in regard to the lack of consent on the part of the husband, if he did not consent to the marriage due to his mental condition, under the provisions of Article 110 he or his legal representatives are the only persons who can be heard to complain.
    Id. at 400, 37 So. 2d at 849-50 (emphasis added).
  \item \textsuperscript{163} La. Code Civ. P. art. 3211. See also La. Code Civ. P. art. 426.
  \item \textsuperscript{164} La. Code Civ. P. arts. 684, 4262, 4555. See the discussion of the curator's powers in Note, Omnipotent or Impotent? The Curator's Role in Separation and Divorce, 43 La. L. Rev. 1017 (1983).
  \item \textsuperscript{165} La. Civ. Code art. 97 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)). The comment to art. 97 adds:
    This Article is new, but it does not change the law. In Louisiana the relatively null marriage has long been regarded as valid until annulled by a judicial decree rendered in a direct action of nullity brought by a property party, as defined in Article 110 of the Civil Code of 1870.
  \item \textsuperscript{166} See discussion in Pascal and Spaht, Louisiana Family Law Course 56-57 (4th ed. 1986).
  \item \textsuperscript{167} The Committee considered and ultimately rejected imposition of the following
the legal relationship is created, the revision continues a trend of permitting the private ordering of the relationship by the spouses. The law imposes few personal obligations upon the spouses. The obligations imposed, however, are so fundamental that they are to be considered generally as matters of public order. During the marriage the spouses are prohibited from suing each other to enforce such obligations.

personal obligations:
(a) requiring the spouses to live together (source: Quebec Civ. Code (rev. 1981)) (rejected: Civil Code should remain silent on whether spouses are obligated to live together, given the increasing number of spouses who are prevented from doing so by the demands of their careers);
(b) requiring the spouses to contribute to the expenses of their marriage in proportion to their respective means (source: Quebec Civ. Code art. 445 (rev. 1981)) (rejected: interspousal bar to suit should not be lifted and judges as arbiters of family financial disputes would be likely to impair family harmony and to seriously overburden the courts);
(c) providing that spouses must choose the principal family residence together (source: Quebec Civ. Code art. 444 (rev. 1981)) (rejected: same reasons as in (a) and (b));
(d) providing that neither spouse may alienate or encumber the principal family residence without consent of the other (source: Quebec Civ. Code art. 452 (rev. 1981)) (rejected: a spouse's right over his separate property should not be thus restricted).

Minutes of Committee Meetings of May, 1982.


1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)) (amending La. Civ. Code art. 98, comment (c)): "The husband's special additional obligation to provide his wife with the conveniences of life, formerly imposed by Article 120 of the Civil Code of 1870, was abrogated by the legislature in Acts 1985, No. 271, and likewise has been suppressed in this revision."

1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)) (amending La. Civ. Code art. 98, comment (f)): "This revision has not carried forward the unconstitutional provision of Article 120 of the Civil Code of 1870 whereby the husband had the exclusive right to choose the location of the matrimonial dwelling and the wife had a concomitant duty to reside there. See Crosby v. Crosby, 434 So. 2d 162 (La. App. 5th Cir. 1983) (provision held unconstitutional on both state and federal grounds). That provision was repealed by the Louisiana Legislature by Acts 1985, No. 271. Under this revision the spouses are free to live together as necessary to fulfill their obligation mutually to support, assist, and be faithful to each other."


169. La. Civ. Code art. 98, comment (e) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): "The spouses' duties under this Article, as a general rule, are matters of public order from which they may not derogate by contract."

With identical terminology to that of its predecessor,\(^\text{171}\) article 98 imposes the mutual obligations of fidelity, support, and assistance.\(^\text{172}\) Fidelity refers to the obligation to refrain from adultery\(^\text{173}\) and "to submit to each other's reasonable and normal sexual desires."\(^\text{174}\) Support includes not only food, clothing and shelter but also the cost "of operating such conveniences as telephones, home appliances, and an automobile."\(^\text{175}\) Assistance, to the extent that it is different from that of support, includes "the personal care to be given an ill and infirm spouse."\(^\text{176}\)

For the first time, explicitly as an incident of marriage, the law provides that "[s]pouses mutually assume the moral and material direction of the family, exercise parental authority, and assume the moral and material obligations resulting therefrom."\(^\text{177}\) The source of the article comment refers to an interim spousal allowance, which is a term of art used in the Law Institute's proposed draft revising the law of spousal support to be introduced at the 1988 Legislative Session.

\(^\text{171}\) La. Civ. Code art. 119 (1870): "The husband and wife owe to each other mutually, fidelity, support and assistance."


\(^\text{173}\) See La. Civ. Code art. 138 (1870) (separation from bed and board) and art. 139 (1870) (divorce).


As used in this Article, the term "fidelity" refers not only to the spouses' duty to refrain from adultery, but also to their mutual obligation to submit to each other's reasonable and normal sexual desires. The jurisprudence has held that the latter obligation is a necessary concomitant of marriage. Favrot v. Barnes, 332 So. 2d 873 (La. App. 4th Cir.), writ denied, 334 So. 2d 436 (La.), reversed in part on other grounds, 339 So. 2d 843 (La. 1976), cert. denied, 429 U.S. 961, 97 S. Ct. 387 (1976); Phillpott v. Phillpott, 285 So. 2d 570 (La. App. 4th Cir. 1973), writ refused, 288 So. 2d 643 (La. 1974); Mudd v. Mudd, 206 La. 1055, 20 So. 2d 311 (1944).


The jurisprudence decided under the source provision has held that the spouses' duty to support each other is limited to furnishing the necessities of life. . . . Nevertheless the term 'support' has been construed to include the cost not only of food, clothing, and shelter, but also of operating such conveniences as telephones, home appliances, and an automobile. Bernhardt v. Bernhardt, 283 So. 2d 226 (La. 1973) . . . .


"The duty to render assistance, insofar as it is separate from that of support, includes the personal care to be given an ill or infirm spouse. . . . James v. State Through Board of Administrators of Charity Hospital, 154 So. 2d 497 (La. App. 4th Cir. 1963)." See also Dollar v. Dollar, 159 La. 219, 105 So. 296 (1925), noted in Pascal and Spaht, Louisiana Family Law Course 111 (4th ed. 1986).

is Quebec Civil Code article 443. It describes the assumption of control over the moral and material direction of the family and states a general principle of equality between the spouses in exercising that control. It serves as an introduction to the more specific chapter on parental authority, which presently does not reflect the general principle of equality. The chapter of the Civil Code devoted to the authority of parents over their children will be revised in the future.

Article 100 is new and is included in the revision for the purpose of resolving a conflict under the jurisprudence. Under the article, the legal name of each spouse remains unchanged by marriage; however, "a married person may use the surname of either or both spouses as a surname." As an example, a woman's name does not change upon marriage such that she can seek to change her name on her birth certificate. The privilege enjoyed by the wife as a matter of custom

178. Quebec Civ. Code art. 443 (rev. 1981). "The spouses together take in hand the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom." Id.

179. La. Civ. Code art. 99 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)). The comment to art. 99 provides: "This Article is new. It states a general principle of equality between the spouses in the moral and material direction of the family."

180. La. Civ. Code art. 216 (1870): "A child remains under the authority of his father and mother until his majority or emancipation.
In case of differences between the parents, the authority of the father prevails."
The article is contained in Section 1 of Chapter 5 (Of Paternal Authority) of Title VII of Book I of the Civil Code.


182. La. Civ. Code art. 100 (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): "Marriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as a surname."

183. La. Civ. Code art. 100, comment (b) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)): Under this Article the legal name of each spouse remains unchanged by marriage, although the spouses are entitled to use each other's names as a matter of custom. Thus, the legal name of a spouse cannot be changed on his birth certificate, as maintained by the state registrar of vital statistics, simply as a result of the marriage. See R.S. 40:34. Only a name change effected by an action under R.S. 13:4751-4755, or by an adoption pursuant to R.S. 9:421-462, or by virtue of a legitimation under R.S. 40:46A, can be given this ultimate legal effect. R.S. 40:34 (A)(1)(a)(v) (rev. 1979); See also R.S. 40:75. However, either spouse may validly sign documents either with his spouse's surname or with a combination of his and his spouse's surname.
to use the name of her husband is extended to the husband, with the additional possibility of some hyphenated version of both surnames.\textsuperscript{184}

While considering the rights and obligations of married persons, the Committee discussed the problem of cohabitants and potential legislative solutions. After lengthy Committee and Council debate, an article was proposed that extended to cohabitants, neither of whom were married to another, the limited right to contract in writing.\textsuperscript{185} The proposed article passed the House and Senate Committees and the House Floor, but was removed by amendment on the Senate Floor. At the same time the Senate passed a bill repealing article 1481 which prohibited certain donations between those persons living in open concubinage.\textsuperscript{186} Both actions may ultimately have some effect upon contracts entered into between cohabitants.\textsuperscript{187}

\textit{Conclusion}

The process of revision of the law relating to marriage and the family has begun. The first phase is completed. Although the new provisions which appear in the Civil Code and Civil Code Ancillaries make only a few substantive changes, the sheer number of statutes has been significantly reduced. The revised Civil Code articles are brief and direct and contain only the essential substantive provisions. The Louisiana Revised Statutes are more detailed and supplement the concise provisions of the Civil Code.

During the 1988 Legislative Session, the revised Civil Code articles on divorce, spousal support, claims for contributions to a spouse's

\textsuperscript{184} La. Civ. Code art. 100, comment (c) (as amended by 1987 La. Acts No. 886, § 1 (eff. Jan. 1, 1988)):

As regards the wife's name, the rules adopted by this Article are those followed in French law .... and the same rules are applied to the husband under this revision. It has been held that these rights continue after the marriage has ended. Welcker v. Welcker, 342 So. 2d 251 (La. App. 4th Cir.), writ denied 343 So. 2d 1077 (La. 1977). Contra, 1 M. Planiol, supra note 15, No. 395.

\textsuperscript{185} H.B. 1139 Reg. Sess. (1987), proposed La. Civ. Code art. 101: "An otherwise valid contract is not rendered unenforceable solely because the parties, neither of whom was married, were cohabitants at the time of contracting but such a contract must be in writing."

Cohabitants was defined in comment (c) as persons who live together in a companionate sexual relationship.


Those who have lived together in open concubinage are respectively incapable of making to each other, whether \textit{inter vivos} or \textit{mortis causa}, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.

Those who afterwards marry are excepted from this rule.

\textsuperscript{187} For a discussion of the potential impact, see Note, 48 La. L. Rev. (1988).
education, child custody, child support and other relief incidental to divorce will be previewed. That work product will represent the completion of the second phase of the revision.

Much still remains to be done. Filiation, with the inherent problems of dual paternity, scientific advances in paternity testing, surrogate motherhood, artificial insemination, and in vitro fertilization, presents a formidable challenge. Implementing the principle of equality between parents in exercising authority over their children will require extensive comparative research for acceptable solutions to irresolvable parental conflicts. The Civil Code articles on tutorship need to be compatible with the parallel institution of custody, and the articles governing interdiction have not been evaluated critically in years.

At least another six years of work will be required to finish the task of family law revision. The law regulating the interrelationship of family members and their relationship to the rest of society touches the lives of every citizen of this state. For that reason, the revision must proceed slowly and cautiously, and only after lengthy consideration and deliberation. Hence one “baby” step at a time is an appropriate pace.