Putative Marriages: What Are "Civil Effects"?

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Severe consequences to good faith possessors, should the state demand a return of the products removed from water-bottoms, could provide incentive for reversal of the instant decision. If the court is willing to extend its fruits analogy to others holding similar patents, that extension of equitable relief would go far toward relieving the harsh results of a decision that has finally corrected an aberration in Louisiana property law. Hopefully the decision in *Gulf Oil Corp. v. State Mineral Board* will not fall beneath the pressures brought by dissenting groups. Mere changes in the composition of the court should not be relied upon at a later time to overturn a decision bringing harmony to the law of navigable waterbottom ownership.53

*Francis J. Crosby*

**PUTATIVE MARRIAGES: WHAT ARE “CIVIL EFFECTS”?**

Two recent decisions by the Louisiana Supreme Court highlight the difficulty traditionally attending determination of the “civil effects” that flow to good faith spouses in a putative marriage.1 The difficulty arises in the courts’ attempts to articulate a difference between rights and duties that arise solely as a result of a marriage contract and are therefore “civil effects” and rights and duties that are personal and would exist regardless of the existence of a marriage.2 The supreme court’s decisions in *Cortes v. Fleming*3

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53. Chief Justice Fournet, after dissenting in *Price*, did, however, concur in the denial of writs in *Cenac*, stating, “Indeed, there would be no stability of title in this state if every time there is a change of the membership of this court, previously adjudicated property rights are to be changed in accord with the views of the individual members as newly composed.” 241 La. at 1059, 132 So. 2d at 929. While this view has not been followed in overruling the erroneous *Price* decision, hopefully the instant case will put an end to the apparently endless controversy over Act 62 of 1912.

1. LA. CiV. CODE art. 117: “The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.”

2. Professor Pascal has noted that “by emphasizing ‘civil effects’ rather than ‘effects’ in general, the articles imply that the purely personal rights and obligations of the parties, as distinguished from the civil effects of marriage, always cease with the declaration of nullity. . . .” R. PASCAL, LOUISIANA FAMILY LAW COURSE 56 (1973) [hereinafter cited as PASCAL].

3. 307 So. 2d 611 (La. 1975).
and King v. Cancienne,\(^4\) expanding the construction of the term "civil effects" into new areas, significantly affect the putative marriage doctrine in Louisiana.

Articles 117 and 118\(^5\) of the Louisiana Civil Code contain the rules regulating the effects of putative marriages. A marriage contracted in good faith by both parties but declared null produces its civil effects as it relates to the parties and children born of the marriage; if only one party is in good faith, the civil effects flow only in that party's favor and in favor of any children born of the marriage. These principles emanate from a theory originally formulated in the canon law,\(^6\) and the redactors of the Louisiana Civil Code of 1825 drew from both French\(^7\) and Spanish sources\(^8\) in drafting the corresponding provisions of the 1825 Code.\(^9\)

Louisiana jurisprudence has required both the performance of a marriage ceremony and the good faith of at least one of the parties before recognizing a null marriage as putative.\(^10\) Article 117, providing that a null marriage produces its civil effects if \textit{contracted} in good faith, is the codal source for the ceremonial prerequisite. Although in one case the Louisiana Supreme Court held the ceremony requirement satisfied by a reasonable belief that a ceremony had taken place,\(^11\) the majority of decisions have emphasized the necessity of an actual marriage ceremony.\(^12\)

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\(^4\) 316 So. 2d 366 (La. 1975).

\(^5\) See text of article 117 in note 1, \textit{supra}. \textit{LA. CIV. CODE} art. 118: "If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."


\(^7\) The wording for these articles comes verbatim from the French counterparts in the Code Napoleon. Code Napoleon arts. 201-02 (1804); Succession of Marini, 183 La. 776, 797, 164 So. 797, 804 (1935).

\(^8\) The redactors of the Louisiana Civil Code of 1825 noted that the putative spouse provisions were conformable to the Spanish law. \textit{PROJET OF THE CIVILE CODE OF 1825}, art. 10, 1 \textit{LA. LEGAL ARCHIVES} 10 (1939) [hereinafter cited as \textit{PROJET}]; \textit{LAS SIETE PARTIDAS} bk. 4, tit. 13, L. 1 (Scott transl. 1931).

\(^9\) \textit{PASCAL} at 56-57; \textit{PROJET} at 10; \textit{LAS SIETE PARTIDAS} bk. 4, tit. 13, L. 1 (Scott transl. 1931).

\(^10\) See cases cited in note 12, \textit{infra}. For a discussion of these two requirements and the putative marriage in general, see Comment, \textit{The Putative Marriage Doctrine in Louisiana}, 12 \textit{LOYOLA L. REV.} 89 (1967).

\(^11\) Succession of Marini, 183 La. 776, 164 So. 797 (1935).

\(^12\) \textit{E.g.}, Succession of Dotson, 202 La. 77, 88, 11 So. 2d 488, 491 (1942) (O'Neill, J., concurring); Succession of Cusimano, 173 La. 539, 138 So. 95
“Good faith” has been defined as the honest and reasonable belief of a party that his marriage was valid.\textsuperscript{13} Louisiana courts have consistently held the issue of good faith a question of fact to be determined ultimately upon the facts and circumstances of each case.\textsuperscript{14} A party’s good faith may be founded on either error of fact or error of law.\textsuperscript{15} Once a party claiming putative spouse status shows that a marriage ceremony took place, a presumption of his good faith arises which must be rebutted by a party challenging that status.\textsuperscript{16}

Having concluded that a putative marriage exists, Louisiana's courts have asked whether the right sought to be enforced can be properly classified as a civil effect of the marriage. In the early case of Smith v. Smith\textsuperscript{17} the Louisiana Supreme Court noted that the courts' broad application of the term “civil effects” was an effort to give to the unfortunate good faith spouse the ordinary effects of a valid marriage. Pointing out the many rights and obligations that Louisiana courts have held to be “civil effects which flow from [a] putative marriage,”\textsuperscript{18} the supreme court in Cortes v. Fleming\textsuperscript{19} and King v. Cancienne\textsuperscript{20} recently also favored a broad con-
struction of the putative marriage provisions of the Civil Code in determining the civil effects of such a marriage.\textsuperscript{21}

However, \textit{Cortes} and \textit{King} also illustrate the difficulty in determining what are civil effects of marriage. \textit{Cortes} presented the question of whether “alimony is a civil effect of a marriage which may be awarded the good faith wife as an incident to an annulment proceeding”\textsuperscript{22} when the husband was in bad faith. Answering that question affirmatively,\textsuperscript{23} the Louisiana Supreme Court further noted that the Louisiana Civil Code provides two additional bases upon which alimony after annulment may be awarded to a putative spouse: a right to compensation analogous to alimony awarded upon divorce under article 160, and a right to damages for the good faith spouse based upon article 2315.\textsuperscript{24}

Despite a comprehensive discussion of the nature of alimony and, more specifically, its characterization as a civil effect of marriage founded upon the continuing duty of spouses to provide mutual support,\textsuperscript{25} the court in \textit{Cortes} concluded by holding narrowly “that alimony is a civil effect of the marriage in favor of a good faith wife of that putative marriage \textit{when the other party is in bad faith}.”\textsuperscript{26} Although the court defined alimony as “the right of support or maintenance ... established at the moment of the marriage,”\textsuperscript{27} its holding curiously was limited to the one instance in which alimony could most properly be characterized as a right of recovery under article 2315, based on the other party’s bad faith.\textsuperscript{28} As

\textsuperscript{21} 316 So. 2d at 371; 307 So. 2d at 613.
\textsuperscript{22} 307 So. 2d at 612.
\textsuperscript{23} “That the right of support or maintenance is established at the moment of the marriage and is an element of the obligations of the parties to one another during the marriage, is clearly established by Civil Code Article 119. It is an effect of the marriage and it is a civil effect of the marriage upon termination of a null marriage when one party is in good faith and the other is in bad faith.” \textit{Id.} at 616.
\textsuperscript{24} “We can also, through analogy with Article 160, establish that alimony is a civil effect going to the party in good faith in an annulment proceeding. We can, without regard to Articles 117 and 118, base an award of alimony to a good faith wife of a putative marriage in an annulment proceeding when the husband is in bad faith upon Article 2315.” \textit{Id.}
\textsuperscript{25} LA. CIV. CODE art. 119: “The husband and wife owe to each other mutually, fidelity, support and assistance.”
\textsuperscript{26} 307 So. 2d at 616 (emphasis added).
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} This limited holding is in accordance with the French concept of alimony. There is, however, disagreement among the French doctrinal writers as to the codal basis for awarding alimony to the good faith spouse in a
the court noted, this narrow result avoids the difficult question of the propriety of awarding alimony when both parties are in good faith\textsuperscript{29} and further sidesteps the issue of a good faith husband's right of alimony based on the mutual duty of support established by article 119. However, the court's reliance on article 119 to support its contention that alimony is a civil effect of marriage would indicate that alimony should rightfully be awarded in each of these situations.

A major problem involved in characterizing alimony as a civil effect of marriage flowing to a good faith spouse under articles 117 and 118 arises in providing for its continuance beyond the termination of the spouse's good faith. In dealing with effects of marriage such as the existence of a community of acquets or gains, Louisiana courts, relying on the Spanish laws to which the putative marriage articles conform,\textsuperscript{30} have consistently held such effects of marriage cease once the good faith spouse learns of the impediment to the marriage.\textsuperscript{31} Thus, if alimony is a civil effect of marriage, the putative husband's duty to provide support for the putative wife under Civil Code article 119 similarly should cease upon termination of the wife's good faith.

Arguments for awarding alimony based solely upon the provisions of article 160\textsuperscript{32} are also unpersuasive. Although

\begin{footnotes}
\footnote{29. Id. at 616 n.8.}
\footnote{30. See authorities cited in note 8, supra.}
\footnote{31. E.g., Patton v. Cities of Philadelphia & New Orleans, 1 La. Ann. 98 (1846); Clendenning v. Clendenning, 3 Mart. (N.S.) 438 (La. 1825); Succession of Hopkins, 114 So. 2d 742 (La App. 1st Cir. 1959); Howard v. Ingle, 180 So. 248 (La. App. 2d Cir. 1938); Evans v. Eureka Grand Lodge, 149 So. 305 (La. App. 2d Cir. 1933).}
\footnote{32. LA. CIV. CODE art. 160: "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when: 1. The wife obtains a divorce; 2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or 3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person. This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries."}
\end{footnotes}
this article authorizes the payment of alimony only to the wife and can be invoked without regard to the husband's good or bad faith, its location in the Civil Code chapter entitled "Of the Effects of Separation From Bed and Board and of Divorce" supports the view that article 160 alimony is indeed "an effect, not of marriage, but of divorce." 33

A right of recovery under article 2315, 34 based on the bad faith of one spouse, provides the good faith spouse, either husband or wife, a more logical basis for recovery upon the annulment of a putative marriage. Although a right of action under article 2315 is personal and should not be considered an effect of marriage provided for by articles 117 and 118, 35 it does provide an effective vehicle through which a putative spouse can recover for the damage he or she has suffered through the partner's bad faith. 36

The term "civil effect" was expanded again in King v. Cancienne, in which the Louisiana Supreme Court expressly overruled Vaughan v. Dalton-Lard Lumber Co. 37 and held that the right of a surviving spouse to maintain a wrongful death action was one of the civil effects of marriage. The inclusion of the term "spouse" among the listed beneficiaries in article 2315 indicated to the King majority that this benefit was one that existed as a result of the marriage relation and was therefore a civil effect of marriage. 38 The clearcut language of the court's holding belies the difficulty involved in formulating a fundamental, rational test for distinguishing such civil effects of marriage from other benefits or duties that accrue to marriage partners because of their relationship but that are not solely the result of the fact of their marriage. 39

33. 307 So. 2d at 617 (Sanders, J., dissenting).
34. LA. CIV. CODE art. 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it . . . ."
35. The problem of continuing alimony beyond the termination of the spouse's good faith is therefore not encountered. See text at note 30-31, supra.
37. 119 La. 61, 43 So. 926 (1907) (holding a putative spouse could not maintain an action for wrongful death under LA. CIV. CODE art. 2315).
38. 316 So. 2d at 371.
39. See authority cited in note 2, supra. Although the Louisiana Supreme Court based its decision on other considerations, the First Circuit Court of Appeal, noting the similarity between the instant case and recent United States Supreme Court decisions striking down Louisiana statutory class distinctions in the area of wrongful death, had stated that the lack of a rational
ance of the conceptual difficulties in such a distinction could have been the basis for Justice Barham’s broad statement in King: “Unless there is legal provision to the contrary, whatever benefit accrues to a legal spouse also accrues to the good faith spouse of a marriage which has been annulled or which is subject to nullity . . . .”

Such broad construction of articles 117 and 118 will necessarily produce problems. As noted in recent decisions, dual payment problems are a definite possibility in several areas. In statutory schemes such as workmen’s compensation and social security, both a legal wife and a putative wife might be entitled to full benefit payments. A similar problem could occur should both a legal and a putative spouse claim the benefit of the legal usufruct provided by Louisiana Civil Code article 916. In wrongful death or tort actions, the test for distinguishing a wrongful death action from a “civil effect” of marriage could possibly be labeled an invidious discrimination. Thus, any such distinction could be barred under the equal protection clause of the fourteenth amendment. King v. Cancienne, 303 So. 2d 891, 895 (La. App. 1st Cir. 1974). Cf. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (finding no significant relationship between the inferior classification of unacknowledged dependent illegitimate children and the recognized purposes of workmen’s compensation such as to justify a denial of equal recovery rights).

40. 316 So. 2d at 371 (emphasis added).

41. Warren v. Richard, 296 So. 2d 813, 817 (La. 1974); King v. Cancienne, 303 So. 2d 891 (La. App. 1st Cir. 1974).

42. LA. R.S. 23:1251 (1950): “The following persons shall be conclusively presumed to be wholly and actually dependent upon the deceased employee: (1) A wife upon a husband with whom she is living at the time of his accident or death . . . .” (emphasis added).

43. E.g., 42 U.S.C. § 416(b) (1970): “The term ‘wife’ means the wife of an individual, but only if she (1) is the mother of his son or daughter, (2) was married to him for a period of not less than one year immediately preceding the day on which her application is filed . . . .”

44. An early workmen’s compensation case determined that although the right to claim workmen’s compensation benefits was a civil effect of marriage, it would not be so construed if to do so would deny or lessen the benefits of the legal spouse. Fulton Bag & Cotton Mills v. Fernandez, 159 So. 339 (La. App. Orl. Cir. 1935).

45. LA. CIV. CODE art. 916: “In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.” When the bigamous spouse is in good faith and there are children of both unions, problems could occur in determining the portion of the community to be held in usufruct by each of
existence of two "spouses," each asserting a claim to the proceeds of the wrongdoer's liability insurance, could encourage increased litigation and make early settlement in such cases impossible.

These potential problems, however, perhaps are outweighed by the difficulty involved in formulating a test for determining the civil effects of a putative marriage. Justice Barham's expansive language in King indicates that, in the absence of a rational standard for making this determination, the putative spouse shall be accorded the right of all of the benefits enjoyed by a legal spouse, "civil effect" or not.

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DIMINUTION OF PROPERTY VALUES AS COMPENSABLE DAMAGE ABSENT FAULT OR PHYSICAL DAMAGE

Plaintiffs sued the owner of a high pressure gas pipeline, operated within fifteen feet of their property, for $30,000 damage to property value due to the alleged danger resulting from the proximity of the pipeline. The plaintiffs did not allege negligent construction or maintenance nor make any claims of actual physical damage or discomfort. The trial court sustained defendant's exception of no cause of action and the court of appeal affirmed. The Louisiana Supreme Court held that allegations of diminution of property values caused by the nearby presence of ultra-hazardous activities state a cause of action under Civil Code article 667 even absent assertions of physical damage. Hero Lands Co. v. Texaco, Inc., 310 So. 2d 93 (La. 1975).

Traditionally, recovery in Louisiana for non-physical damage to property as a result of works or activities on neighboring estates has been limited to cases in which a neighboring proprietor was at fault, that is, guilty of negligence, intentional misconduct or abuse of right.1 Whereas recovery under Louisiana Civil Code article 2315 has encompassed both physical and non-physical damage,2 recovery the surviving spouses. Cf. Patton v. Cities of Philadelphia & New Orleans, 1 La. Ann. 98 (1846).