Omnipotent or Impotent? The Curator's Role in Separation and Divorce

Paul M. Adkins
NOTES

OMNIPOTENT OR IMPOTENT? THE CURATOR'S ROLE IN SEPARATION AND DIVORCE

Introduction

Dissolution of marriage by divorce presents a multitude of problems which have far-reaching effects on individuals, families, and society as a whole. Louisiana courts traditionally have maintained that the great interests of society dictate that "marriage relations should be surrounded by every safeguard, and their severance allowed only for the causes specified by the law, and clearly proven." Based upon this preservation of societal interests, divorce may be viewed as a somewhat unique proceeding which the courts may be hesitant to expand upon absent express authority. A particularly enigmatic problem is posed for the judiciary when the spouse seeking divorce has been judicially interdicted: does a third party have the right or authority to institute the personal action on the interdict's behalf? Although the powers and duties of the curator, who is appointed to care for and represent the interdict, are worded in rather general terms, the court may hesitate to adopt an expansive interpretation of these powers when the purpose of the curator's actions is to assume authority to institute an admittedly unique and personal action. While there has been some limited indication that the noninterdicted spouse may have relief in the form of divorce,\(^2\) the interdict's right to institute divorce proceedings through a curator remains unaddressed by either the Louisiana Legislature or courts.

In assessing the interdict's right of access to the judiciary through his curator, the different types of interdiction in Louisiana, along with

Copyright 1983, by LOUISIANA LAW REVIEW.
2. See Ridell v. Hyver, 215 La. 358, 40 So. 2d 785 (1949). The parties were separated in 1935, and Mr. Hyver was admitted to East Louisiana State Hospital nearly a year later. Mr. Hyver was not formally interdicted until twelve years after the original physical separation. In reversing the district court's dismissal of the divorce suit brought by Mrs. Hyver, the Louisiana Supreme Court held that "the separation must be voluntary at its inception and that, if one of the parties becomes insane after such voluntary separation, the insanity does not preclude, prevent, or bar the granting of a divorce." 215 La. at 355-56, 40 So. 2d at 787. See also Adams v. Adams, 408 So. 2d 1322 (La. 1982). Mrs. Adams initially left the matrimonial domicile after Mr. Adams choked her and threatened her with a machete. Mr. Adams was committed that same day, and Mrs. Adams told both her sister-in-law and her husband's probation officer that she had no intention of staying with him. The supreme court, in granting Mrs. Adams' divorce request, held that "from the point in time that a party evidences an intention to terminate the marital association, when coupled with actual physical separation, the statutorily required separation period begins to run. And that is so regardless of the cause of the initial physical separation." 408 So. 2d at 1327.
the extent to which such interdictions curtail procedural capacity, must be analyzed. In addition, the general authority and duties of the curator should be examined, as well as the statutory grounds for obtaining a divorce. Regardless of whether the curator is allowed to initiate the divorce proceeding, alternatives such as partition of community property and support pending suit for separation or divorce should be considered.

Louisiana Jurisprudence

The curious case of Cory v. Cory\(^3\) presented the Louisiana Second Circuit Court of Appeal with the question of whether a curator had authority to file suit for separation or divorce on behalf of an interdict. In Cory, the plaintiff wife and her husband were married in Louisiana and remained in the state for about two years before moving to California in the late 1940’s. Mrs. Cory slowly lost her mental faculties because of a degenerative brain disease, and in 1977 she returned to Louisiana where her sister, a registered nurse, had agreed to care for her. Mrs. Cory’s sister instituted interdiction proceedings and was appointed curatrix. In June of 1979, the curatrix instituted separation proceedings\(^4\) based on abandonment, cruel treatment, and nonsupport;\(^5\) alternatively, she sought a divorce based on voluntarily living separate and apart for one year.\(^6\) The trial court granted a separation and award of alimony pendente lite\(^7\) on the grounds of abandonment under the provisions of Civil Code article 143.\(^8\) The second circuit reversed, opining that the elements of abandonment had not been established.\(^9\) The trial court had held (and the second circuit

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4. While the jurisdictional concerns of Cory present timely issues involving the domicile of an interdict and her nonresident husband, consideration of these issues is deferred, as it is beyond the scope of this note.
7. La. Civ. Code art. 148:
   If the spouse has not a sufficient income for maintenance pending suit for separation from bed and board or for divorce, the judge may allow the claimant spouse, whether plaintiff or defendant, a sum for that spouse’s support, proportioned to the needs of the claimant spouse and the means of the other spouse.
8. La. Civ. Code art. 143:
   Separation grounded on abandonment by one of the parties can be admitted only in the case when he or she has withdrawn himself or herself from the common dwelling, without a lawful cause, has constantly refused to return to live with the other, and when such refusal is made to appear in the manner hereafter directed; provided, however, that separation grounded on abandonment may be the object of a reconventional demand in any suit for separation from bed and board.
9. In holding that abandonment had not been established, the second circuit found that Mr. Cory, although legally blind, supported his family by his work at concession
affirmed) that a divorce could not be granted based on living one year separate and apart, because a separation was not considered to be voluntary where either spouse was insane at the time of separation.\footnote{11}

In Cory, the issue of the power of the curator to institute separation and divorce proceedings was pretermitted by the plaintiff’s failure to establish statutory grounds of abandonment and the court’s view that the separation was not “voluntary.” In light of the \textit{Adams v. Adams}\footnote{12} holding that separation need be voluntary only as to one of the spouses, courts soon may have to answer squarely the question of whether curators may institute divorce proceedings based upon sufficient statutory grounds. Louisiana has no specific provisions allowing curators or guardians to institute separation and divorce proceedings, nor is there any jurisprudence directly addressing the matter. Resolution of the divorce issue in cases where the petitioning spouse has been judicially interdicted must therefore be based on case analogy and interpretation of a broad spectrum of laws dealing with divorce, curators, and incompetents, as well as the nature of the right.

\textit{History of Divorce in Louisiana}\footnote{13}

While society traditionally has expressed a strong interest in the preservation and perpetuation of marriage, this strong interest may have weakened. A review of the evolution of Louisiana’s divorce laws reflects a general trend of diminution of the waiting periods before obtaining divorce and a gradual relaxation of the legislative attitude toward divorce. Divorce was not available under the general laws of Louisiana until 1827 and then only pursuant to a legislatively recog-

\footnotesize{stands in public buildings. Although his income totaled only about $400 monthly, he sent a check to the curator every month to assist in his wife’s care. Mr. Cory even made the long journey from California on one occasion to visit his wife, but the trip was terminated when a brother of Mrs. Cory forced him to leave the property. Under these facts, there was no intent shown by Mr. Cory to abandon his wife.}

\footnotesize{10. \textit{LA. R.S. 9:301} (Supp. 1979): “When the spouses have been living separate and apart continuously for a period of one year or more, either spouse may sue for and obtain a judgment of absolute divorce.”

11. \textit{But see} Adams v. Adams, 408 So. 2d 1322 (La. 1982). In \textit{Adams} the court held that a separation, when evidenced by an intention to terminate the marital association, need be voluntary only on the part of one of the parties to comply with the requirements of \textit{LA. R.S. 9:301}, regardless of the cause of the separation. Although the facts are distinguishable (Mr. Adams was not formally interdicted, and the interdicted spouse in \textit{Adams} did not seek the divorce), the \textit{Adams} court’s statement regarding the nature of voluntariness will have a direct impact on situations like that in Cory. Hence, while the holding of Cory is undoubtedly correct, the statement that a separation is involuntary where either spouse is insane now appears to be overbroad.

12. 408 So. 2d 1322 (La. 1982).

13. For a more thorough treatment of this subject, see R. Pascal & K. Spaht, \textit{Louisiana Family Law Course} 101-103 (2d ed. 1979).}
nized cause. The Revised Civil Code of 1870 recognized adultery and felony conviction of the other spouse as grounds for immediate divorce, but it imposed a minimum one-year waiting period if the divorce was sought following a period of legal separation. Act 25 of 1898 provided the initial authority for the at-fault spouse to obtain a divorce after a judicial declaration of separation from bed and board, but until 1916, the at-fault spouse was still precluded from seeking the initial separation. Although the period of physical separation required was seven years, Act 269 of 1916 was the first provision allowing a separation without a showing of fault by either spouse.

The time periods required for divorce have gradually diminished until today only a one-year period of physical separation or a six-month period following the judgment of legal separation need be shown to obtain a final divorce. Earlier Louisiana court decisions expressed a reverential attitude toward the sanctity of marriage, noting that "it is in the great interest of society that the conjugal relation should not be dissolved except upon weighty and well established reasons." The same philosophy may no longer hold true, however, as along with the weakening societal interest in preserving the marriage, as expressed by the legislature, emerges an interest of the individual which may be so significant as to be entitled to constitutional protection.

Divorce as a Fundamental Right

The United States Supreme Court has increasingly recognized the right of parties to marry without unnecessary interference by the state. The modern era of Supreme Court cases treating marriage began with Loving v. Virginia, in which the Court found a Virginia antimiscegenation statute unconstitutional on both equal protection and due process grounds. In dictum, discussing the due process argument, the Court noted that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." This oft-cited language has been used to support the theory that marriage is a fundamental right,

14. LA. CIV. CODE art. 139.
15. LA. CIV. CODE art. 139 (as it appeared prior to 1954 La. Acts, No. 618, § 1).
21. Id. at 12.
but the actual holding of Loving was only that “restrictions on marital choice based explicitly on race are unconstitutional” as violative of equal protection. The Court appears to have taken the final necessary step in granting “fundamental right” status to marriage in Zablocki v. Redhail. In striking down a Wisconsin statute which required court approval prior to the marriage of those persons under child support obligations, the Court noted its earlier decisions respecting the importance and value of marriage and reaffirmed the fundamental character of the right to marry, holding that “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”

In Boddie v. Connecticut, the plaintiffs were denied access to divorce because they could not afford the court costs and fees required by state law. The Court recognized the importance of the marriage relationship and the “concomitant state monopolization” of the only legal means of dissolving the relationship; the Court held that “due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.” In Sosna v. Iowa, the plaintiff challenged Iowa’s one-year residency requirement for obtaining a divorce on both due process and equal protection grounds, claiming that the requirement interfered with both the right to interstate travel and access to divorce. In denying relief, the Court found that the residency requirement did not preclude access to the courts for purposes of obtaining a divorce; the residency requirement merely delayed this access. The Court held that since Iowa had asserted a strong basis for the requirement, i.e., that it not become a divorce mill for neighboring states and that litigants have sufficient attachment to the state before being entitled to access to its courts, the residency requirement fell within permissible constitutional parameters. According to the rationales of Boddie and Sosna, states may justify regulation of divorce if such regulations further a sufficiently strong state interest. While the state clearly has an interest in preserving the family unit, such an interest may not warrant arduous restrictions on the ability to obtain a divorce. The state’s characterization of the role of the family unit as essential wanes in the face of evidence that the marriage has irretrievably broken down or is no longer viable.

23. Id. at 953.
25. Id. at 388.
27. Id. at 374.
The state's justification that regulating divorce promotes general morality is less supportable in light of increasing recognition of personal autonomy and freedom of life styles. State and societal interest in promoting the family and preserving public morals may give way to individual autonomy and the rights both to be left alone in one's private affairs and to make decisions without government interference. If the right to marry is a fundamental right, it logically follows that until the right to divorce is equally recognized, the ability to fully exercise the right of marriage has been greatly impaired. The Court noted in United States v. Kras that the "Boddie appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities" and suggested that the most fundamental of these interests was the right to remarry. If the right to marry (or remarry) is based upon a fundamental freedom of associational interests, this right also may impliedly include the right to choose not to continue to associate, regardless of whether the motivation is remarriage. Alternatively, the individual's interest in both privacy and freedom of association suggests recognition of divorce as a right worthy of significant constitutional protection.

The Boddie and Sosna holdings illustrate the constitutional problems triggered by state requirements imposed upon divorce. In Boddie, the interest of the state in insuring that court costs were paid was insufficient to justify a blanket denial of procedural access to divorce by indigents. Conversely, the Iowa regulation was justified in Sosna by a significant state interest in both assuring the requisite attachment to the state and avoiding the flood of litigants from other states seeking refuge in a more desirable forum. Based on these decisions, it appears that the Court has failed to adopt a clear standard of review. The determination of a divorce statute's constitutional validity necessarily will involve an analytical balancing—weighing the state's interest in regulating divorce procedures against the individual's interest in obtaining relief. Applying such a balancing test, it appears that the individual's interest frequently will outweigh that of the state, particularly when the state attempts to deny access to

30. See Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563 (1977); see also Department of Agriculture v. Moreno, 413 U.S. 528, 535 n.7 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972).
33. Id. at 444-45.
34. See Strickman, supra note 22, at 981.
divorce. While the state often can establish legitimate rationales for restricting divorce, the regulations it imposes to effectuate its policies must be narrowly drawn, for broad denials of the right to divorce likely will be declared unconstitutional.

Interdiction and Powers of the Curator in Louisiana

In narrowing the present focus to the rights of the interdict in divorce and separation proceedings, it is first necessary to examine the Louisiana law on interdiction. Louisiana presently provides three different statutory grounds for interdiction: interdiction for mental incapacity,36 interdiction for physical infirmity,37 and limited interdiction for mental retardation, disability, or other infirmity.38 The language of Civil Code article 422 suggests that any incapacitating physical infirmity is sufficient for a judicial declaration of interdiction;39 however, the jurisprudence consistently has construed the provision as applicable only to those physical infirmities which also affect mental capacity,40 such as senility,41 complete paralysis,42 and learning disability.43 No reported cases reflect application of the article to infirmities which are purely and solely physical, having no effect on mental capabilities. Although the courts have recognized the article's apparent applicability to those physical disabilities involving no effect on mental capacity,44 they have stopped short of applying it in that vein.45 Regardless of judicial construction, the articles dealing with the capacity and authority of a curator generally apply with equal force to interdiction under both articles 389 (interdiction for mental incapacity) and 422 (interdiction for "any infirmity"). Code of Civil Procedure article 684 denies the interdict procedural capacity to sue and

36. LA. CIV. CODE art. 389.
37. LA. CIV. CODE art. 422.
38. LA. CIV. CODE art. 389.1.
39. LA. CIV. CODE art. 422 states:
   Not only lunatics and idiots are liable to be interdicted, but likewise all persons who, owing to any infirmity, are incapable of taking care of their persons and administering their estates.
   Such persons shall be placed under the care of a curator, who shall be appointed and shall administer in conformity with the rules contained in the present chapter.
40. Interdiction of Scurto, 188 La. 459, 177 So. 573 (1937).
41. Pons v. Pons, 137 La. 25, 68 So. 201 (1915).
44. Succession of Connor, 165 La. 890, 891, 116 So. 223, 224 (1928) ("The law allows a formal interdiction for other causes than insanity, to wit, physical infirmities.")
45. Louisiana courts might apply the article to purely physical disabilities when provided with an appropriate factual setting. However, a review of the jurisprudence offers no instances in which a Louisiana court has been presented with the opportunity to implement this approach.
places this power in the hands of his curator. As no specific provision empowers the curator to institute divorce proceedings, analysis of the curator's general powers under the Code of Civil Procedure and the jurisprudence may provide insight as to the permissibility of such action.

Code of Civil Procedure article 4550 provides, in part, that "[w]ithin thirty days after the judgment of interdiction the court shall appoint a curator for the person interdicted." Very few specific provisions deal with the authority of the curator, but article 4554 provides that the rules applicable to the minor—tutor relationship are also applicable to the relationship between incompetent and curator. Thus, "the curator may exercise all procedural rights available to a litigant." While article 4264, read in isolation, suggests a very broad scope of powers available to the curator, his authority is not unlimited. Comment (a) to article 4269 recognizes the fiduciary nature of the curator's role in managing and preserving the property interests of the interdict, while article 4271 requires the filing of a petition with recommendations and reasons therefore when action is taken affecting the interdict's interest. The codal articles on procedural capacity of the curator are very general and provide little insight into the legislative intent. When read in pari materia rather than individually, however, a discernible scheme appears. Code of Civil Procedure article 4234 provides that mismanagement of the interdict's property is grounds for removal of the curator; article 4262 instructs the curator to "take possession of, preserve, and administer the [interdict's] property";
article 4269 imposes a prudent administrator standard in the investing and managing of the interdict's property; and article 4069 specifically provides for a tutor for property only. In short, the bulk of the procedural articles emphasize the care and management of the interdict's property, reflecting a legislative attitude that financial and property concerns were a primary object of the legislation empowering the curator. This primary concern is reflected in Civil Code articles 389 and 422, which implicitly require that the incompetent be unable to manage his person and administer his property before interdiction occurs. Where interdiction is imposed, the duties of administering the interdict's property, as well as caring for his person, fall upon the curator, who is appointed for that purpose. The care of the interdict's person more appropriately might be left within the discretion of the interdict's family (as it has been traditionally), particularly where the interdict's personal affairs do not necessitate prompt action. The administration of the interdict's estate, however, is better left with one who is judicially determined to be competent to handle such matters and who is instructed and empowered to act in the interdict's best interests.

In defining the incapacity requiring interdiction, the drafters could have selected more appropriate language had the intent been to include a less severely impaired group which merely experienced difficulty in making personal decisions, as opposed to financial ones. Undoubtedly, such a group would be comprised of a large segment of the population that is commonly considered rational but experiences difficulty in personal life and relations. A more logical interpretation consistent with the jurisprudence is that the statutory language was chosen only after thoughtful deliberation, with the intent to provide for the interdiction of those who had reached a point of such severe incapacity that they could neither care for themselves physically and emotionally nor protect their own financial and property interests.

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Natural cotutors shall be bound in solido except as to damages arising from the administration of all or a part of the minor's property by one of the cotutors individually pursuant to an agreement between the cotutors approved by the court. See In re Fabre, 371 So. 2d 1322 (La. 1979). La. Civ. Code art. 389 provides: "No person above the age of minority, who is subject to an habitual state of imbecility, insanity or madness, shall be allowed to take care of his own person and administer his estate, although such person shall, at times, appear to have the possession of his reason." La. Civ. Code art. 422 is quoted in note 39, supra.

50. This contention is supported by the jurisprudence. To impose interdiction, the court must find that the person both cannot administer his estate and cannot care for his person. See Pons v. Pons, 137 La. 25, 68 So. 201 (1915) (noting the existence of all the requisites for interdiction). See also In re Adams, 209 So. 2d 363 (La. App. 4th Cir. 1968) (finding that although Miss Adams [was] able to perform simple routine chores, "a normal seven-year-old child was capable of doing these things," the decree of interdiction was warranted, as she could neither administer her estate nor take care of her person).
The minimum standards warranting interdiction under articles 389 and 422, however, are not inseparably linked with the procedural authority the curator assumes. Combining the general articles on the curator’s authority with the codal language describing the status which requires interdiction, one can infer that the curator, in the performance of his duties, should be more concerned with the interdict’s finances and property than with the interdict’s personal affairs.

Authority of the Curator to Institute the Divorce Action

The jurisprudence lends support to those who view the curator as a guardian of the interdict’s financial concerns. Louisiana courts have recognized the curator’s binding authority to defend the interdict in a partition action, to administer the incompetent’s estate, and to pay the just debts of a deceased interdict. However, there is a surprising scarcity of cases dealing with the authority to initiate actions not motivated by pecuniary interest. This absence is consistent with Planiol’s view that the powers of the curator should be so limited that he only can concern himself with the most indispensable and urgent acts. The curator properly asserts himself when representing the interdict who has been sued or when administering an estate, since failure to act to resolve these problems often may prove financially disastrous. Action for divorce, however, does not carry this sense of financial urgency in all cases. While the raucous and improprieteous acts of one spouse might prove offensive or embarrassing to the other spouse, there generally is no pending urgency to the dissolution proceeding. Indeed, the interdict (who is likely to be insulated from both the offending spouse and society) should be relatively unaffected by the personal conduct of others. In the event the interdict is not in a position to remarry or embark upon new intimate personal relations, the failure to sever the matrimonial bonds is of little direct consequence to him.

Arguably, a sense of urgency is present as to at least one party if the curator initiates the divorce action. Inherent dangers accompany the grant to the curator of the power to seek divorce on behalf of the interdict, for this power invites abuse. A curator granted power

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54. In re Onorato, 46 La. Ann. 73, 14 So. 299 (1894).
56. Thus, if a primary concern in affording constitutional protection to the right to divorce is the safeguarding of one’s right to remarry, the interdict in this position arguably is entitled to a lesser degree of constitutional protection.
to seek divorce on behalf of the interdict might assert the action in order to provide for the financial welfare of the curator, rather than the best interests of the interdict; e.g., the curator might be compensated by ten percent of the revenues of the interdict's property. That possibility suggests the withholding of such authority as the more judicious choice. Since the interdicted spouse may be insulated or incapable of expressing an attitude or of understanding the nature of the other spouse's acts, there seems to be no requirement for prompt action until the competent spouse begins to alienate community assets, at which point the curator may act on behalf of the incompetent to protect his financial concerns.

A particular problem arises in the context of appointing the curator. Code of Civil Procedure article 4550 provides alternative procedures for this appointment. A competent person may nominate a curator to serve if he later becomes interdicted. If this curator is not nominated by power of attorney or is for some reason disqualified, the interdict's spouse would have preference over other parties in the appointment of the curator. The appointment of the interdict's spouse as curator gives rise to potential problems, especially where the interests of those spouses living under the legal regime conflict and one spouse controls the financial destiny of both. Under the recently enacted matrimonial regimes provisions, Louisiana provides for

57. LA. CODE CIV. P. art. 4274 & comment (c).
58. See Cory v. Cory, 395 So. 2d 937 (La. App. 2d Cir. 1981). The family of Mrs. Cory had never shown any liking for Mr. Cory and did not approve of the marriage. In such a situation, the opportunity for Mrs. Cory's sister to impose her wishes upon the interdict was clear, as she did by seeking the divorce almost immediately upon being appointed curatrix. Similar problems arise in the context of the curator who stands to benefit financially if a potential heir can be eliminated by divorce.
59. LA. CODE CIV. P. art. 4550:
Within thirty days after the judgment of interdiction the court shall appoint a curator for the person interdicted.
By power of attorney, a competent person may nominate the curator of his person, of his property, or both, to serve should he be later interdicted. The court shall appoint the person nominated upon his furnishing security and taking an oath, as provided in Articles 4131, 4171, and 4554, unless he is disqualified or, unless for some other reason, the court determines that the appointment would not be for the best interest of the interdict.
If the curator is not nominated by power of attorney, or if the nominee is not appointed, the spouse of an interdicted person has the prior right to be appointed curator.
If the interdict has no spouse or if the spouse does not apply for appointment as curator within ten days after the judgment of interdiction, the court shall appoint the applicant best qualified, personally, and by training and experience, to serve as curator. Article 4069 governs the appointment of a separate curator of the property and person.
equal management of community property: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." The spouse who is the sole manager of a community enterprise has the exclusive right to alienate or encumber its movables. Additionally, either spouse has the exclusive right to manage, alienate, or encumber movables issued or registered in his name, even though such movables may be community property. While a standard of equal management of community property has been advanced, the equal management provisions actually extend only to a limited class of nonregistered movables, for the concurrence of both spouses is required for the alienation or encumbrance of registered movables, community immovables, and all or substantially all of the assets of a community enterprise. While either spouse may renounce the right to concur in favor of the other spouse, retention of the right to concur does not necessarily fully protect a spouse, as each spouse possesses individual authority to dispose of or alienate substantial community assets. Not only does either spouse possess the capability of alienating considerable assets, but Civil Code article 2355 allows a spouse to seek judicial authorization to act without the concurrence of the other upon showing, among other factors, that such concurrence cannot be obtained due to physical incapacity or mental incompetence. In anticipation of problems involving the alienation of community assets, Louisiana has provided some procedural safeguards. Article 4550 allows the court to appoint as curator the applicant best qualified if the spouse does not apply for appointment within ten days of the judgment of interdiction. In any event, at the time the court appoints a curator, the court also must appoint an undercurator. The undercurator acts to protect the interests of the interdict by express-

61. LA. CIV. CODE art. 2346.
62. LA. CIV. CODE art. 2350. Article 2350 does not include movables issued in the name of the other spouse or situations in which the concurrence of the other spouse is required.
63. LA. CIV. CODE art. 2351.
64. LA. CIV. CODE art. 2346, comment (a).
66. LA. CIV. CODE art. 2347.
67. LA. CIV. CODE art. 2348.
68. While it is not entirely clear whether the court could arbitrarily refuse to appoint the spouse if application is made, it appears that the court, under its broad discretion to act in the best interests of the interdict, could refuse the application if the spouses' interests conflicted. The court also may appoint a separate curator for property. See LA. CODE CIV. P. art. 4069.
69. LA. CODE CIV. P. art. 4553.
ing his concurrence or nonconcurrence in actions suggested by the curator, as well as by intervening whenever the interests of the curator and the interdict are opposed. If the undercurator fails to concur, the court holds a contradictory hearing, thus assuring neutral judicial intervention to seek the best interests of the interdict. The interdicted spouse is further protected by the general rule that "a spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property." The protection afforded by this general rule, however, presupposes that the court will intervene in disputes involving undissolved marriages—an attitude which courts traditionally have been reluctant to assume. Thus, while the law purports to bridle the discretion of the spouse appointed curator, its impact and effectiveness, in view of the attitude adopted by the courts, remains uncertain.

Limited Interdiction

The impact of Louisiana Civil Code article 389.1 is somewhat unclear, as it is a new provision and there is no reported interpretive jurisprudence. Arguably, the same procedural limitations apply to this limited interdiction as apply to the more comprehensive interdiction under articles 389 and 422. Were this true, however, there hardly would be a need for a new provision; in fact, the judgment of limited interdiction is specifically intended to grant the curator only limited authority. Article 389.1 clearly calls for a curator with limited powers:

When a person is declared incapable by reason of mental retardation, mental disability, or other infirmity under the provisions of Articles 389 or 422 of the Louisiana Civil Code, of caring for his own person or of administering his estate, a court of competent jurisdiction may appoint a limited curator to such person or his estate. Pending appointment of a limited curator, the court shall inquire into the specific abilities and disabilities of the incapacitated person and such limited curator shall have only those powers necessary to provide for the demonstrated needs of the incapacitated persons. The powers, duties, responsibilities, and any liabilities of the limited curator shall be specifically set forth in a judgment of limited interdiction.

The rights of the limited interdict shall be infringed in the least restrictive manner consistent with his incapacities. A judgment

70. La. Code Civ. P. arts. 4202, 4553. This responsibility is not to be taken lightly. The undercurator may be liable to the interdict for the negligent performance of his duties. See Angelloz v. Angelloz, 204 La. 988, 16 So. 2d 654 (1944).
72. See text at note 46, supra.
of limited interdiction shall not operate to deprive the incapacitated person of any civil right, the right to contract, or any right pertaining to any license, permit, privilege, or benefit unless specifically set forth in the judgment.

The interdiction under this article is certainly not intended to be as comprehensive as that under articles 389 or 422, which removes virtually all of the interdict's authority to exercise his civil rights. The new provision envisions a person who is competent enough to make many decisions and express opinions yet needs assistance in administering an estate or handling certain affairs. Consistent with the concept of infringing on this person's rights in the least restrictive manner, the regulation of personal relations, absent a contrary decree in the judgment of limited interdiction, would be left in the hands of the interdict. In this fashion, the limited interdict could have a limited curator who would act as a consultant or even a limited curator who, although fully empowered to administer the concerns of his financial well-being, could in no way interfere with his right to seek a divorce. Even if the limited curator is established specifically in the decree as the procedural representative in all matters on behalf of the limited interdict, such a declaration would not necessarily include a suit for divorce filed by the curator. However, the curator should be entitled to at least submit his petition and demonstrate that such a suit would be in the best interests of the interdict. Prior to the enactment of the limited interdiction provision, the parties faced an all-or-nothing proposition. The person was either completely incompetent and stripped of virtually all capacity or fully competent and vested with complete capacity. The new provision recognizes that there is a vast gap between complete incompetence and full capacity. In recognizing this gap, Louisiana may adopt the approach of that California court which made an exception to the general bar against curators instituting divorce proceedings when the spouse under conservatorship was shown to be capable of exercising a rational judgment and expressing her wishes concerning termination of a marital relationship. If, in the judgment of limited interdiction the court grants the power to pursue all legal actions to the curator, the limited curator clearly would be the proper procedural representative to assert the action; conversely, if this power is not specifically set forth, article 389.1 mandates that it not be denied to the limited interdict. The language of the article suggests that the legislature intended that the

74. Id. at 173.
75. In re Marriage of Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973), overruled on other grounds, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).
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right of the interdict were to be preserved to the greatest possible degree, and included within these rights may be access to the courts, whether an action is initiated by the limited interdict or his curator pursuant to the limited interdiction decree.

The question of whether an action for divorce can be maintained pursuant to any of the three provisions for interdiction is hardly crystalline. As Louisiana’s courts have not clearly addressed this issue, a survey of the solutions from other states and the social policies reflected therein may be of some assistance.

_Treatment by Other States_ 76

Of the twenty-three surveyed states which have dealt specifically with the authority of a curator or guardian to initiate divorce proceedings on behalf of an interdict, the vast majority have noted that in the absence of a specific statute, the curator is not allowed to do so. 77 Although most of these states grant to the interdict’s guardian or curator broad, vague procedural authority similar to that provided for in Louisiana, the underlying rationale which frequently surfaces suggests that a suit for divorce is one so strictly personal that only the offended spouse should be able to prosecute it. 78 The courts of these states have offered diverse reasons for concluding that divorce is such a unique and personal action as to preclude participation by the curator: the offended spouse might condone the acts of the other spouse, 79 one or both parties could be opposed to divorce based on religious beliefs 80 (even though a spouse might be incapacitated to the extent that he could not express such opposition), and the interdict could be incapable of making a truly voluntary decision as to the termination of the relationship. 81 Many state courts continue to recognize marriage as a highly-regarded institution to be left undisturbed in the absence of specifically expressed legislative design: “The right to divorce is not a common law right, but depends upon legislative enactments.” 82 Only three states have ever recognized the authority

76. Although many states have adopted all or part of the Uniform Marriage and Divorce Act, the act contains no specific provision regarding the curator’s authority to institute divorce. See generally _Unif. Marriage & Divorce Act_ § 303(f) (1974): “The court may join additional parties proper for the exercise of its authority to implement this Act.”
of the curator to institute divorce proceedings—Massachusetts and Rhode Island (by statute) and Alabama (through its jurisprudence). (Although a lower New York court allowed appointment of a guardian to initiate divorce proceedings on grounds of adultery, it is doubtful that this court's approach would be generally followed in light of earlier precedent from the state's highest court.) Massachusetts formerly allowed the libel for divorce to be signed by the guardian of the person not of sound mind, but this provision was repealed in 1975, leaving Rhode Island as the only state with a statutory provision for this authority. The repeal of the Massachusetts provision leaves the guardian with general procedural capacity to sue on behalf of his ward, much like that granted in Louisiana and other states. While the broad terms of the current Massachusetts provision have suggested to some that there truly has been no reduction of authority for the guardian or curator, the legislative act of repeal and the failure of any cases to surface more logically suggests that the legislature intended to completely remove this authority from the scope of the guardian's powers. Under Rhode Island General Law,

[every complaint [the divorce petition] shall be verified by the plaintiff, if of sound mind and legal age to consent to marriage; otherwise upon application to the court and after notice to the party in whose name the complaint shall be filed, the court may allow such complaint to be verified by a resident guardian or next friend].

Rhode Island expressly recognizes the authority of the guardian to initiate divorce proceedings, yet no reported cases reflect application of the statute to interdicts and curators.

The Alabama Supreme Court, in 1941, found statutory authority for allowing the curator to act by reading that state's laws regarding

83. See text at note 102, infra.
86. MASS. ANN. LAWS R. Civ. P. 17(b) (Michie/Law. Co-op. 1982).
87. LA. CODE CIV. P. arts. 4202, 4262, 4264.
88. KY. REV. STAT. ANN. § 387.060 (Baldwin 1982) provides: "A guardian shall have the custody of his ward, and the possession, care and management of the ward's property, real and personal. He shall provide for the necessary and proper maintenance...of the ward out of the estate." See also GA. CODE ANN. § 29-2-1 (1982); TENN. CODE ANN. § 34-401 (1977).
90. R.I. GEN. LAWS § 15-5-11 (1956). The complaint is the petition filed for divorce. This statutory provision is located under chapter 5 of the Rhode Island Domestic Relation Law and applies specifically to divorce.
guardsians in pari materia with its laws of divorce, and the court did allow the curator to institute divorce proceedings.\textsuperscript{91} Although the majority opinion expressed no rationale for this departure from the “rule sustained by the weight of authority,”\textsuperscript{92} a dissenting opinion implied that the holding was based primarily on the social implications involved. It was averred that the wife, subsequent to her husband’s interdiction, had remarried and reared a family of children. The dissent noted that “[f]or sound reasons of public policy, where the legitimacy of children is involved, a presumption of the validity of the second marriage is indulged.”\textsuperscript{93} This decision may have been based upon unique circumstances, but a later Alabama decision reflects the state supreme court’s hesitancy to depart from its earlier precedent\textsuperscript{94} and leaves Alabama as one of only several states which have addressed the issue and allowed such liberal powers to the curator.

While these two Alabama decisions remain undisturbed, no subsequent reported cases have followed their approach. Massachusetts clearly has reversed its position on the issue, and it is unclear how the courts of Rhode Island will interpret its statute. The predominant trend, however, is towards withholding authority from the curator.

\textit{SpecialGrounds for Divorce}

The provisions regulating the powers of the curator emphasize that person’s obligation to act in the best interests of the incompetent. Louisiana courts, in aiding the curator to achieve this goal, necessarily must examine the content of these interests. Louisiana, under certain circumstances, might be willing to follow the more liberal approach granting power to the curator to institute divorce proceedings.

While Louisiana traditionally has recognized adultery and felony conviction as grounds for simultaneous separation and divorce,\textsuperscript{96} the more commonly recognized divorce is a two-step procedure initiated by a period of legal separation and, if no reconciliation takes place, followed by final divorce. Under modern Louisiana law, a one-year period of physical separation is still generally required before divorce is granted,\textsuperscript{97} although final divorce may be obtained six months after a judgment of separation.\textsuperscript{98} Additionally, immediate divorce is available

\begin{footnotes}
\item[91] Campbell v. Campbell, 242 Ala. 141, 5 So. 2d 401 (1941).
\item[92] 242 Ala. at 142, 5 So. 2d at 401.
\item[93] 242 Ala. at 143, 5 So. 2d at 403 (Bouldin, J., dissenting).
\item[94] Hopson v. Hopson, 257 Ala. 140, 57 So. 2d 505 (1952).
\item[96] LA. R.S. 9:301 (Supp. 1979).
\end{footnotes}
in the case of adultery or felony conviction. As noted by Planiol,

[t]he stigma flowing from condemnation to a serious penalty falls
indirectly upon the spouse of the convict. It is proper that this
spouse, thus affected by the unworthiness of the convict, should
be able to obtain the rupture of the marriage and have nothing
more in common with such a spouse.

This stigma attaches equally to the spouse of an adulterer. Civil Code
article 139 reflects society’s condemnation of both these acts and pro-
vides the offended spouse with the opportunity to immediately ter-
minate the marital relationship. A further reflection of this social
opprobrium is suggested by the duty of fidelity contained in Civil Code
article 119. As a specific obligation, fidelity apparently is viewed
as a desirable virtue necessary to maintain the marital relationship,
and departure therefrom is immediate cause for dissolution.

A lower New York court expressed this same attitude toward
adultery when "in the interests of justice," it allowed a guardian to
be appointed for an interdict so a divorce action could be prosecuted
on grounds of adultery. While New York previously had followed
the majority rule in disallowing a divorce action filed by a guardian
the court noted, "It cannot be presumed that the Legislature intended
to leave an insane spouse completely at the mercy of the other party
to the marriage contract, who might then with impunity disregard
marital obligations or successfully assert marital rights lost by
misconduct." The disdain of the New York court for adultery is
paralleled in Louisiana, where the legislature has long recognized
adultery, as well as felony conviction, as immediate grounds for
divorce. Divorce based upon the narrow statutory grounds of adultery
(or felony conviction) could provide the Louisiana courts with a basis
upon which to decline to follow the majority trend. However, even
if Louisiana fails to recognize divorce upon the grounds of adultery

98. LA. CIV. CODE art. 139.
99. 1 M. PLANIOL, supra note 55, no. 1171, at 651.
100. LA. CIV. CODE art. 119: “The husband and wife owe to each other mutually,
fidelity, support and assistance.”
102. The current position of New York is unclear. New York’s highest court had
previously adhered to the majority trend in Mohrmann v. Kob, 291 N.Y. 181, 51 N.E.2d
921 (1943). The decision of McRae v. McRae, 43 Misc. 2d 252, 250 N.Y.S.2d 778 (Sup.
Ct. 1964), which allows the prosecution of the divorce action by an appointed guar-
dian, leaves an apparent conflict within the state, as the state’s highest court has
not addressed the issue since Mohrmann; presumably, the high court’s earlier Mohrmann
rationale remains valid.
103. McRae v. McRae, 43 Misc. 2d 252, 254-55, 250 N.Y.S.2d 778, 779 (Sup. Ct. 1964)
(citing Kaplan v. Kaplan, 256 N.Y. 366, 371, 176 N.E. 426, 427-28 (1931)).
(much less any other cause) as actionable by a curator, the interdict would not necessarily be without a remedy.

Other Options of the Curator

Although the curator may be barred from petitioning for divorce on the interdict’s behalf, feasible alternatives are available, particularly where financial and property matters are the primary concern. As previously noted, the provisions regarding the power of the curator seem to be directed at protecting the financial security of the interdict. In this context, the Fourth Circuit Court of Appeal found that the curatrix was a proper party to assert an alimony claim on behalf of her sister, who was interdicted subsequent to her divorce. Recognizing that the limits and scope of authority of the curator are nebulous at best, the curator nevertheless may have viable options consistent with the legislative goal of securing the interdict’s financial stability. While the following illustrations of potential alternatives are not intended to be an exclusive listing of the curator’s options, they do evidence a legislative design to provide solutions to the interdict’s problems. Civil Code article 136 specifically states that “separation from bed and board does not dissolve the bonds of matrimony.” Since such a judgment does not terminate the marital association, the courts might express a less reverential attitude towards it and permit a curator to file a separation suit on behalf of an interdict. In allowing the curator to institute the separation action, Louisiana would not be unique. Although New York generally does not recognize the power of a curator to institute divorce proceedings, the power to seek a judicial separation was recognized in Kaplan v. Kaplan. The New York high court noted that the state’s statutory provisions did not expressly provide that an action for separation could be brought by an insane spouse through a guardian ad litem. The court stated, however, that any cause of action in favor of an infant or incompetent could be prosecuted by a guardian, and the court then concluded that judicial separation was one such cause of action. The court expressly withheld judgment on the question of whether a divorce suit could be maintained by a guardian. The actions for separation and divorce were distinguished based upon the fact that actions for separation existed long before divorce was recognized. In

104. In re Williams, 288 So. 2d 401 (La. App. 4th Cir. 1974).
105. Of course, the power of the curator to seek the judicial separation presupposes the existence of statutory grounds which could be pursued by a person of competence.
106. See text at note 102, supra.
addition, separation continues the marriage tie and allows enforcement of the "marital obligation of support." Other states have recognized the authority of a curator to set aside a decree of divorce, as well as to institute annulment proceedings. These decisions recognize the fact that the curator must be able to protect one who can not do so on his own behalf. Under Louisiana law, judicial separation might be a more desirable means of protecting the financial and property interests of a spouse than divorce.

The judgment of separation from bed and board effects a dissolution of the community, entitling each spouse immediately to a partition of the community property. The interdict who obtains a separation is assured by the provisions of Civil Code article 2357 that his liability for debts incurred during the existence of the community is limited to his share of the former community and that his separate property may not be seized by any creditors unless he was the party who incurred the debt. Article 2357 additionally protects the interdicted spouse by discouraging the alienation of former community property. Either spouse who disposes of property of the former community for any purpose other than the satisfaction of community obligations is liable for all obligations incurred by the other spouse up to the value of the property so alienated. This general rule, however, is subject to the modifications contained in the third paragraph of Civil Code article 2357. Either spouse, by written act, may assume responsibility for one-half the community obligations incurred by the other spouse. Under such a voluntary agreement, the assuming spouse is free to dispose of former community property without incurring additional liability for the debts incurred by the other spouse.

A recent Third Circuit Court of Appeal decision supports the proposition that the curator may act to terminate the community existing between the interdict and his spouse. In *Hines v. Hines*, the curator representing the interdicted husband entered into a matrimonial agree-

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108. 256 N.Y. at 370, 176 N.E. at 427.
113. Termination of the community pursuant to a judgment of separation from bed and board is retroactive to the date on which the petition was filed. See *La. Civ. Code* art. 155.
115. 419 So. 2d 971 (La. App. 3d Cir. 1982).
ment dividing the community property and adopting a "separate maintenance regime." The curator's action on behalf of the interdict had been taken "with court approval." The matrimonial agreement in Hines produced the same effects with respect to community property as would termination of the community pursuant to legal separation.

While the curator's actions in Hines effected a termination of the community, the court did not treat the question of whether the curator could represent the interdict in a suit for separation. One aspect of a suit for separation that is not present in a Hines-type agreement is alimony pendente lite:

If the spouse has not a sufficient income for maintenance pending suit for separation from bed and board or for divorce, the judge may allow the claimant spouse, whether plaintiff or defendant, a sum for that spouse's support, proportioned to the needs of the claimant spouse and the means of the other spouse. Of course, alimony pendente lite is dependent upon the curator's ability to initiate separation proceedings, even if he cannot file for divorce. Once this right is established, the interdicted spouse, through a curator, may seek maintenance based upon the mutual obligations of support set forth in Civil Code articles 119 and 120. These mutual obligations remain intact, since the marital ties are not dissolved upon separation. The enforcement of the codal obligations, however, requires a suit for legal separation or divorce. No provisions now exist for the civil enforcement of these mutual obligations by the curator of an interdicted spouse.

Conclusion

The problems faced by the interdicted spouse are unique. Louisiana has not committed itself to any inflexible standards and has the

116. Id. at 972.
117. LA. CIV. CODE art. 148.
118. See Holliday v. Holliday, 358 So. 2d 618 (La. 1978). In Holliday the court said, The right of the wife to seek alimony pendente lite does not depend at all upon the merits of the suit for separation from bed and board, or for divorce, or upon the actual or perspective outcome of the suit. The reason for this is that an order to pay alimony pendente lite is merely an enforcement of the obligation of the husband to support his wife as it exists under La. Civil Code art. 120, which continues during the pendency of a suit for separation from bed and board or for divorce and does not terminate until the marriage is dissolved either by death or divorce.

Id. at 620.
119. LA. CIV. CODE art. 136.
opportunity to draw upon the experiences of other states in solving the problem of divorce for an interdict. The courts may hesitate to depart from the majority trend by granting blanket approval for the curator to interpose himself between the spouses and initiate a dissolution of the marriage. The structure of Louisiana's family and property laws do not necessitate such a departure, as the curator may protect the interdict's financial and property interests through partition, alimony pendente lite, or a contractual agreement to terminate the community. Louisiana can protect the best interests of the interdict by interpretation of its present statutory provisions. Within this framework, Louisiana courts have been given the tools not only to protect the interdict's assets but also to seek additional support for the interdict in need and, given the proper grounds, to allow the action for divorce by the curator when the acts of the opposing spouse have been of such a nature as to prove offensive to both the interdicted spouse and society.

Paul M. Adkins