The Pitfalls of a Putative Marriage and the Call for a Putative Divorce

Monica Hof Wallace
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* Monica Hof Wallace is an Assistant Professor of Law at Loyola University School of Law, New Orleans. Professor Wallace teaches in the areas of Louisiana successions, donations and family law. The author would like to thank Professors Kathryn V. Lorio, Dian Tooley, and Mary G. Algero of Loyola University School of Law, as well as Michael McAuley and Robert A. Pascal of the Paul M. Hebert Law Center for their guidance, support, and invaluable comments on drafts of this article. She would also like to thank Heather Gattuso Lambert for her tireless efforts in compiling the research for this article and assisting in its completion.
I. INTRODUCTION

Is not marriage an open question, when it is alleged, from the beginning of the world, that such as are in the institution wish to get out, and such as are out wish to get in? From the beginning of time, the institution of marriage has been the recipient of considerable philosophy, legislation and, of course, humor. This article will consider the legislation, jurisprudence, and doctrine surrounding a putative marriage and will philosophize about its shortfalls, with the hope that Louisiana will adopt a solution to remedy the inequities present under the current interpretation and application of the law.

According to secular positive law, marriage is a civil contract entered into by a man and a woman pursuant to the laws of the state in which they marry. Concomitant with the civil contract are civil effects—the rights and privileges—that both parties enjoy during the union: legitimate children, the right to support from one's spouse (both during and after the marriage), the right of one spouse to sue for the other's wrongful death and the right to the marital portion, to name a few. Any valid marriage will produce civil effects in favor of both parties as a matter of law. By the general rule, parties who

1. Ralph Waldo Emerson, Representative Men 127 (Thomas Y. Crowell & Company 1891).
2. See, e.g., La. Civ. Code art. 86 (1999); Cal. Fam. Code § 300 (1994); Idaho Code § 32–201 (1996); Nev. Rev. Stat. §§ 122.010, 122.020 (2001); Wash. Rev. Code § 26.04.010 (1997); Wis. Stat. § 765.01 (2001). This article will focus on the law and jurisprudence in the nine community property states, as the right to community property, in particular, is affected by a putative marriage. Additionally, the author recognizes that with the advent of civil unions, putative marriage and its effects may be applicable to other non-traditional relationships. For purposes of this article, however, focus will remain on marriage between a man and a woman.
3. See infra notes 10–16 and accompanying text.
do not enter into a valid marriage create no civil contract and therefore are afforded no rights and duties of that marriage.\(^5\)

The putative marriage rule\(^6\) provides the proverbial bridge to civil effects in the event parties fail in their attempt to contract a valid marriage, believing in good faith they had done so.\(^7\) The putative marriage rule has been described as "ameliorative or corrective," designed to give innocent spouses to a legally null marriage the civil effects to which parties in a valid marriage enjoy.\(^8\) In other words, if one or both of the parties celebrate a marriage, believing it to be properly contracted in form and in substance, but some legal impediment plagues its validity, the putative marriage rule would allow the good faith party or parties to the marriage to enjoy the civil effects of valid marriage, notwithstanding its invalidity.\(^9\)


5. Louisiana does not recognize common law marriages. See Succession of Marinoni, 148 So. 888, 894 (La. 1933). A party who wishes to enter into a marriage in Louisiana must meet the prerequisites of a valid marriage as prescribed by the Civil Code. See infra note 7.


7. In Louisiana, the need to rely on the putative marriage rule depends on which impediment of marriage caused the nullity. Compare La. Civ. Code art. 94 (1999) (absolutely null marriage) with La. Civ. Code art. 95 (relatively null marriage). Legal impediments to a marriage include a prior undissolved marriage, marrying certain familial relations, and marriages of the same sex. La. Civ. Code art. 88 (prior undissolved marriage), La. Civ. Code art. 89 (same sex marriage), La. Civ. Code art. 90 (familial relationships). In addition, the parties must participate in a marriage ceremony, the marriage may not be contracted by procuration, and the parties to a marriage must express their consent to marry. La. Civ. Code art. 91 (marriage ceremony), La. Civ. Code art. 92 (procuration), La. Civ. Code art. 93 (consent). A marriage without the requisite consent to marry will produce a relatively null marriage and the civil effects will flow to both parties until the marriage is declared null. La. Civ. Code art. 97. In contrast, an absolutely null marriage—one entered into in the face of any other impediment to marry—generally produces no civil effects to either party. La. Civ. Code art. 94; see also Robert O. Homes, Jr., Comment, The Putative Marriage Doctrine in Louisiana, 12 Loy. L. Rev. 89, 91–92 (1965).

8. Christopher L. Blakesley, The Putative Marriage Doctrine, 60 Tul. L. Rev. 1, 2 (1985); 1 Planiol, supra note 6, at no. 1094.

9. See La. Civ. Code art. 96; see also King v. Cancienne, 316 So. 2d 366, 371 (La. 1975); Cortes v. Fleming, 307 So. 2d 611, 612 (La. 1973); Prince v. Hopson, 89 So. 2d 128, 130 (La. 1956); Succession of Fields, 62 So. 2d 495, 499 (La. 1952); Funderburk v. Funderburk, 38 So. 2d 502, 504 (La. 1949); Succession of Gibson, 173 So. 185, 190 (La. 1937); Succession of Marinoni, 164 So. 797, 804 (La. 1935);
What are the civil effects that putative spouses may receive? Although states that recognize the rule disagree on the breadth of effects that a putative spouse can receive, spouses can be granted the legitimacy of the children of the marriage, the right to alimony, the right to claim workman’s compensation benefits, the right to a share of the community property, the right to inherit as a spouse in the succession, the right to insurance proceeds as a widow, and


12. See, e.g., Cortes, 307 So. 2d at 613; Neureither v. Workmen’s Comp. Appeals Bd., 93 Cal. Rptr. 162, 164-65 (Cal. Ct. App. 1971); Ritchie v. Katy Coal Co., 231 S.W.2d 57, 59 (Ky. 1950); Dawson v. Hatfield Wire & Cable Co., 280 A.2d 173, 177 (N.J. 1971); compare Price v. Travelers Ins. Co., 25 F. Supp. 894, 895-96 (N.D. Tex. 1939) (refusing to allow the putative spouse to collect worker’s compensation when the legal spouse was still alive) with Davis v. Davis, 521 S.W.2d 603, 606 (Tex. 1975) (expanding the putative marriage rule to give putative spouses a right to all property-related incidents of marriage, which may include the right to inherit as a spouse in the succession); Williams v. Fireman’s Fund Ins. Co., 670 P.2d 453, 455 (Colo. Ct. App. 1983).

13. See infra Section IV for a discussion of various state cases.

14. See, e.g., Cortes, 307 So. 2d at 613; compare Fort Worth & R.G. Ry. Co. v. Robertson, 121 S.W. 202, 203 (Tex. Civ. App. 1909) (refusing to allow the putative spouse to inherit when the legal spouse was still alive) with Davis, 521 S.W.2d at 606 (expanding the putative marriage rule to give putative spouses a right to all property-related incidents of marriage, which may include the right to inherit as a spouse in the succession); Aubrey v. Folsom, 151 F. Supp. 836, 840 (N.D. Cal. 1957).

15. See, e.g., Cortes, 307 So. 2d at 613; Adduddell v. Bd. of Admin., 87 Cal.
the right to sue for the wrongful death of the other spouse. The putative marriage rule has particular application in community property states, because one of the civil effects of marriage is the right to one-half of the property acquired during the marriage. This article will focus on the extent to which this right is afforded putative spouses and, in some cases, their children.

To explain, let me introduce you to Clementine Prince. Clementine Prince fell in love with James Brough. Clementine and James decided to marry and therefore obtained a marriage license and expressed their consent to wed in a ceremony. They lived together as husband and wife one day shy of twenty-one years, when James died. Almost fifteen years after his death, Clementine sought to borrow money on a piece of property purchased during their marriage. At the time of the sale, the property was purchased in her name, as wife of James Brough, although a declaration that it was her separate property was not included.

Louisiana likewise offers the putative spouse the right to the marital portion when the spouse is otherwise qualified. See Cortes v. Fleming, 307 So. 2d 611, 613 (La. 1973). This Article will not address the controversy in Louisiana and other states surrounding the extent of civil effects offered to good faith spouses. For an excellent discussion of the civil effects, see Blakesley, supra note 8, at 29–52; see also Ryland Percy, Note, Putative Marriages: What are “Civil Effects?”, 36 La. L. Rev. 704 (1976).

Absent a legal spouse, the putative spouse has the benefit of all of the civil effects, including the right to claim his or her one-half share of the community property. Problems will arise, however, when the common spouse dies leaving both a legal and a putative spouse. Although the common spouse can bequeath his or her separate property to the putative spouse by will, if the common spouse dies intestate or disposes of his or her share of the community property to the putative spouse by will, the legal wife may have a claim to a portion of the property acquired during the putative community.

These facts are based on the case of Prince v. Hopson, 89 So. 2d 128 (La. 1956).

A declaration could provide proof that property acquired by one spouse that was purchased with that spouse’s separate funds and used for that spouse’s separate estate did not become a part of the community between the two spouses. See La. Civ. Code art. 2402 (1870); Prince, 89 So. 2d at 130–31; Salassi v. Salassi, 57 So. 2d 684, 685 (La. 1952).
was not legally married to James—a woman by the name of Victoria Albert was his legal wife.

Victoria Albert had been married to James Brough before he met Clementine. Victoria and James had been married for five years when they separated. Seven years later, James filed for divorce and a preliminary default judgment was entered in the case. A final judgment of divorce, however, was never obtained. Believing themselves to be divorced, James later married Clementine and Victoria married Elijah. Because Clementine’s marriage to James was legally invalid (and Victoria’s marriage was legally valid), Victoria asserted rights to the property that Clementine sought to alienate. Victoria insisted that as James’s legal wife, she was entitled to one-half of the community property acquired during the marriage, which did not end until his death.

Does Victoria have an absolute right to her one-half share of the property as James’s legal wife? Does Clementine have any right to the property as the named purchaser of the property or the putative spouse of James? Are the rights affected if James or Victoria or Clementine or more than one of the parties is in bad faith? Do the rights change if children from either marriage exist?

Some, but not all, of these questions can be answered using the putative marriage rules. In Louisiana, the rules governing putative marriage have developed legislatively and jurisprudentially, albeit at times in misled directions. This article will begin, in Part II, with the history of putative marriage, from the English law, the Spanish civil law, and the French civil law. After an historical perspective, Part III of this article will present the path of Louisiana law. The cases of Patton v. Cities of Philadelphia and New Orleans and Prince v. Hopson will be examined and at times criticized for the inequitable treatment given to the innocent, putative spouse and children of the putative marriage. After a discussion of the current state of the law in Louisiana, Part IV will consider the law of other states to give context and to offer possible solutions to Louisiana’s treatment of a putative marriage. Finally, to cure the current pitfalls present in the law, in Part V the author will advocate the enactment of a “putative divorce,” with the hope that it can be implemented by the legislature or through judicial ingenuity if the case arises. Recognizing a putative divorce will not only complement putative marriage but will provide fairness and equality among the spouses and the children affected by the division of property present under the law today.

22. 89 So. 2d 128 (La. 1956).
The recognition of putative marriage crosses both civil and common law lines. Although generally believed to have its roots in the civilian traditions, putative marriage has been traced to early English law as well. 23 As discussed in more detail below, protecting a child's legitimacy when born of an invalid marriage spawned the protection of spouses entering into an invalid marriage.

A. English Law

Putative marriages had been recognized as early as the twelfth century in canon law. 24 During the twelfth, thirteenth and fourteenth centuries, the law of England relied on the canon law and recognized that even though a marriage could be declared null based on a prior undissolved marriage or consanguinity (marriage of blood relations), some civil effects of that marriage would flow to the spouses in good faith and their children. 25 Specifically, scholars of the English law explained that if a woman in good faith married a man who was already married, any children from him would be legitimate and capable of inheriting from both parents. 26 Outside of the legitimacy of children, however, the English law did not focus on any other civil effects, but recognized the need for some equitable complement to marriage when the parties, albeit in good faith, entered into a legally invalid marriage. This rule, however, was abandoned in later English history. 27

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23. See 1 Planiol, supra note 6, at no. 1094; Blakesley, supra note 8, at 7.
24. 2 Sir Frederick Pollock & Frederic W. Maitland, The History of English Law 375–77 (2d ed. 1898, Cambridge reprint 1968). Like the classic civil law, good faith was required to produce civil effects, but canon law also required the public celebration of the marriage and a just cause for the mistake. 1 Planiol, supra note 6, at no. 1095. Planiol noted, however, that even though public celebration and just cause are technically absent from the civilian doctrine, in practice these requirements impact a finding of good faith. Id. at no. 1101, 1103. In fact, according to some civilian doctrine, the parties must "contract" a marriage in good faith, which has been interpreted to mean that some celebration of marriage must take place. Id. at no. 1107; Charles D. Marshall, Comment, The Necessity of Ceremony in a Putative Marriage, 10 Tul. L. Rev. 435, 437 nn.12, 14 (1936); but see Succession of Marinoni, 164 So. 797, 804 (La. 1935) (recognizing a putative marriage even though no ceremony took place).
25. Id. For a compilation of citations discussing early English law, see Blakesley, supra note 8, at 7 n.16.
26. 2 Pollock & Maitland, supra note 24, at 375–77. A woman was in good faith if she believed that her soon-to-be husband was unmarried at the time of their nuptials.
27. 2 Pollock & Maitland, supra note 24, at 377; Blakesley, supra note 8, at 7.
B. Spanish Civil Law

Putative marriage was introduced in the Spanish system in Las Siete Partidas, during the late thirteenth century. Initially, the rule was not termed "putative marriage," but was inferred from a provision that deemed children born to good faith parties of an invalid marriage to be legitimate children.\(^2\) If only one of the spouses was in good faith at the time of the child’s birth, the child would remain legitimate, but after the time that both spouses had knowledge of an impediment to their marriage, any children thereafter born would be illegitimate.\(^2\) Although the Partidas contained no provision addressing the parties to the putative marriage themselves, the law of Spain recognized the right of a spouse to share in the community property acquired during the putative marriage.\(^3\)

The Spanish, however, advanced a novel purpose under the law. Not only did the Spanish seek to protect the innocent spouse, but the bigamous spouse was punished for causing the putative spouse to enter into an invalid marriage.\(^2\) Punishment took the form of brandings, imprisonment, banishment and, most pertinent here, loss of property.\(^2\) Under Spanish law, a bigamous husband who died

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\(^2\) Partida IV, Title XIII, Law I provided:
If between those who are married openly in the face of the church, such an impediment should exist that the marriage must be annulled on account of it, the children begotten before it was known that an impediment of this kind existed will be legitimate. This will also be the case where both parties did not know that such an impediment existed, as well as where only one of them knew it, for the ignorance of one alone renders the children legitimate. But, if after it had been certainly ascertained that such an impediment existed between the parties, they should have children, all those born subsequently will not be legitimate.

\(^2\) Id.; see also L. Julian Samuel, The Necessity for the Continuance of Good Faith in a Putative Marriage, 6 Tul. L. Rev. 306, 307 (1932). The Partidas considered the illegitimacy of children born of spouses with knowledge of the impediment as punishment imposed on such spouses. Las Siete Partidas, Part. IV, Tit. III, Law III (Scott trans., Burns ed., 2001). Today, the Spanish Civil Code provides that when bad faith exists on the part of both spouses, the marriage produces civil effects only with relation to the children. Spanish Civil Code art. 79 (Julio Romanach, Jr. trans., Lawrence Publishing Co. 1994).

\(^2\) See Smith v. Smith, 1 Tex. 621, 628 (1846) (noting the incompleteness of the Partidas and citing the Spanish "El Diccionario de Legislacion" to conclude that the spirit of Spanish law recognizes the civil effects of matrimony with respect to the spouses as well as the offspring); see also Patton, 1 La. Ann. at 106.


\(^2\) 1 White, New Recopilacion 45 (1839) ("That besides the ecclesiastical
leaving both a legal and a putative spouse had to forfeit his share of the property earned during the putative marriage to his two wives as compensation for the grievous wrong he committed against the legal wife and for deceiving the good faith, putative wife. Consequently, one-half of the property acquired during the putative marriage devolved to the legal spouse and the other half devolved to the putative spouse.

C. French Civil Law

The 1804 French Code Napoleon recognized the effects of putative marriages in the following two articles:

Art. 201. A marriage which has been declared null draws after it, nevertheless, civil consequences, as well with regard to the married parties as to their children, where the marriage has been contracted in good faith.

Art. 202. Where good faith exists only on the part of one of the married persons, the marriage is only attended by civil consequences in favor of such persons, and the children of the marriage.

Good faith was the hallmark of a putative marriage, although French doctrine accorded children the rights of legitimacy even if neither parent was in good faith. Once a good faith spouse penalties those who marry clandestinely will also be liable to civil ones; ... but thus incur the penalty of confiscation of property, banishment, and just cause of being disinherited."

Id. at 242 ("The married man who lives in concubinage ... and if she is married, he forfeits the half of his property.").

33. 1 White, supra note 32, at 242; see also Patton, 1 La. Ann. at 106. This punishment theory imposed against unfaithful spouses permeated early Spanish law. Wives who were guilty of adultery likewise had to forfeit their share of the acquests and gains acquired during the marriage. See Harriet Spiller Daggett, The Community Property System of Louisiana with Comparative Studies 117 (1931). Although Louisiana followed Spanish law for many years, Louisiana law never accepted this principle. See id. at 117, 123.

34. See Patton, 1 La. Ann. at 106.


36. See 1 Planiol, supra note 6, at no. 1098. The Spanish law, in comparison, failed to grant legitimacy to children when neither parent was in good faith. See supra note 29. Although now Spanish law grants civil effects to children born of bad faith parents, Louisiana law follows the early Spanish approach on this issue. See supra note 30; see also Prieto v. Succession of Prieto, 115 So. 911, 913 (La. 1928) (concluding that a child born of a putative marriage in which both spouses were in bad faith was illegitimate). The Persons Committee of the Louisiana Law Institute has recognized the inequity to the child born of two bad faith parents, but has yet to craft a solution. See Katherine Shaw Spaht, Revision of the Law of Marriage: One Baby Step Forward, 48 La. L. Rev. 1131, 1149 n.129 (1988); see
established the putative marriage, the civil effects of the union were the same as those of a legal marriage.\textsuperscript{37} In French doctrine, unlike its Spanish law counterpart, the civil effects ended when the marriage was declared null, rather than when a party's good faith ceased to exist.\textsuperscript{38} Also unlike the Spanish law, French doctrine sought only to protect the putative spouse; punishing the bigamous spouse was not its goal.\textsuperscript{39} In fact, at least one French commentator opined that the bigamous spouse has an equal right to the property acquired during the putative union as the good faith spouse because both assisted in building the community and should be entitled to share in its rewards.\textsuperscript{40}

French commentators spent a considerable amount of time discussing the inheritance rights of spouses in a putative marriage when the common spouse died leaving both legal and putative spouses.\textsuperscript{41} Denisart, Toullier, and Vazeille advocated a theory akin to a partnership or an association between two strangers to grant the legal spouse her share of the community from the inception of her marriage until the contracting of a putative marriage.\textsuperscript{42} The good or


\textsuperscript{37} Aubry et Rau, 7 Cours de Droit Civil Francais 75 (5th ed. 1913); C. Demolombe, 3 Cours de Code Civil § 371 (1846); M.A. Duranton, 1 Cours de Droit Francais § 367 (3d ed. 1834). M.F.A. Vazeille, 1 Traite du Mariage § 284 (1825); M. Toullier, Le Droit Civil Francais §§ 653, 661 (4th ed. 1824).

\textsuperscript{38} 1 Planiol, supra note 6, at no. 1110; \textit{see also} Samuel, supra note 29, at 308; \textit{but see} Toullier, supra note 37, at § 656 n.2 (arguing that if spouses receive an official document or important evidence of the invalidity of the marriage, civil effects should end at that time, rather than on a declaration of nullity).

\textsuperscript{39} None of the French writers speak of punishing the husband, only of offering the civil effects to innocent spouses. \textit{See} Henderson, supra note 31, at 58 n.25.

\textsuperscript{40} Aubry et Rau, supra note 37, at 72 n.18; \textit{see also} Vazeille, supra note 37, at § 285. The bigamous spouse, however, is not entitled to all of the effects given to the good faith spouse. The bigamous spouse is denied any right to take in the inheritance of his putative spouse or children from the putative marriage, even though the putative wife and the children are entitled to inherit from the bigamous spouse. 1 Planiol, supra note 6, at no. 1110A; Toullier, supra note 37, at § 663; Vazeille, supra note 37, at § 286; C. Demolombe, supra note 37, at § 372.

\textsuperscript{41} The comment by Joseph B. Henderson, \textit{The Civil Effects of a Putative Marriage}, 1 Loy. L. Rev. 54 (1941), greatly assisted in the research of this section. The writer would also like to thank Lambert Boissiere, Patricia Janvier, Philippe Langlois, and Julie Ell-Lugar for translating the writings of the French scholars cited below.

\textsuperscript{42} Denisart, 3 Collection de Jurisprudence 614 (1784); Toullier, supra note 37, at § 665; Vazeille, supra note 37, at § 285. These three French scholars relied on a case decided in 1584 that awarded half the community of each marriage to the legal or putative wives, as the case may be, and the other half to the children of the
bad faith of the common spouse was not considered in the analysis. The theory was founded, not on the establishment of a community regime, but on an association between two persons to share the gains and benefits of their relationship according to the general rules of society. The putative spouse received her one-half share of the community from the inception of her putative marriage until the contracting of another putative marriage, and so on through several communities if applicable. Although this theory could have been couched in terms of multiple communities, each marriage was described as an association formed with the husband and each wife. Each putative spouse received a one-half share of the property acquired during her association with the common spouse.

The writers diverged, however, on the allocation of the common spouse's half of the community in each of the different unions. Denisart and Toullier believed that this one-half of the community devolved to the children of each respective marriage. Vazeille contended that the children of all of the marriages should share equally in the community as it existed during all of the marriages, not just during the marriage from which they were born.

Amidst this disagreement concerning the common spouse's one-half of the community emerged concerns about the putative wife. Demolombe, another leading French scholar, challenged the writings of Toullier, Vazeille, and Duranton arguing that, under their "association" theory, the good faith putative wife may be deprived of the effects of a true marital community. According to Demolombe, a better solution would be to liquidate successively and separately each of the community regimes beginning with the first legal marriage and continuing through the second (and possibly third) putative marriage. That way, the second or subsequent wife would receive property equal to the property she would have a right to under her own community property regime.

43. Denisart, supra note 42, at 614; Toullier, supra note 37, at § 665; Vazeille, supra note 37, at § 285.
44. Denisart, supra note 42, at 614; Toullier, supra note 37, at § 665; Vazeille, supra note 37, at § 285.
45. Denisart, supra note 42, at 614; Toullier, supra note 37, at § 665; Vazeille, supra note 37, at § 285.
46. Later, another French commentator, Duranton, concurred with the opinions of Denisart, Vazeille, and Toullier. Duranton, supra note 37, at § 373.
47. Denisart, supra note 42, at 614; Toullier, supra note 37, at § 666.
49. Demolombe, supra note 37, at § 377.
50. Id.
51. Id.
The eventual solution to this dilemma originated with Aubry and Rau, with whom Planiol and Ripert and Baudry-Lacantinerie concurred. Aubry and Rau agreed with early French commentators that the husband, whether or not in good faith, was entitled to share in the community earned with the putative spouse. Accordingly, his children, including those with the putative spouse, inherited from him his share in the putative community. Because, however, the legal wife was legally entitled to one-half of the property acquired during the existence of both communities (as her legal marriage never ended), she would receive one-half of the putative wife's share in the community, or one-quarter of the whole putative community, and the putative wife would retain the other one-quarter share. In other words, the putative community would be divided one-half to the successors of the deceased common spouse, one-fourth to the legal spouse, and one-fourth to the putative spouse.

III. THE TREATMENT OF PUTATIVE MARRIAGE IN LOUISIANA

Louisiana's first interpretation of the putative marriage rule occurred in 1846, when the court considered *Patton v. Cities of Philadelphia and New Orleans*. The court relied on Spanish law, which was in effect in Louisiana at the time of the putative marriage, to conclude that at the death of the common spouse, the legal and putative wives shared one-half each the property acquired during the putative community. Spanish law prevailed even after the putative marriage rule was codified in Louisiana, but French influence entered the arena. Courts, though, wrestled with the appropriate legal standard to apply. Until 1956, courts consistently applied...
Spanish law, but with the case of *Prince v. Hopson*, the Louisiana Supreme Court reexamined the history and roots of putative marriage and imported French doctrine. Now, in the twenty-first century, Louisiana law remains a convergence of Spanish and French law, neither of which reaches the appropriate balance between the rights of a legal spouse, a putative spouse, and the children of the deceased common spouse.

**A. Patton v. Cities of Philadelphia and New Orleans**

The case of *Patton v. Cities of Philadelphia and New Orleans* was the first to consider the division of property when a spouse died leaving both a legal and a putative spouse. Abraham Morehouse married Abigail Young in New York and two children were born of the marriage. Approximately nine years later, Abraham moved to Louisiana, represented himself as a widower (although Abigail Young was still alive and no divorce proceedings had been initiated) and married Eleonore Hook, his then putative bride. Eleonore had no knowledge of his prior undissolved union and bore several children from Abraham. Abraham acquired property during his putative marriage to Eleonore, and after his death a third party acquired the property from Abigail and her children, who represented themselves as the only legitimate heirs to Abraham. In the lawsuit, Eleonore and her children claimed rights to this property.

In its analysis, the court applied Spanish law to determine which parties had claims to the property acquired during the putative marriage to Eleonore. Abigail, as the legal spouse, had a legal entitlement to one-half of all property acquired during the legal marriage and Eleonore, as the putative spouse, had a legal entitlement to one-half of all property acquired during her putative marriage. The court concluded that because each wife had a valid claim to the property, Abigail and Eleonore would each receive an undivided one-

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61. 89 So. 2d 128 (La. 1956).
62. *Id.* at 133.
63. 1 La. Ann. 98 (1846).
64. *Id.* at 101.
65. *Id.*
66. The opinion does not make clear how many children were born during Eleonore's good faith belief that her marriage to Abraham was valid. Ultimately, because the court refused to recognize the right of Abraham's children to his share of the community earned during the putative marriage, the court declined to consider the question. *Id.* at 105.
67. *Id.* at 102.
68. *Id.* at 104–06. Because Spanish law was in place at the time of Abraham's death in 1813, it was appropriately applied in the case.
half interest in the property.\textsuperscript{69} The effect of the court’s decision prevented Abraham’s children from inheriting their father’s share of his community.

Implicit throughout the tone of the opinion was the court’s intent to punish the bigamous spouse for his actions, a result that had been embraced by Spanish law for many years. The court explained:

As the wife, under [the Spanish] laws, forfeits her share of the acquests and gains when she is guilty of adultery, so the husband forfeits his share when he has two wives living, and each of the wives takes the undivided half to which the law would entitle to her, if she was alone.

\textsuperscript{** *** **}

From which it results that one-half goes to each of the wives, and that the husband deceiving the second and doing a grievous wrong to the first, refuses unjustly to either the share which belongs to her; and that he is bound to satisfy both out of everything he possesses, because the law favors those who are deceived against those who deceive them.\textsuperscript{70}

Because the bigamous husband had committed a grievous wrong against the first wife and had deceived his second wife by causing her to enter into a bigamous union with him, his share of the community property would devolve to them. Nowhere in the opinion did the court expressly state that Abraham was in “bad faith” when he married Eleonore knowing his marriage to Abigail was valid, but this finding was implicit. The court emphasized Abraham’s lack of morality and sought to prevent him from reaping any benefit from his wrongdoing.

The court’s desire to punish Abraham was misplaced. Abraham was already dead and there were no benefits for him to reap. Rather than Abraham suffering for his wrongdoing, his children suffered by failing to inherit in their father’s succession.\textsuperscript{71} The court sought to address this anomaly in its opinion, suggesting that the inheritance to the children was not affected, per se, because any debts owed in Abraham’s succession were paid from the assets of Abraham’s estate, the net of which belonged to the children.\textsuperscript{72} Because the court

\textsuperscript{69} 1 La. Ann. at 106.

\textsuperscript{70} Id. (citing Paz, 61 Consultas Varitas 9 at 483–84).

\textsuperscript{71} Because Abraham died intestate, his legitimate children would succeed to his share of any community property. See La. Civ. Code art. 27 (1808) (current version at La. Civ. Code art. 888 (2000)).

\textsuperscript{72} The court relied on the writing of Paz, a Spanish writer, in his sixty-first Consultas Varitas. Paz classified the wives as creditors of the husband’s estate to ensure that they received the community property to the detriment of the intestate heirs. 1 La. Ann. at 106.
classified Abraham's share of the community as a debt that he owed to his wives for his wrongdoing, Abraham's children simply took the net of the estate, none of which was left because it had been paid to his wives as a debt of his succession.\footnote{Id.}

Although absent from the court's opinion, the element of "bad faith" has been lifted from its undertones and relied on in a number of cases that follow.\footnote{Prince, 89 So. 2d at 132; Gathright v. Smith, 368 So. 2d 679, 682 (La. 1978); Cortes, 307 So. 2d at 616; Succession of Marinoni, 164 So. at 804; Price, 326 So. 2d at 549-50; Succession of Choyce, 183 So. 2d at 459.} Courts have consistently relied on the Patton case to divide the putative community between the legal and putative spouses when the common spouse enters a second marriage knowing that his first marriage had not been properly dissolved.\footnote{See, e.g., U.S. v. Robinson, 40 F.2d 14, 17 (5th Cir. 1930); Funderburk, 38 So. 2d at 504; Ray v. Knox, 113 So. 814 (1927); Succession of Fields, 62 So. 2d at 499; Waterhouse, 71 So. at 359-60; Jerman v. Tenneas, 11 So. 80, 83 (1892); Succession of Navarro, 24 La. Ann. at 300; Abston, 15 La. Ann. at 140; Hubbell, 7 La. Ann. at 253; Price, 326 So. 2d at 549; Succession of Choyce, 183 So. 2d at 459; Jackson v. Gordon, 186 So. 399 (La. App. 1st Cir. 1939); Overton v. Brown, 3 La. App. 591 (1st Cir 1926); Succession of Devezin, 7 Teiss. 111, 115 (La. App. 1910).} Even though the Patton case was decided under Spanish law, its effects, as discussed in detail below, still permeate Louisiana law.

B. Codification of the Putative Marriage Rule

Louisiana first codified putative marriage in the Civil Code of 1825, taking verbatim the written language from Articles 201 and 202 of the French Code Napoleon.\footnote{Code Napoleon, supra note 35, arts. 201, 202; see Additions and Amendment to the Civil Code of the State of Louisiana at 10 (1822), commonly referred to as the Projet of the Civil Code of 1825 (hereinafter Projet of the Civil Code of 1825); see also King, 316 So. 2d at 371; Succession of Marinoni, 164 So. at 804.} Enacted as Articles 119 and 120, Louisiana law provided:

Article 119. 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.

Article 120. 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.\footnote{La. Civ. Code arts. 119, 120 (1825).}

Not addressed in the passage of these articles was the effect on children born of spouses who entered the marriage in bad faith. Rather than adopting the French interpretation, the Louisiana
judiciary interpreted these articles consistent with the Spanish law in force in 1825, which denied legitimacy to children born of two bad faith spouses.  

In 1870, the articles were renumbered to articles 117 and 118 but the language did not change. In the revision of 1987, the legislature passed article 96, which reproduced the substance of articles 117 and 118, but contained a change that allows civil effects to continue in favor of a putative spouse regardless of whether the putative spouse remains in good faith when the cause for nullity of the marriage is the other party's prior undissolved marriage. Because the spouse in good faith is unable to rectify the impediment of the prior undissolved marriage, only that spouse can enjoy the ongoing civil effects of the marriage even after obtaining knowledge of the impediment. Article 96 remains the law today.

Post codification of the putative marriage rule, Louisiana courts have continued to refer to Spanish and French sources to aid in their analysis. Although the substance of the rule has changed slightly,
Louisiana adheres to the classic understanding of putative marriage, with its foundation in statutory law, rather than in equity. Under the Louisiana Supreme Court’s decision in Prince v. Hopson, however, it appeared that equity—albeit unspoken—began to enter into the analysis.

C. Prince v. Hopson: The Good Faith Spouse

From the Supreme Court’s decision in Patton until the mid-1900s, courts applied and expounded on what became a settled rule: when a second marriage is contracted without the first being dissolved, the community property acquired during the coexistence of the two marriages belongs exclusively and in equal shares to the legal and putative spouses, as long as the putative spouse is in good faith; in turn, the bigamous spouse has no share in the property. In 1956, the Supreme Court was faced with a set of facts that stretched the boundaries of this rule.

In Prince v. Hopson, the “bigamous” husband married his second wife based on the erroneous belief that the divorce from his first wife was legally valid. James Brough was married to his first wife for twelve years (living with her for only five of those years) and filed for a divorce. One daughter was borne of that marriage. Although he received a preliminary judgment of divorce, a final decree was never rendered. Based on what he believed to be a valid divorce, he entered into another marriage with Clementine, his putative wife. James lived with Clementine for twenty-one years until his death. Fifteen years after his death, she attempted to borrow money on property purchased by her in her name during their putative marriage. At this time, James’s first wife, who herself had remarried based on the invalid divorce, asserted rights to one-half of the property, citing Patton.

community between the legal and putative spouses).

84. See Blakesley, supra note 8, at 31–32.
85. See supra note 75.
86. For a more detailed explanation of the facts in Prince, see supra note 19 and accompanying text.
87. Prince, 89 So. 2d at 129.
88. Id.
89. Id. at 130.
90. Id.
91. Id.
92. Prince, 89 So. 2d at 130. Although Clementine purchased the property at issue in her name, she failed to sign a declaration that the property should remain in her separate estate. Id. at 130. Without the declaration, Clementine was unable to overcome the presumption that the property purchased in her name was community property. Id. at 130–31.
93. Id. at 130–32.
Most troublesome to the court was James's good faith belief that he entered a valid marriage with Clementine. Under article 117 of the Civil Code (now article 96), a marriage produces civil effects in favor of parties and their children if the marriage was contracted in good faith. Based on James's good faith, he and hence his daughter, as the heir to his estate, were entitled to civil effects—one of which was community property—from the putative marriage. According to the court, the Patton decision could not be reconciled with the express provisions of the Civil Code when both of the putative spouses were in good faith:

To follow the Patton rule in the instant case and to give to the putative wife the husband's one-half of the property acquired during the existence of the putative community would be to deny him and his heirs the civil effects of the second marriage, in the teeth of the provisions of Article 117.

The court recognized three competing interests to the putative community under the law: first, the legal wife was entitled to one-half of any property acquired during the community; second, the good faith common spouse was entitled to one-half of any property acquired during the existence of the putative community; and third, the good faith putative spouse was entitled to one-half of any property acquired during the existence of the putative community. The court concluded that when James died, one-half of the property fell into his succession and could be inherited by his heir. The court then was faced with a quandary: two spouses each entitled to one-half of the putative community.

There are many paths the court could have taken. The court could have denied the legal wife the ability to challenge the putative marriage because after the purported divorce, she had also

94. Id. at 132.
95. Id.
98. See id.; see also Henderson, supra note 31, at 56 (noting that "the amount of the claims, all equal in the law, is greater than the amount with which to satisfy the claims ....").
100. Prince, 89 So. 2d at 133. ("The provisions of our law which give to each of these wives one-half of the property are of equal dignity and rank.")
remarried.101 It did not. The court could have applied the *Patton* rule and awarded one-half of the property to each of the wives. It did not. The court could have reduced ratably each party's share of the whole to one-third and split the putative community equally. It did not. Rather, the court took the approach advanced by French commentators, Aubry and Rau, Baudry-Lacantinerie, Colin and Capitant, and Ripert and Boulanger.102 Under the French approach, the common spouse, James in this case, received his one-half of the putative community, which because of his death would be inherited by his daughter. In what has been termed an "equitable" solution, the other one-half of the putative community was divided between the legal and putative wives, each receiving one-fourth.103

The court's approach and the approach of other courts to follow are flawed in many respects and yield an inequitable result to the good faith putative spouse and a windfall to the legal spouse.104 The putative spouse enters the marriage in good faith, believing her union to be legally valid. At the death of her bigamous husband, she not only learns that her marriage was invalid, but the putative spouse rule that should give her the same rights as a legal spouse requires that she share her one-half of the community property with a woman that she did not know existed. The facts present in the *Prince* case illuminate this inequity and the legal problems with the result.

1. One continuous community

In *Prince*, the court assumed that the parties contributed to one continuous community, which began at the inception of the legal marriage and ended at the death of the common spouse. Essentially, the court allowed all three parties to contribute to one community, the ultimate division of which forms the problem. The more sound


102. *Prince*, 89 So. 2d at 133.

103. *Id.* at 133–34.

104. The Second Circuit in *Succession of Gordon*, 461 So. 2d 357 (La. App. 2d Cir. 1984) considered a case with facts similar to those in *Prince*. In *Gordon*, the good faith, common spouse lived with his legal wife for five years and had one daughter, then lived with his putative spouse for thirty eight years and had nine children. *Id.* at 358. The sole asset of the common spouse's succession was property purchased two years after the putative marriage. *Id.* at 358–59. The court awarded one-half of the property to all of the common spouse's children and split the remaining one-half (one-quarter each) to the legal and putative spouse. *Id.* at 365 (relying on *Prince*).
approach under the law recognizes two separate communities: the legal one and the putative one, with the putative divorce separating the two.

Under the *Prince* rationale, the common spouse, as long as he is in good faith, retains a one-half share of the entire, continuous community. The legal spouse also receives a one-half share of the community property acquired during the marriage prior to the inception of the putative marriage. Once the putative community begins, however, the legal spouse retains a one-quarter share of the property acquired during the putative marriage—a marriage to which the legal spouse does not contribute. Rightfully so, the putative spouse is not entitled to any property acquired prior to the inception of the putative marriage, but once the putative marriage begins, the putative spouse's one-half share, to which she is entitled as a good faith spouse, is reduced to one-quarter. Therein lies the problem: the putative spouse is forced to give up half of her share to a person who has failed to contribute whatsoever to the putative community.

Rather than have three parties taking from one continuous community, the Civil Code supports the existence of two separate communities. The first article in the Matrimonial Regimes Title of the Civil Code provides that “[a] matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons.” A community consists of certain assets and liabilities of two spouses—not three. The fundamental basis of marriage and the family recognizes this union between two spouses. Additionally, nothing in the Matrimonial Regimes Title of the Civil Code suggests that there can be only one community. The principles of matrimonial regimes can be extended to two communities, especially in the context of putative marriages. Indeed, the Supreme Court in *Patton* recognized the existence of separate communities.

105. The continuous community begins at the legal marriage and ends at death and consists of the legal and the putative communities.
107. The Code recognizes that third persons have a relationship toward the spouses as a couple, not along with the spouses. *See id.*; Robert A. Pascal, *Putative Marriage and Community Property*, 17 *La. L. Rev.* 303, 303 (1957) ("[T]he community by definition can consist only of property acquired by either or both these spouses. If property is acquired by a third person, as in this case the putative wife, it cannot possibly fall into the community between the legal spouses.").
109. The court referenced the laws of Spain when stating that two separate communities can exist. *Patton*, 1 *La. Ann.* at 105–06. Indeed, the court seemed to
Once two separate communities exist, a more reasonable division of property will result. Using a mechanism, such as a putative divorce, that would cause the legal community to end and the putative community to begin would allow two parties—and only the two parties to the marriage—to contribute to their respective community.\textsuperscript{110} For example, during the existence of the legal marriage, the legal spouse and the common spouse would acquire property, and each would have a claim to one-half of that community. Once the putative marriage began, the common and the putative spouse would acquire property, and each would have a claim to one-half of that community.\textsuperscript{111} Essentially, the common spouse would receive the same share as he did under the \textit{Prince} division, but the legal spouse would no longer receive the windfall from the putative spouse's share.\textsuperscript{112}

Consider the specific scenario in \textit{Prince}, which highlights the inequity to the putative spouse. The property at issue in \textit{Prince} was purchased by Clementine, the putative spouse, in her name.\textsuperscript{113} Because property purchased in the name of either spouse is presumed to be community,\textsuperscript{114} the property entered the putative community.\textsuperscript{115}
How then could Clementine purchase a piece of property that entered the legal wife's community if a community consists of assets of liabilities of two spouses? Under *Prince*, the court awarded the legal wife one-quarter of the property purchased by Clementine. It seems illogical that in purchasing property, the putative spouse could contribute to an unrelated, third party's community. With two separate communities, the property purchased by Clementine would have entered the putative community and she would be entitled to her entire one-half of that property to the exclusion of the legal wife.

2. Bad faith legal spouse

Under the rule in *Prince*, a legal spouse, regardless of his or her good or bad faith, receives one-quarter of the putative community. Only the putative spouses' good faith is considered in the analysis. Although the legal wife in *Prince* believed in good faith that her divorce was valid (she also contracted a second, putative marriage), consider the bad faith spouse. A legal spouse who is aware of or causes a faulty divorce nonetheless will be entitled to one-quarter of any property acquired during the putative community. The bad faith spouse could be rewarded for his or her silence—a result that bars the senses.

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Clementine. Ironically, Clementine could have enjoyed full ownership of the property purchased in her name by disclaiming her twenty-one year marriage to James. *See* Frederick W. Swaim, Jr. & Kathryn V. Lorio, 10 Louisiana Civil Law Treatise: Successions and Donations § 2.15 (1995).

116. *Prince*, 89 So. 2d at 134.


118. *Prince*, 89 So. 2d 130.

119. One Louisiana court intimated that a legal spouse in bad faith should not be able to share in property acquired during the putative marriage. *See* Succession of Chavis, 29 So. 2d 860, 864 (La. 1947). In *Chavis*, the legal wife lived in the same city as the common and the putative spouses and never raised the issue of her marriage to the common spouse until after his death. *Id.* at 864. After noting this fact, the court stated: [The legal spouse] does not appear to have contributed a penny to the acquisition or improvement of the property involved in this suit, but immediately after his death and for the first time she seems to have become obsessed with the idea that she was still his community spouse and as such entitled to one-half of all this property left by him at his death and which was acquired entirely through the union of the labors of [the common spouse and the putative wife].

*Id.; but see* Succession of Gordon, 461 So. 2d at 363–65 (awarding legal spouse one-quarter of the putative community even though she lived in the same community as the common and putative spouses and saw them at church outings from time to time, believing all the while that she and the common spouse had never been divorced).
Certainly, a legal spouse in bad faith should not be entitled to benefit from actual knowledge of an invalid divorce. Likewise, a legal spouse who in good faith believes that the divorce was valid should not be entitled to benefit from a marriage (the putative one) that she too believed was properly contracted. Again, the legal spouse's entitlement to any part of the putative community is inappropriate.

3. Potential for lost property rights

If the legal spouse is entitled to a portion of the putative community, then there may be a portion of the legal spouse's putative community to which the common spouse would have a property right. The court in Prince failed to consider the inequity to James and his heirs at the time of his death. In Prince, James's legal wife had also entered into a putative marriage with a second husband. She and the second husband, like James and Clementine, created a putative community. If James's legal wife had died before he did, James would have a claim to one-quarter of the putative community between her and her second husband.

Simply because James died first, his heirs may be unable to collect his one-quarter share of the putative community between his legal wife and her second husband. Although James's heirs could have attempted to recover, from the legal wife, James's share of her putative community at the time of his death, it does not appear that they did. In fact, it is unclear whether a claim by the heirs would be recognized. If James's heirs are unable or simply fail to recover the property, the legal wife not only enjoys a windfall, but so does her second husband, who will not have to forfeit any portion of his share of the putative community. Both putative spouses are in good faith, yet one must forfeit half of the community property to which that spouse is legally entitled. No reason exists for placing one putative spouse in a superior position than the other.

4. General inequity

Clementine, James's putative wife, lived with him for twenty-one years, four times longer than he lived with his legal wife. She

120. See Pascal, supra note 107, at 304 (noting that it would be an abuse of the law to award a legal spouse property acquired during the putative community if the legal spouse had knowledge of the putative marriage situation and did nothing to prevent or terminate it); Chavis, 29 So. 2d at 864.
121. See Pascal, supra note 107, at 304-05; see also Prince, 89 So. 2d at 130 (noting that the legal wife believed that she and the common spouse were divorced and she had contracted a second marriage as well).
122. Prince, 89 So. 2d at 130.
123. Id.
enjoyed all of the rights and obligations of married life. The couple acquired property and lived in the community as husband and wife. Clementine contributed to the community—albeit in a nonmonetary manner—and she should reap the benefits of the community that she worked hard to create.\footnote{124}

At the time the \textit{Prince} case was decided, the traditional notions of the family were in place: the husband provided for his family and the wife cared for the children. The husband, as the breadwinner, was the head of the household and managed the familial finances. These traditional notions of the family have advanced in our society today. Many wives provide either second incomes or sole support for their families. Assume that a putative second wife provided the sole support for the household and contributed all of the earnings that entered the community. Under the \textit{Prince} rationale, the putative spouse would have to give up one-quarter of her hard earned income to a legal spouse who did not contribute one penny to the community. No court would want to deprive the putative spouse—whether male or female—of one-quarter of his or her earnings as the provider for the family.\footnote{125} In today's society, this scenario illuminates the general inequity present in the current division of a putative community.

\section*{5. The State of the Law in Louisiana}

In Louisiana, the rules on putative marriage consists of statutory law infused with judicial and doctrinal opinion. Article 96 of the Civil Code grants civil effects, one of which is the right to one-half of the community property of the putative marriage, to a putative spouse who in good faith enters the marriage believing it to be valid.\footnote{126} This civil effect enjoyed by putative spouses is contained in article 2336 of the Civil Code, which gives each spouse to a marriage the right to one-half of the community acquired during the union.\footnote{127} The general right of spouses to share in one community becomes problematic with the addition of a putative spouse. Courts

\footnotesize{\textbf{124.} See Succession of Chavis, 29 So. 2d at 864 (denying the legal wife any right to property acquired during the putative marriage in part because the property was acquired solely through the labors of the putative spouses); see also Homes, \textit{supra} note 7, at 123 (arguing that the very foundation of the community property system is honoring the equality of the wife in the community relationship as an equal contributor even if she is not the actual wage-earner).

\textbf{125.} Homes, \textit{supra} note 7, at 123 (citing cases in which putative husbands, who were the breadwinners of the family, were not forced to give up a share of the putative community at the death of his wife, the common spouse).


\textbf{127.} La. Civ. Code art. 2336 (1985) ("Each spouse owns a present undivided one-half interest in the community property.").}
have attempted to reconcile these competing interests by focusing on the motivation of the common spouse when entering the invalid marriage.\textsuperscript{128}

If, for example, C had been married to A but left A without divorcing her to live with B. He eventually married B, who knew nothing about A. When C died, based on the judicial interpretation in Patton, C's heirs would inherit none of the community property acquired during his community with B. Rather, B would receive her one-half share of the putative community as the putative spouse in good faith, and A would receive the other one-half share as his legal spouse. Because C was in bad faith when he contracted the second marriage to B, he is required to forfeit the one-half share of the putative community to which he would have been entitled.

If, however, C entered into the marriage with B in good faith, believing that he properly arranged for his divorce from A or believing that A had died, he would enjoy the civil effects of the marriage, including one-half of the community property earned during the putative marriage. Neither A nor B would receive the one-half share to which each is entitled, but the remaining one-half share would be split among them, fifty-fifty, regardless of length of the putative marriage or the good or bad faith of the legal spouse.

Louisiana has not yet considered the division of property when the legal spouse was in bad faith or when the putative spouse was the sole or primary wage earner in the family. Although the Civil Code does not provide answers to all of these questions, the Louisiana judiciary has demonstrated its willingness to deal with issues of putative marriage when the case arises.\textsuperscript{129} Many questions, however, remain unanswered. In searching for the most legally sound and equitable solution to the division of a putative community, the best path is often worn by others also searching for an answer.

IV. THE TREATMENT OF PUTATIVE MARRIAGE IN OTHER STATES

Louisiana is not the only state to have wrestled with the problem of property division in a putative marriage. Of the nine community property states,\textsuperscript{130} all of them have considered the division of

\textsuperscript{128} See, e.g., Prince, 89 So. 2d at 131-32 (distinguishing the husband's good faith when marrying the second spouse from the Patton line of cases in which the husband contracted the second marriage in bad faith).

\textsuperscript{129} See, e.g., Prince, 89 So. 2d at 128; Patton, 1 La. Ann. at 98; Price, 326 So. 2d at 545.

\textsuperscript{130} The nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. The State
community property in the context of a putative marriage. Some, of course, consider the issue in more depth than others. With resounding uniformity, however, each state has relied on equity as a factor, if not the deciding factor, when assigning property rights to each spouse.

When relying on equity as the predominant factor in assigning property rights to putative spouses, most states have rejected the classic putative marriage rule, which considers the property acquired during the existence of the putative marriage—just like property acquired during a legal marriage—to be community property. Rather than classify property of the putative marriage as community property, some states have termed it quasi-community, quasi-marital, or partnership property. Equity, not the laws of community property, govern the division, even though the result under either theory likely will be the same.

Courts in Texas and California offer the most extensive discussion on putative marriage, although courts in Arizona, Idaho, Nevada, New Mexico, and Washington have broached the issue in varying degrees. While the approach may differ, courts in each state generally consider the origin of the rule, its statutory or common law foundation, and the principles of equity when seeking a resolution. A study of these decisions provides valuable insight into, and offers possible solutions for, the pitfalls present in Louisiana law.

of Alaska has adopted legislation that allows spouses to opt into a community property regime by entering into a community property agreement or a community property trust. See Alaska Stat. 34.77.030 (1999). Additionally, Alaska recognizes invalid marriages once the impediment has been removed. See Alaska Stat. § 25.05.051. It is not clear, however, how property would be distributed among legal and putative spouses who opted into the community property regime.

131. See infra notes 138, 148, 182 and accompanying text.

132. One author has concluded that Louisiana is the only state that continues to apply the classic doctrine. See Blakesley, supra note 8, at 31. That same author has concluded that equitable theories of relief are “conceptually inaccurate” because the putative marriage rule is a matter of substantive law. Id. at 54.

133. Other non-community property states have enacted legislation to provide for the rights of putative spouses. These statutes are similar to Section 209 of the Uniform Marriage and Divorce Act, which provides that the rights of a putative spouse can not supersede the rights of a legal spouse or those acquired by other putative spouses, but the putative spouse should receive an apportionment of property as circumstances warrant and in the interests of justice. See, e.g., Colo. Rev. Stat. § 14–2–111; 750 Ill. Comp. Stat. 5/305; Minn. Stat. Ann. § 518.055; Mont. Code Ann. § 40–1–404; see also Neb. Rev. Stat. § 42–378 (1999) (compensating an innocent party to a null marriage). For a collection of cases from states that have adopted the putative marriage rule or some equitable analogue thereof, see Blakesley, supra note 8, at 14 n.46.
Texas, like Louisiana, was initially governed by Spanish law.\textsuperscript{134} Relying on Las Siete Partidas, Texas courts applied the classic putative marriage rule and afforded putative spouses all the incidents and privileges of a lawful marriage, as long as the putative spouse acted in good faith.\textsuperscript{135} In 1840, the common law of England supplanted the Spanish law in Texas, and there was some question whether putative marriage survived.\textsuperscript{136} Texas courts, however, continued to recognize the putative marriage rule, notwithstanding its roots in Spanish law.\textsuperscript{137} In a landmark case decided in 1905, the Texas Supreme Court welcomed the putative marriage rule into its common law and granted innocent, putative spouses the right to property acquired during the putative marriage in the same way as the legal spouse.\textsuperscript{138}

After adoption of English common law, though, Texas courts relied on equitable principles to divide community property when a putative spouse was involved.\textsuperscript{139} Although in practice the putative

\textsuperscript{134} Barkley v. Dumke, 87 S.W. 1147, 1148 (Tex. 1905); For a further discussion of the putative marriage rule in Texas, see Carlson, \textit{supra} note 195, at 18.

\textsuperscript{135} Carroll v. Carroll, 20 Tex. 732, 742 (1858) (pre-1840 marriage); Lee v. Smith, 18 Tex. 141, 143 (1856) (pre-1840 marriage); Smith v. Smith, 1 Tex. 621, 628-29 (1846) (pre-1840 marriage). The putative marriage rule originated in Texas in \textit{Smith v. Smith}, 1 Tex. 621 (1846). The court relied on Las Siete Partidas to conclude that the end of putative marriage produces the same effects as the end of a lawful marriage, but the effects will only benefit a spouse who acted in good faith. \textit{Id.} at 629. In fact, the court considered the good faith putative spouse to be the decedent's lawful wife. According to the court, the putative spouse had, "a larger interest in the property than any other person," because she was married to the decedent for fifteen years and was the mother of the decedent's children. \textit{Id.} at 634.

\textsuperscript{136} Act of Jan. 20, 1840, 1840 Laws of Tex. 3, reprinted in 2 Laws of Tex. 177 (Gammel 1898); see also Routh v. Routh, 57 Tex. 589, 593 (1882) (implying that the common law of England governed the marriage contract but leaving the question open).


\textsuperscript{138} Barkley, 87 S.W.2d at 1147–48. The Texas Supreme Court reaffirmed that holding in 1975 in the case of Davis, 521 S.W.2d at 607–08. A putative marriage may result either out of a ceremonial marriage or a common law marriage. Garduno, 760 S.W.2d at 738; Rey v. Rey, 487 S.W.2d 245, 248 (Tex. Civ. App. 1972).

spouse would receive the same treatment if the classic rule had been applied, Texas courts often granted relief based on partnership principles or joint ownership principles. In part because the law was not statutory, remedies reached were often inconsistent in their rationale.

Most interesting is the case of Parker v. Parker, which involved the distribution of the estate of a common spouse whose legal and putative spouses survived him. In Parker, the common husband left the legal wife, filed for a divorce (which was found by the court to be null and void), and married his second, putative wife with whom he lived until his death. When dividing his community property, the court recognized the existence of two separate estates: the first existing between the common spouse and the legal wife until the time of the putative marriage and the second beginning from the date of the putative marriage until the death of the common spouse. The legal wife was entitled to one-half of all of the community property from the first estate and the putative wife was entitled to one-half of all of the community property from the second estate. As to the other half of the second estate, the court concluded that the legal wife and the heirs of the common spouse were entitled to split the remaining one-half, each receiving a one-quarter share.

Morgan v. Morgan, 21 S.W. at 156–57, underscore the importance of equity in its decision:

property acquired in this state, under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not; and why should this not be so, especially when they have attempted to enter into a marriage contract, and believed that they were lawfully husband and wife? How then, can it be said that the property acquired in pursuance of such contract shall belong to one of the parties more than the other?

140. Routh, 57 Tex. at 595 (partnership theory applied to allow relief); Garduno, 760 S.W.2d at 739 (property acquired during putative marriage is jointly owned separate property); Matthews v. Matthews, 292 S.W.2d 662, 665 (Tex. Civ. App. 1956) (property acquired during the putative marriage is jointly owned separate property); Hupp v. Hupp, 235 S.W.2d 753, 756 (Tex. Civ. App. 1950) (each putative spouse is entitled to half of the joint accumulations); Little v. Nicholson, 187 S.W. 506, 507–08 (Tex. Civ. App. 1916) (each putative spouse is entitled to half of the joint or partnership property between the two).

141. See Blakesley, supra note 8, at 10.

142. 222 F. 186 (5th Cir. 1915) (applying Texas law).

143. Id. at 188–90. The divorce was annulled because the grounds alleged for divorce were false and service was insufficient. Id. at 189.

144. Id. at 194.

145. Id.

146. Id. at 195; see also Routh, 57 Tex. at 602 (Bonner, J. concurring) (concluding that the putative spouse was entitled to one-half of the property acquired during the putative community and the other half constitutes the net
equity played an important role, the court noted that even though the legal marriage guaranteed the legal wife her share of community rights, her rights concerning the second estate should be, subject to "the just and equitable claim of the putative wife."\textsuperscript{147}

B. California

The origin of putative marriage in California likewise rests with Spanish law, but California courts have relied on equitable principles rather than its Spanish legal foundation to award putative spouses a share of the community property.\textsuperscript{148} In 1969, California codified the rule that gave putative spouses the rights of legal spouses, as long as either or both believed in good faith that the marriage was valid.\textsuperscript{149} Amended in 1994, the law provides that the putative spouses divide property acquired during the putative marriage, but the law calls this property "quasi-marital property," rather than community property.\textsuperscript{150} Under California law, true community property exists only when there is a legal marriage, so "quasi-marital property" is used to give the same legal effect to the putative spouses.\textsuperscript{151}

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\textsuperscript{147} Id.; see also Lee v. Lee, 247 S.W. 828, 833 (Tex. 1923), in which the court granted the putative spouse one-half of all the community property acquired during the existence of the putative marriage, noting that she had no right to any of the separate property of the common spouse or any of the community property the common spouse shared with his legal wife.  
\textsuperscript{150} Cal. Fam. Code § 2251 (1994), which provides:  
(a) If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall:  
(1) Declare the party or parties to have the status of a putative spouse.  
(2) If the division of the property is an issue, divide in accordance with Division 7 (commencing with Section 2500), that property acquired during the union which would have been community property or quasi-community property if the union has not been voidable. This property is known as "quasi-marital property."
\textsuperscript{Id.} Section 2550 of the California Family Code makes clear that community property is divided equally. Cal. Fam. Code § 2550 (1994).  
\textsuperscript{151} In re Estate of Vargas, 111 Cal. Rptr. 779, 780 (Cal. Ct. App. 1974); Blanche v. Blanche, 160 P.2d 136, 145 (Cal. Ct. App. 1945); Blakesley, supra note 8, at 32 n.143. At least one court in California has relied on partnership principles to award the putative spouse a portion of the community property. See Sousa v.
As far as the division of quasi-marital property, one-half of the property belongs to the putative spouse, and one-half belongs to the legal community. The share that belongs to the legal community is distributed to the legal spouse and the common spouse like any other community property under the circumstances. In other words, of the remaining one-half (belonging to the legal community), the common spouse has testamentary capacity over one-half of the property, and the legal spouse is entitled to the other half. If the common spouse dies intestate, according to California law, his share devolves to the surviving spouse.

In the case of *Estate of Ricci*, two surviving widows each claimed an interest in the common spouse’s intestate succession. One child was born of the putative marriage, and all of the property at issue was purchased during the putative community. The court concluded that the putative spouse, who was in good faith, was entitled to her one-half share of the community earned while she was married to the decedent, and the legal spouse as the “surviving spouse” under intestacy was entitled to the other half of the putative community.

When the common spouse left a will bequeathing all of his property to his putative spouse, the court in *Sousa v. Freitas* concluded that the putative wife was entitled to her one-half of the property because she was in good faith. As to the other half,

Freitas, 89 Cal. Rptr. 485, 489 (Cal. Ct. App. 1970) (“In effect, the innocent putative spouse was in partnership or a joint enterprise with her spouse, contributing her services—and in this case her earnings—to the common enterprise. . . . Upon death of the husband, only his half interest is considered as community property, to which the rights of the lawful spouse attach.”).


157. *Id.*

158. *Id.* at 741–42; see also *Estate of Foy*, 204 P.2d 685 (Cal. Ct. App. 1952) (in a contest between the putative spouse and the child of decedent from his prior marriage, the court awarded the putative spouse all of the property acquired during the invalid marriage because the decedent died intestate); *In re Krone’s Estate*, 189 P.2d at 741 (same). According to California Probate Code section 201 (now section 100), in the absence of a testamentary disposition, the decedent’s share of the community property devolves to the surviving spouse. Cal. Prob. Code § 201 (repealed 1983) (current version at Cal. Prob. Code §§ 100, 6401).

159. *Sousa*, 89 Cal. Rptr. at 487.
however, the court allowed the decedent to bequeath his half to the putative wife and awarded the legal wife the other half (or one-quarter of the whole). Therefore, the putative spouse received three-quarters of the community acquired during the putative marriage, and the legal spouse received the other one-quarter. Although courts in California award the good faith putative spouse one-half of the quasi-marital property, equitable principles assist in dividing the other half.

C. Arizona

Technically, Arizona does not recognize the putative marriage rule. Although the Arizona Supreme Court has cited precedent from other states on the putative marriage rule, and has referred to "putative marriages" in its opinions, courts will not recognize it as a part of Arizona law. Because of the inherent inequity in refusing to award an innocent spouse some property earned during an invalid union, some courts have allowed a purported spouse to equitably recover property that she contributed to the purported community. Although Arizona refuses to attach any community property rights to

160. Id. at 489–90.
161. Id.
162. See Estate of Hafner, 229 Ca. Rptr. 676, 689 (Cal. Ct. App. 1986) (relying on principles of equity to award one-half of the quasi-marital property to the putative spouse and one-half to the legal spouse and her children); Union Bank & Trust, 254 P.2d 644 (denying the claim of the legal wife to a share of the property acquired during the putative community under the theory of equitable estoppel because the legal spouse had entered into another marriage); Estate of Vargas, 111 Cal. Rptr. 779 (applying principles of equity to divide the property in half because the legal and putative wives had each been living as a family with the bigamous husband). For a compilation of cases discussing the division of quasi-marital property, see Estate of Hafner, 229 Cal. Rptr. 676.
165. Cross v. Cross, 381 P.2d 573, 575 (Ariz. 1963) ("[W]here there was no valid marriage... there can be no acquisition of property rights based on their marital status."); see also Carlson, supra note 195, at 18.
166. See Cross, 381 P.2d at 575 (allowing "wife" to recover funds paid to improve the "husband's" real property because she contributed labor and money during the purported marriage that enriched her "husband"); Garza v. Fernandez, 248 P.2d 869, 871–72 (Ariz. 1952) (allowing woman who lived with man as his wife under the agreement that they would equally divide any joint accumulations to assert rights to property at his death); see also In re Marriage of Fong, 589 P.2d 1330, 1336–37 (Ariz. Ct. App. 1978) (at dissolution of legal marriage, awarding husband a greater share of the community property earned during the marriage, when the husband in good faith had entered into another marriage and had acquired much of the property during the invalid marriage).
a good faith putative spouse, it appears that courts will make the
effort to apply equitable principles to reach similar outcomes.

D. Idaho

Idaho recognizes the putative spouse's right to bring a wrongful
death action, but at the death of the common spouse, gives no other
effects to a putative spouse.\(^\text{167}\) In fact, in *Reichert v. Sunshine Mining Co.*,\(^\text{168}\) the Idaho Supreme Court rejected an equitable argument by
the putative spouse who, at the common spouse's death, sought
worker's compensation benefits and the property acquired during the
invalid marriage.\(^\text{169}\) The court awarded all of the property to the legal
spouse, noting that no legal mechanism in Idaho existed to award the
putative spouse with benefits of the marriage even though policy
considerations may dictate otherwise.\(^\text{170}\) The Idaho Supreme Court,
however, has indicated that a spouse who in good faith disputes the
invalidity of a marriage that the other spouse seeks to annul may be
allowed temporary alimony and costs of presenting her contention in
the lawsuit.\(^\text{171}\)

E. Nevada

Nevada, too, adopted its community property laws from Spain but
has failed to recognize the rights of a putative spouse to a portion of
property acquired during a putative marriage.\(^\text{172}\) One court in Nevada
recognized the property rights granted to a putative spouse in another
state,\(^\text{173}\) but no court in Nevada has construed the rule by name.\(^\text{174}\)
The Supreme Court of Nevada, however, has implicitly applied the

\(^{168}\) 516 P.2d 704 (Idaho 1973).
\(^{169}\) *Id.* at 706–07 (citing Idaho Code § 15–2–102 (2001)). Because the
common spouse died intestate, the surviving spouse takes all of the community
property.
\(^{170}\) *Id.* at 706. The *Reichert* case was decided before the Idaho Legislature
granted putative spouses the right to sue for wrongful death, so its result may be
\(^{172}\) See *Western States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1228 n.3 (Nev.
\(^{173}\) See *Western States Construction, Inc.*, 840 P.2d at 1228 n.3 ("There is no
statutory provision [in Nevada] with respect to a division of property between
parties that acknowledges that even a 'putative' spouse, i.e., one who held a good
faith belief that the marriage was valid, is to be afforded any entitlements which
approximate those of a married person.").
\(^{174}\) But see *Warren v. Warren*, 579 P.2d 772, 775 (Nev. 1978) (noting that
plaintiff failed to present any evidence to support her claim of putative marriage).
principles of putative marriage. In *Wolford v. Wolford*, the common spouse entered into a marriage with the putative spouse, believing that his legal wife was dead. A prior court had divided the property acquired during the "putative" marriage equally between the common and putative spouses as co-owners or tenants in common. At the request of the purported husband, the Supreme Court granted partition of the property by a sale. Even though the court did not set forth a rule under which a putative spouse would be entitled to relief, the innocent spouse received property acquired during the invalid union.

**F. New Mexico**

No court in New Mexico has specifically discussed the putative marriage rule. Two courts, however, have indicated that innocent spouses to a null marriage will be entitled to some relief. Without using the terms "putative spouse" or "putative marriage," one court stated that a spouse in good faith that disputes the invalidity of a marriage may be entitled to interim alimony, and the other court suggested that payment for services rendered when there is an agreement between the parties would be granted to the good faith spouse of an invalid marriage. Although no court has adopted the rule, New Mexico courts appear to protect innocent spouses from the loss of property for entering an invalid marriage.

**G. Washington**

The State of Washington recognizes the putative marriage rule but has rejected the classic theory even though its community property system stems from Spanish heritage. Rather, courts of Washington have applied principles of equity to divide property of a putative marriage. Some courts in Washington have treated the

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175. 200 P.2d 988 (Nev. 1948).
176. *Id.* at 989.
177. *Id.* at 988–89.
178. *Id.* at 991.
181. In re Estate of Lamb, 655 P.2d at 1004.
183. In re Marriage of Himes, 965 P.2d 1087, 1100 (Wash. 1998) (finding that a "putative wife...has equitable interests in the common property acquired during an illegal marriage"); In re Marriage of Lindsey, 678 P.2d at 332 (adopting a rule
property earned during the putative community as partnership property and have awarded the putative spouse one-half of the property as a partner.\textsuperscript{184} Regardless of whether courts have relied on the partnership theory or have simply relied on principles of equity, the putative spouse is protected.

The case cited most often for the division of community property in Washington is \textit{In re Brenchley's Estate}.\textsuperscript{185} In \textit{Brenchley}, the putative wife lived with her husband for twenty-six years, even though the marriage was technically invalid.\textsuperscript{186} Using the partnership theory, the court concluded that a woman who lived in good faith with her putative spouse for twenty-six years was entitled to one-half of the property of their putative marriage, and the other half was awarded to the common spouse's children from the first, legal marriage.\textsuperscript{187}

The \textit{Brenchley} decision has been relied on to ensure that an innocent party receives a fair share of property from the marriage.\textsuperscript{188} The Washington Supreme Court has explained, "[i]f the putative spouse has valid interests, such as rights to property jointly accumulated during the putative marriage, then the trial court must shape and balance the relief to protect the interests of both the putative spouse and the legal spouse."\textsuperscript{189} Although one scholar insists that Washington does not recognize the putative spouse of just and equitable division of property); Poole v. Schrichte, 236 P.2d 1044, 1048–49 (Wash. 1951) (noting that "a court of equity will protect the right of an innocent party in the property accumulated by the joint effort of both" parties); Creasman, 196 P.2d 835 (noting, in dicta, that if a man and woman enter into a marriage in good faith and it proves to be void, a court of equity will protect the rights of the innocent party and the property accumulated by the joint efforts of both), overruled by In re Marriage of Lindsey, 678 P.2d 328 (1984); Powers v. Powers, 200 P. 1080, 1081 (Wash. 1921) (concluding that the court has the power to award the innocent party a portion of the property to which the party is equitably and justly entitled); Buckley v. Buckley, 96 P. 1079, 1083 (Wash. 1908) (awarding putative spouse the proportion of property which under all circumstances was just and equitable).

\textsuperscript{184} See Knoll v. Knoll, 176 P. 22, 24 (Wash. 1918) (concluding that as long as the parties lived together as husband and wife in good faith, upon annulment of the marriage, the property should be divided equally between them as partners); In re Brenchley's Estate, 164 P. 913, 915 (Wash. 1917) (treating the property acquired during the putative marriage as partnership property and awarding one-half of the partnership property to the putative spouse).

\textsuperscript{185} 164 P. 913 (Wash. 1917).

\textsuperscript{186} Id. at 914.

\textsuperscript{187} Id.; but see Buckley v. Buckley, 96 P. 1079, 1080 (Wash. 1908) in which the court, at dissolution of the marriage while the parties were still alive, awarded the legal and the putative wives with one-quarter of the property and award the common spouse with one-half.

\textsuperscript{188} See, e.g., Himes, 965 P.2d at 1100–01.

\textsuperscript{189} Id. at 1101.
rule, the courts apply its principles with reliance on equity to protect the innocent spouse.

H. Wisconsin

In 1986, Wisconsin adopted the Uniform Marital Property Act and became a community property state. Although the putative marriage rule is not present in Wisconsin per se, good faith parties to invalid marriages can have their marriages recognized as valid after the impediment has been removed. Additionally, at least one court has concluded in a wrongful death suit that if both parties in good faith believe their marriage to be valid, they are entitled to legal effects of a marriage. Furthermore, Wisconsin law provides that any property of parties to an invalid marriage can be divided “as is necessary to avoid an inequitable result.” Even though the scheme is statutory in Wisconsin, some aspects of putative marriage exist.

V. CURING THE PITFALLS: A SUGGESTION FOR REVISION

To cure the pitfalls present in Louisiana law, the time has come for Louisiana to adopt a mechanism—a putative divorce—that puts an end to the legal community and allows the putative community to begin. Like a putative marriage, a putative divorce would separate the communities and allow the spouses who contribute to each community to reap the benefits of that community at the other’s death. One French scholar reached the same conclusion by suggesting successive and separate liquidation of each community regime to achieve equal treatment of the putative spouse.

196. The need for a putative divorce as a counterpart to a putative marriage was first advanced by Professor Robert Pascal in 1957. Pascal, supra note 107, at 305. Professor Pascal notes that the term “putative divorce” was suggested to him by Fred Godwin, a student author of a related note. Id. (citing Godwin, supra note 99).
197. Blakesley, supra note 8, at 38–39; Pascal, supra note 107, at 303; Godwin, supra note 99, at 491. Each of these authors suggest that two separate communities can exist.
198. See supra notes 49–51 and accompanying text. Interestingly, Aubry and Rau considered the legal community, from the legal marriage until contraction of
To adopt the concept of putative divorce, Louisiana need not stray from the classic civilian doctrine of putative marriage.\textsuperscript{199} Putative spouses should be entitled to the same community property rights as the legal spouse. The idea that, like the legal spouse, the putative spouse is entitled to a share of the community has been parlayed into the principle that both the legal and the putative spouse must take from the same community.\textsuperscript{200} That need not be the case. With the aid of the putative divorce, the legal community could end and the putative community could begin. Each community would consist only of two spouses contributing and withdrawing from their community, and the legal spouse would be entitled to a share of the putative community in certain limited circumstances.\textsuperscript{201}

When dividing property between the legal and putative spouses who equally have a claim to the same share, it is nearly impossible to ensure that neither spouse suffers any prejudice. Each is legally entitled to one-half of the putative community. In Louisiana today, however, the legal spouse is entitled to one-fourth of the putative community, due to her technical relationship and regardless of her actual relationship with the common spouse.\textsuperscript{202} Use of the putative divorce would prevent the status of the legal spouse from being elevated over the innocent, intimate working-relationship with the putative spouse.\textsuperscript{203} Although separating the two communities by a putative divorce may, in some cases, benefit the putative spouse, such benefit is appropriate in light of the relative ease at which the legal spouse can terminate the community and the makeup of today's family.\textsuperscript{204}
A. The Putative Divorce

Logistically, how would the putative divorce function? The putative divorce would function the same as any divorce—the community property regime would terminate at the time the putative divorce became effective. The putative divorce would take effect at the earlier of 1) filing suit for divorce even if the divorce was legally invalid or 2) contracting the putative marriage. The bad faith of the common spouse would not prevent his heirs from succeeding to his estate. Indeed, his heirs would be entitled to inherit the community share of assets that the bad faith spouse would not be entitled to if he were alive. Additionally, equity would enter the analysis when no divorce was attempted and the legal spouse could demonstrate, based on a number of factors, an entitlement to a share of the property acquired during the putative community.

1. Filing suit for divorce even if the divorce was legally invalid

Take again for example, A (the legal spouse), B (the putative spouse), and C (the common spouse) as presented above. If C left A in the good faith belief that the marriage had legally terminated by divorce and he married B, the putative divorce would take place at the moment C or A filed the legally invalid divorce. C and A would share equally in the legal community and C and B in the putative community. C’s heirs would receive his share of the community property from both marriages. B’s rights as the putative spouse would be preserved and A, even though technically a legal wife, would take only from the community to which she contributed.

In this situation, the parties intended to end the community property regime. A, therefore, should not be granted a share of property acquired during the putative community. Whether or not C

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205. Currently, the legal regime terminates “by the death or judgment of declaration of death of a spouse, declaration of the nullity of the marriage, judgment of divorce or separation of property, or matrimonial agreement that terminates the community.” La. Civ. Code art. 2356. A putative divorce likewise would terminate the regime. The author recognizes, but leaves unanswered, the effect that a putative divorce could have on other incidents to divorce, such as an award of alimony or reimbursement claims between spouses.

206. It is the author’s preference that putative divorce should be adopted into Book I of the Civil Code after article 96 to ensure a statutory foundation and proper integration into the Code.

207. The bad faith of either putative spouse will prevent the civil effects from flowing to that spouse during the spouse’s lifetime. La. Civ. Code art. 96. At the time of death, however, the bad faith of the common spouse would not affect his or her heirs.
or A remarried, both spouses believed that their marriage had ended and all rights to property acquired by their ex-spouse had ceased. Causing the putative divorce to take place at the time the parties believed that the community terminated realizes the parties' expectations and assures that the legal spouse does not receive an unearned, unexpected gratuity.

2. Contracting the putative marriage

A more difficult question arises when no divorce was attempted, but the spouses separate. In that case, if C left A and married B knowing that he was legally married to A, the putative divorce would take place at the moment he contracted the putative marriage with B. The legal community would begin at the moment of the valid marriage and would end when the putative marriage was contracted. 208 The putative community would begin at the moment he contracted the putative marriage and end at C's death. Any property acquired by C or A during the valid marriage would enter the legal community and would be shared equally by them and any property acquired by C or B during the putative marriage would enter the putative community and would be shared equally by them. Again, C's heirs would receive his share of the community property from both marriages.

Not raised by this example is the potential harm to the legal spouse by causing a putative divorce without her knowledge or consent. For example, a common spouse could leave his legal spouse and enter into a putative marriage, while his legal spouse, having no desire to remarry, awaits his return. Even more egregious, a deceitful common spouse could carry on separate lives, one with the legal spouse and the other with a putative spouse. In either situation, because the legal community ends when the putative marriage begins, the legal spouse is no longer entitled to property acquired by the common spouse after he enters the putative marriage. 209 To ameliorate any harm to the legal spouse, property from the putative community would be available to the legal spouse in certain circumstances. 210

To explain, some have suggested that property acquired during the existence of a putative marriage should be divided among the legal and putative spouses based on which party acquired the property. 211 Under this theory, the legal and the putative

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208. If C did not remarry, the legal community would end at his death.
209. The reverse is also true. If the legal spouse acquires property at the time when the common spouse has entered the putative marriage, the common spouse will have no claim to that property.
210. See infra Section V(A)(3).
211. Pascal, supra note 107, at 303–04; Blakesley, supra note 8, at 39.
communities coexist. If the legal spouse or the putative spouse acquired property during the putative marriage, that property would remain in their respective communities. Consequently, the legal spouse would not be entitled to a share of the property acquired by the putative spouse. If, however, the common spouse acquired property during the putative marriage, that property would enter both communities. In this author’s opinion, property acquired during the putative marriage—by either the common or the putative spouse—should remain in the putative community. Just as the putative spouse has no right to property in the legal community, the legal spouse should have no right to the property in the putative community unless the legal spouse can demonstrate, based on several factors, the requisite entitlement to such property.

3. Entitlement to property in the putative community by the legal spouse

The legal spouse, in certain circumstances, should have a claim to a portion of the putative community. To determine whether the legal spouse can demonstrate an entitlement to certain property, certain factors should be considered: a) the contact between the legal and the common spouse, b) the legal spouse’s understanding of the marital status of the common spouse, and c) whether the legal spouse received any benefit or enjoyment from property in the putative community.

212. Pascal, supra note 107, at 303–04 (noting that the value of property entering each community would be governed by equity); Blakesley, supra note 8, at 39 (concluding that reliance on equity would be necessary to divide the property into both communities).

213. Although some scholars have suggested that the legal spouse should only be able to recover property acquired by the common spouse, see Pascal, supra note 107, at 303, Blakesley, supra note 8, at 39, the legal spouse may be disadvantaged if the common spouse places assets in the name of the putative spouse. If, for example, the putative spouse purchased property in her name with community funds, but the common spouse allowed the legal spouse to use the property (most likely without knowledge of the putative spouse). The legal spouse should not be prevented from collecting a share of the property because the property was acquired in the name of the putative spouse. Based on community property principles, whether it was purchased by either spouse, it presumptively enters the community between them. La. Civ. Code art. 2340 (the presumption is rebuttable). Consequently, if the legal spouse could demonstrate an entitlement to the property based on her relationship with the common spouse, even if the property was acquired by the putative spouse, the legal spouse should be protected.

214. Two other authors have also recognized the potential harm to a legal spouse if she is denied any right to claim property in the putative community. See Blakesley, supra note 8, at 39; Homes, supra note 7, at 125. Mr. Homes argues that a legal spouse should have a claim against the community only where she has been "truly wronged" and suggesting that positive economic need ought to be shown to constitute a wrong. Homes, supra note 7, at 125.
These factors should be weighed against each other to award the legal spouse a share of property from the putative marriage when equity so dictates.

For example, in the case of the bigamous spouse leading two separate lives, the legal spouse may be able to demonstrate an entitlement to property in the putative community through her continued contact with the common spouse and her ignorance of the putative marriage. It seems equitable that if two wives coexist in relationships with the common spouse, ignorant of the other’s marriage, neither should receive a greater benefit in property than the other. In the case of a common spouse who abandoned his legal wife, however, the legal spouse may have to demonstrate that she received a benefit or enjoyment from property acquired during the putative community to establish her entitlement. For example, if the legal spouse, who had little interaction with the common spouse and was unaware of his second marriage, was given a car to use by the common spouse, she may be entitled to a share of that property at his death even if it was acquired during the putative community. Again, it seems equitable that if the legal spouse, believing that she is married, uses property that she thinks entered her patrimony, she should be entitled to a share of the property notwithstanding the putative marriage.

By focusing on the actual relationship between the legal and the common spouse, the status of the legal spouse is appropriately elevated when her marriage with the common spouse is more than a mere formality. Otherwise, the putative spouse, who shares the responsibilities of a conventional marriage—working together, mutually assuming responsibilities, and enjoying benefits—should be protected against claims of a spouse who had no involvement in the putative community.

During the putative marriage, in most circumstances, the legal wife neither contributes to nor withdraws from the putative community. When one spouse leaves the other, even if the other spouse did not want a divorce or separation, the other spouse (i.e. the legal spouse) has limited involvement in building the putative community. Although technically the legal community does not

215. If the legal spouse is aware of the putative marriage, it seems implausible that she would be able to demonstrate an entitlement to property. See Pascal, supra note 107, at 304 (noting that it would be an abuse of the law to allow the legal spouse to collect property acquired by the common spouse during the putative community if the legal spouse has knowledge of the putative marriage and does nothing to prevent or terminate it).

216. If the legal spouse demonstrates an entitlement to property, its division among the legal and putative spouse should be left to the discretion of the court.

217. It is possible that the legal spouse’s share of the legal community could be
end until the marriage is terminated, the institution of marriage and the contributions into and withdrawals from the community by the legal spouse generally terminate before the putative marriage begins. The putative spouse, rather than the legal spouse, should be entitled to her full one-half share of the assets acquired during the community in which she contributed as an equal partner in the marriage.

Fairness dictates that the parties enjoying and contributing to the community property regime ultimately take pleasure in its benefits. The law should not elevate the formal tie between the legal and common spouse over the mutual participation and productivity of the putative spouses. The innocent, putative spouse lives the life of a legal spouse in all respects except technical validity. Indeed, the putative spouse is recognized in the community as the actual spouse, lives with the common spouse, and enjoys the benefits and detriments of a conventional marriage—devoid only of the formality of legal marriage.

The putative spouse deserves protection from the claims of the legal spouse who reaps the benefit of the putative spouse's work. All of the community property states that have considered the issue consistently protect the innocent spouse. In addition, the children of the decedent, as the priming class of successors, should benefit from the fruits of their parent's labor. Even though one Texas court recognized what this writer believes is the correct separation of communities, that court allowed the legal spouse to enjoy property to the detriment of the decedent's children based on her technical status alone.

With the advent of a putative divorce, the legal spouse is not forgotten. The legal spouse remains protected if her level of interaction with the common spouse or property acquired during the

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219. See Homes, supra note 7, at 122 (noting that the concept of community property is dependent on the active participation of two partners joined in a vital relationship, not the formality of marriage between two partners); Pascal, supra note 107, at 305 (suggesting that effects of marriage should be withheld if the parties, although technically married, do not believe themselves to be married).
220. See Chavis, 29 So. 2d at 864; Homes, supra note 7, at 122–23.
221. Homes, supra note 7, at 122 ("[T]o allow the legal wife to participate in the putative community in that situation would usually work an injustice to the parties in the putative relationship who have worked together to acquire the property, and at the same time would constitute a pure gratuity to the legal wife who, although legally united to one of the parties to the putative relationship, has in no way participated in the very relationship which is the foundation of the community property theory.").
222. See supra Section IV.
223. Parker, 222 F. at 194; see supra notes 142–47 and accompanying text.
putative marriage elevates her above a technical, non-participating spouse. Additionally, because the putative divorce takes effect at the earlier of contracting the putative marriage or filing the invalid divorce, the legal spouse would be entitled to one-half of the property acquired while the other spouse lived alone—even when separated from the legal spouse. If the common spouse never remarried or filed for divorce, the legal regime would persist until the common spouse's death.

The legal spouse in today's society needs less protection than the legal spouse of years past. In the lines of cases stemming from Patton and Prince, legal wives were left behind by their husbands, often faced with a difficult and lengthy process to obtain a divorce. The husbands were the heads of the households, and the wives, who did not work outside of the home, were left behind with either promises of divorce or promises for a return. Today, the makeup of the family has changed. Wives are not only wage-earners in the family, but can obtain a divorce more quickly and can unilaterally obtain a separation of property.

If the legal spouse learns of the putative marriage or is abandoned by the common spouse, she can terminate the community. In fact, the putative divorce would protect any assets acquired by the legal spouse from claims of the common spouse. If the community is not terminated, both spouses are entitled to a share of the other's acquisitions. After the putative divorce, all acquisitions made in the name of the legal spouse would be the legal spouse's separate property and all those made by the common spouse would enter the putative community.

224. The community is not terminated by mere separation. See La. Civ. Code art. 2356 for the causes of termination of the community regime. By giving the legal spouse one-half of the community property acquired while the other spouse is separated but has failed to file a divorce, there is an incentive for the other spouse to properly terminate the regime through a judgment of divorce or separation of property.

225. See id. (providing that death terminates the community property regime).

226. See Katherine Shaw Spaht, Louisiana Practice Series: Family law in Louisiana §§ 7.1–7.7 (3d ed. 2000) for a discussion of the progression of development of the law of divorce from 1808 to the present.

227. See La. Civ. Code arts. 102, 103(1) (1999) (providing that a divorce can be granted after living separate and apart continuously for one hundred and eighty days).

228. See La. Civ. Code art. 2374 (1999) (providing that "[w]hen the interest of a spouse in a community property regime is threatened to be diminished by the fraud, fault, neglect or incompetence of the other spouse, or by the disorder of affairs of the other spouse, he may obtain a judgment decreeing separation of property," and "[w]hen a spouse is an absent person, the other spouse is entitled to a judgment decreeing separation of property.").

229. If the legal spouse remarried as well, all acquisitions would enter the legal
Without so stating, one Louisiana court has applied the concept of putative divorce by awarding the putative spouse and the heirs of the common spouse property acquired during the putative community. In *Succession of Chavis*, the common spouse married his second, putative wife having obtained only a separation from bed and board from his first wife but not a judgment of divorce. Prior to his death but during his putative marriage, the common spouse acquired two pieces of property, to which the legal wife asserted a claim. Failing to cite its own decision in *Patton*, the *Chavis* court awarded the putative spouse one-half of the property and the children of the common spouse, both from the legal and the putative marriage, the other one-half of the property. The legal spouse received no portion of the property acquired during the putative community because “she [did] not appear to have contributed a penny to the acquisition or improvement of the property involved in [the] suit” and “[the property] was acquired entirely through the union of the labors of [the putative spouses].” Even though there was no mention of a putative divorce, the court allowed the putative spouses to contribute to a separate community to which the legal spouse had no claim—the practical effect of a putative divorce.

Many formulas can be advocated to legally divide the putative community and, with any of these formulas, one if not all of the parties’ legal rights will be compromised. When considering the reality of putative marriage, one solution captures the balance of equality and fairness, and that solution is accomplished by recognizing two communities separated by the putative divorce. To achieve the appropriate balance between the legal and putative spouses, Louisiana courts should not only consider the analysis of

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230. 29 So. 2d 860 (La. 1947).
231. *Id.* at 861.
232. *Id.* at 864. See also Jones v. Squire, 69 So. 733, 737 (La. 1915) in which the Louisiana Supreme Court, without any reference to its decision in *Patton*, awarded one-half of the putative community to the putative spouse and the other half to the child of the common spouse from the legal marriage, even though the legal spouse was alive.
233. *Chavis*, 29 So. 2d at 864. The court did not consider whether the common spouse was in bad faith.
234. See *Homes*, *supra* note 7, at 126–27 (citing *Chavis* as the correct application of the putative marriage rule when the common spouse dies leaving both legal and putative wives).
235. See *id.* at 122–23 (taking the position that the solutions in the *Patton* and *Prince* cases are unfair to the putative spouse); Pascal, *supra* note 107, at 304 (suggesting two solutions: one in which the common spouse receives one-half and the legal and putative spouses split the other one-half and the second giving all three parties an equal one-third share).
other states but, as instructed by the Civil Code, should rely on principles of equity.

**B. Effect on Patton and Prince**

A putative divorce solves the problems presented in *Patton* and *Prince*. First, the *Patton* line of cases, which awards the legal and putative spouses the entirety of the common spouse’s community at his death, is outmoded and outdated. While the goal of the *Patton* case was to punish bigamous spouses, the only persons punished on his death are the bad faith spouse’s testate and intestate heirs. Second, the *Prince* line of cases, in attempting to protect the heirs of the common spouse, unduly prejudices the innocent, putative spouse. The putative divorce not only protects the heirs of the common spouse, even if the common spouse is in bad faith, but strikes the appropriate balance between the legal and putative spouses.

1. Patton inappropriately punishes the heirs of the common spouse

Reliance on the *Patton* case is fraught with problems, most notably the application of Spanish law, which is no longer a part of positive law in Louisiana. Under the Spanish regime, bigamous spouses were punished for their infidelity by being denied any share in the community property earned during the invalid marriage. Rather than punish the bigamist, the division of property unfairly punished the heirs of the bigamous spouse, who were denied any inheritance from their ascendant.

Admittedly, there is some appeal in punishing spouses who knowingly lure another into a marriage knowing it to be a sham.

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236. A California appeals court considered the case of *Estate of Vargas*, 111 Cal. Rptr. 779 (Cal. Ct. App. 1974), in which the decedent had lived a double life for twenty-four years as a husband and father to two separate families. The court recognized that its laws are not designed to cope with the extraordinary circumstance of purposeful bigamy and therefore resorting to equitable principles was mandatory. *Id.* at 781. Using equitable principles, the court divided the estate one-half to each spouse. *Id.*

237. The Civil Code provides that “[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity.” La. Civ. Code art. 4; *see also* Pascal, supra note 107, at 303.

238. *See Hubbell*, 7 La. Ann. at 252 (recognizing that Spanish law was no longer in force in Louisiana but still applying its principles as background for interpretation); *see also* Henderson, supra note 31, at 58; *and* Homes, supra note 7, at 121.

239. *See supra* notes 31–34 and accompanying text.

240. *See Prince*, 89 So. 2d at 133; Homes, supra note 7, at 124; Godwin, supra note 99, at 490 n.6.
Prior to the death of the bigamous spouse, Louisiana law provides such a punishment. Article 96 of the Civil Code allows civil effects of a putative marriage to flow only to the party in good faith. If the bigamous spouse is not in good faith at the inception of the putative marriage, civil effects will never flow to him. The Louisiana Third Circuit in Price v. Price denied civil effects to a common spouse when the legal and putative spouses were still living. In Price, the putative wife sought a declaration of nullity after learning of her husband's prior undissolved marriage. Because she was in good faith, she sought one-half of a piece of property acquired by her husband during the putative marriage. The court awarded one-half of the property to the good faith putative spouse and the other half to the legal spouse based on Patton, thereby denying the common spouse any share in the property.

Based on Price, the rule articulated by the Patton court makes sense when the putative marriage is discovered while the bigamous husband is still alive. Because the bad faith, bigamous spouse is not entitled to civil effects of the putative marriage, one-half of the community belongs to his putative spouse and the other half belongs to his legal wife, under the principle that the legal spouse has a legal entitlement to one-half of all the property acquired during the marriage.

The appeal to punish bigamous spouses, however, loses its luster once the bigamous spouse dies. The heirs of the bigamous spouse suffer, rather than the one who committed the wrong. French scholars failed to embrace this punishment rationale and recognized the right of the bigamist to property that he earned during the

241. Article 96 also contains an exception for spouses who are putative as a result of the other spouse's prior undissolved marriage. La. Civ. Code art. 96. Civil effects will continue, despite the putative spouse's knowledge of the prior undissolved marriage. Id. Because that exception applies to the putative spouse, and not the common spouse, it is inapplicable in this context.

242. Id.

243. 326 So. 2d 545 (La. App. 3d Cir. 1976).

244. Id. at 549.

245. Id. Because the Price case dealt with division of one piece of property, it is not known whether a court would deny a bad faith common spouse any share of his earnings during the putative marriage.

246. See id. (La. App. 3d Cir. 1976) (applying Patton in a divorce when both putative spouses were still alive); Pascal, supra note 107, at 304 (noting that generally the rule in Patton and depriving the common spouse of any community property is equitable when the common spouse is in bad faith).

247. See Price, 326 So. 2d at 549.

248. See Harriet S. Daggett, Work of the Supreme Court: Successions, Donations and Community Property, 14 La. L. Rev. 152, 162 (1953) (noting that to punish a dead bigamist by preventing his children from inheriting was illogical).
In fact, the interpretation in *Patton* contradicts the spirit of article 96, which specifically grants civil effects to the children of a putative marriage when one spouse is in good faith. Applying *Patton*, the children are denied inheritance from their parent (the bad faith spouse) even though the other parent is in good faith. Even if the right of inheritance persists, there is nothing to inherit because the community property has been forfeited to the putative spouse. Inheritance becomes meaningless to the child, thus violating the spirit of article 96.

The *Patton* case has been applied in a number of cases since its decision in 1846. In *Succession of Choyce*, the five children of a man who had entered into a putative marriage were denied any inheritance in favor of a legal wife who had lived with the decedent for two years and believed that she had been divorced from decedent. Initially, the trial court awarded the putative wife one-half of the property and the five children as his legal heirs the other half. The appellate court reversed, focusing solely on the common husband who, the court concluded, was in bad faith. Because the husband entered a fifteen year marriage in bad faith, his children did not inherit his share of the community property and the legal and putative spouses were awarded equal proportions.

The result in this case highlights the windfall to the legal spouse, who, due to a technical relationship, will enjoy property to the detriment of decedent's children. Courts have recognized that the rationale in *Patton* is no longer appropriate or applicable in Louisiana.
Creation and application of a putative divorce would ameliorate the consequences present in *Patton*.

2. *The result in Prince unduly prejudices the innocent spouse*

The result in *Prince* allowed an absent, legal wife to prevent the putative spouse from realizing her full share of property earned during her putative marriage. With the use of the putative divorce, the putative spouse in *Prince* would have been able to retain her full one-half interest in property of the putative community. Essentially, the putative divorce serves the exact same function as the putative marriage. The parties intend for the community property regime to end and simply need a legal device—the putative divorce—to give them the legal effect of a divorce and terminate the regime. In *Prince*, because the legal spouses attempted to get a divorce, which was later discovered to be invalid, the putative divorce would have become effective at the time the divorce petition was filed.

Even if the legal spouses had simply parted ways, without attempting the divorce, the result would be the same. Because the property was acquired after the putative marriage, the property would remain in the putative community. The facts in *Prince* do not suggest that the legal spouse could demonstrate an entitlement to the property based on any ongoing relationship with the common spouse. In fact, she married someone else.

Similar to the inequitable results caused by application of *Patton*, the *Prince* interpretation has produced unfortunate consequences for the putative spouse. In the *Succession of Gordon*, the common spouse had been married to his legal spouse for approximately five years and then married his putative spouse, with whom he remained married for thirty-eight years. At issue was the common spouse's succession, which contained one piece of property purchased during the putative community. Because the court concluded that the common and putative spouses entered the marriage in good faith, the heirs were awarded one-half of the property and the putative spouse had to relinquish one-half of her share to the legal spouse.

Using the putative divorce, the putative spouse would have been entitled to keep her share of the putative community. The property

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Code). In fact, as early as 1892, the Louisiana Supreme Court realized the impending problems of *Patton*. See *Jermann v. Tenneas*, 11 So. 80 (La. 1892) (hinting that children of the common spouse should inherit from him under the French system, regardless of the spouse's bad faith).

259. 461 So. 2d 357 (La. App. 2d Cir. 1984).
260. *Id.* at 359–61.
261. *Id.* at 358.
262. *Id.* at 365.
was purchased during the putative community and absent any evidence of the legal spouse’s entitlement to a share of the property, the property would have been shared by the putative spouse and the heirs of the common spouse. The legal spouse in Gordon lived out of state for many years after the separation and claimed to have no knowledge of the putative marriage.\textsuperscript{263} Further, she testified that she had been in contact with the common spouse, who purportedly told her that he would never divorce her.\textsuperscript{264} If the testimony of the legal spouse was deemed credible, the trial court could have awarded a certain share of the property to the legal spouse.

VI. CONCLUSION

The putative divorce strikes the balance between the legal and putative spouses, while protecting the claims of the successors of the common spouse. The current state of the law and jurisprudence in Louisiana fails to adequately protect the successors of the common spouse as well as the innocent putative spouse. In addition, the legal spouse in most cases enjoys a windfall of property from the putative community.

Ultimately, the putative divorce will protect the property interest of all of the spouses. A spouse can lose a share of his or her community acquisitions to a spouse not participating in the marriage relationship. For example, at the death of the common spouse, the putative spouse could owe a share of her community property to the legal spouse, with whom she had no relationship. Two communities would accomplish a just division of ownership. Spouses who work together in their marriage, legal or putative, should share equally in the community acquired between them.

A putative divorce will have consequences beyond the division of community property discussed in this article. A putative divorce may affect matters incidental to divorce, such as reimbursement claims between spouses and awards of alimony. Additionally, as civil unions are integrated into the law of some jurisdictions, putative divorce principles can be applied in that context as well. Notwithstanding its potential reach, the purpose of putative divorce—to meet the parties’ expectations and prevent an unjust division of property—should form the backbone of its application in Louisiana and beyond.

\textsuperscript{263} Id.
\textsuperscript{264} Id. at 360.