ACURIO V. ACURIO: *PARENS PATRIAE* IN MARITAL REGIMES

I. INTRODUCTION

Louisiana courts have become increasingly overprotective of its citizens. Although usually seen in the context of juvenile court, *parens patriae* refers to the idea that the state holds the inherent power and authority to protect persons who are unable to act on their own behalf—similar to the role of a parent.[1] Louisiana courts have extended this idea by claiming that one of

1. *Parens patriae*, BLACK'S LAW DICTIONARY (9th ed. 2009).

its duties is to protect adult citizens from entering into contracts that are not completely balanced. Louisiana courts, however, have disregarded its citizens' personal duty to safeguard themselves from unfavorable agreements. Further, the courts do not, and cannot, have the authority to decide what is in the best interest of its citizens.

Louisiana courts continue to broaden their power to act as parental figures for citizens.[2] In *Acurio v. Acurio*, the Louisiana Supreme Court's desire to protect, in its eyes, the "weaker" spouse, led to its decision to uphold an unfavorable premarital agreement. This Note proceeds as follows. Part II presents *Acurio*'s background facts and procedural posture. Part III examines the history and analysis of the laws pertinent to this case. A discussion of the Louisiana Supreme Court's majority opinion and its two dissenting opinions follows in Part IV. Finally, Part V explains why the Louisiana Supreme Court's opinion was incorrect and how it will result in negative policy implications for future marital contracts.

II. FACTS AND PROCEDURAL POSTURE OF *ACURIO*

Danielle Deon Dickerson Acurio Cage and Dr. Michael Thomas Acurio were initially married on June 27, 1998; however, the couple divorced in 2000.[3] When Mrs. Acurio and Dr. Acurio decided to marry a second time, they agreed to sign a premarital agreement drafted by Mrs. Acurio before they legally married.[4] Thus, before their wedding, they signed the agreement in the presence of a notary and one witness.[5] During their second marriage, the spouses conducted their marital life in accordance with this agreement.[6] For instance, both spouses honored the agreement when purchasing their family home because Dr. Acurio only used funds from his separate bank account, and Mrs. Acurio "appeared and signed the deed and affirmed that the house was Dr. Acurio's separate property."[7]

Like their first marriage, the second marriage did not end with the couple living happily ever after. Mrs. Acurio petitioned

---

2. *See*, *e.g.*, Acurio v. Acurio, 2016-1395 (La. 5/3/2017); 224 So. 3d 935; Duhon v. Activelaf, LLC, 2016-0818 (La. 10/19/16); 2016 WL 6123820.

3. *Acurio*, 2016-1395, p. 1; 224 So. 3d at 936.

4. *Id.*

5. *Id.*

6. *Id.* at p. 8; 224 So. 3d at 945.

7. *Id.*

the court for a judgment of divorce and subsequently filed a Motion in Limine to exclude from evidence the premarital agreement they signed before the second marriage.[8] For a premarital agreement to have proper form, the parties must execute the document by either an authentic act or by an act under private signature duly acknowledged.[9] Because authentic acts require a notary and two witnesses,[10] the parties agreed at trial that the document was not executed by an authentic act.[11] Further, although the parties eventually acknowledged their signatures in a subsequent deposition, their acknowledgements did not occur before their marriage.[12]

The issue before the court was whether the parties formed a valid premarital agreement even though they failed to execute the agreement by either an authentic act or by acknowledging their signatures before becoming legally married.[13] The plaintiff, Mrs. Acurio, argued that the agreement was invalid because the parties failed to acknowledge their signatures before they were legally married.[14] She supported this claim by stating that if the parties failed to execute a valid premarital agreement before the marriage occurred, Louisiana Civil Code article 2329, titled "Marital Contracts that Modify the Marital Regime," dictates that the parties must jointly petition the court to receive its approval.[15] Conversely, the defendant, Dr. Acurio, argued that the agreement was valid because article 2331,[16] which provides the form requirements for modifying marital regimes, does not explicitly place a time requirement on the acknowledgement of a party's signature.[17] Instead, he argued, acknowledgement merely

8. Acurio v. Acurio, 2016-1395, p. 2 (La. 5/3/17); 224 So. 3d 935, 936.

9. LA. CIV. CODE ANN. art. 2331 (2018).

10. LA. CIV. CODE ANN. art. 1833 (2018).

11. *Acurio*, 2016-1395, p. 1; 224 So. 3d at 936.

12. *Id.* at p. 2; 224 So. 3d at 936.

13. *Id.*

14. *Id.*

15. *Id.* at pp. 2–3; 224 So. 3d at 937; *see also* LA. CIV. CODE ANN. art. 2329 (2018) (stating in part that "[s]pouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval.").

16. LA. CIV. CODE ANN. art. 2331 (2018) ("A matrimonial agreement may be executed by the spouses before or during marriage. It shall be made by authentic act or by an act under private signature duly acknowledged by the spouses.").

17. *Acurio*, 2016-1395, p. 4; 224 So. 3d at 937.

serves as an evidentiary function for proving a party's signature.[18]

The district court ruled in favor of Mrs. Acurio and declared the premarital agreement invalid because it lacked proper form at the time of their marriage.[19] On appeal, the Louisiana Second Circuit Court of Appeal reversed the district court's ruling and stated that the parties did not need to acknowledge their signatures before their marriage for the agreement to be enforceable.[20] Specifically, the second circuit noted, "[W]e find it nonsensical to expect a party to sign a document days before marriage and to immediately need to acknowledge his signature prior to the marriage for it to have any effect."[21] Mrs. Acurio then filed a writ, which the Louisiana Supreme Court granted.[22] Ultimately, the supreme court ruled in favor of Mrs. Acurio and held that the marital agreement was invalid because the parties failed to acknowledge their signatures before the marriage occurred.[23]

III. THE LEGAL BACKGROUND SURROUNDING THE *ACURIO* DECISION

When two people enter into a marriage, they establish a matrimonial regime that governs the ownership and management of property between themselves and third parties.[24] The Civil Code designates all property owned by a married person as either community or separate.[25] Louisiana's default rule provides that the two spouses enter into a *community* property regime,[26] which means that each spouse owns a one-half interest in all of the couple's property.[27]

However, spouses can agree before marriage to alter the default community property regime and create a separate property regime instead.[28] Property in a separate property

18. Acurio v. Acurio, 2016-1395, p. 4 (La. 5/3/17); 224 So. 3d 935, 938.
19. *Id.* at p. 2; 224 So. 3d at 936.
20. *Id.*
21. Acurio v. Acurio, 50, 709-CA, p. 9 (La. App. 2 Cir. 6/22/16); 197 So. 3d 253, 257.
22. *Acurio*, 2016-1395, p. 2; 224 So. 3d at 936.
23. *Id.* at p. 9; 224 So. 3d at 940.
24. LA. CIV. CODE ANN. art. 2328 (2018).
25. LA. CIV. CODE ANN. art. 2335 (2018).
26. LA. CIV. CODE ANN. art. 2340 (2018).
27. LA. CIV. CODE ANN. art. 2336 (2018).
28. LA. CIV. CODE ANN. art. 2329 (2018).

regime is owned by only one spouse.[29] Spouses may alter their marriage regimes through marital agreements.[30] These marital agreements may be formed either before or during the marriage, provided the agreements are not contrary to public policy.[31] Once the spouses are married, they may only enter into a marital agreement that modifies the matrimonial regime upon joint petition and approval by the court.[32]

The issues raised in *Acurio* primarily revolved around the interpretation of article 2331, which governs the form of these spousal marital agreements.[33] This article states that marital agreements must be made by authentic act or act under private signature duly acknowledged by the spouses.[34] Thus, to understand the dilemma presented in *Acurio*, one must understand the legal theories and background of authentic acts and acts under private signature duly acknowledged.

A. OVERVIEW OF LOUISIANA FORM REQUIREMENTS

Historically, parties have used gestures such as handshakes, signatures, and personal seals to indicate the existence of their agreement and to demonstrate that "this is for keeps."[35] While the form requirements seen in the modern world are more sophisticated than those of the past, the goal of these requirements is to demonstrate to the court the parties' intention to be bound by their agreement.[36] As noted by legal scholar Lon Fuller on the intention behind wills, "[C]ourts are frequently faced with the difficulty of determining whether a particular document—it may be an informal family letter which happens to be entirely in the handwriting of the sender—reveals the requisite 'testamentary intention.'"[37] Further, form requirements are not implemented for every transaction, but only for transactions the legislature deems to be particularly important.[38]

29. LA. CIV. CODE ANN. art. 2341 (2018).

30. LA. CIV. CODE ANN. art. 2328 (2018).

31. LA. CIV. CODE ANN. art. 2329 (2018). For example, a marital agreement that requires one spouse to leave all of his property to his wife in his will is against public policy. *See* LA. CIV. CODE ANN. art. 1606 (2018).

32. LA. CIV. CODE ANN. art. 2329 (2018).

33. LA. CIV. CODE ANN. art. 2331 (2018).

34. *Id.*

35. HOWARD O. HUNTER, CEREMONY OF CONTRACTING § 7:2, *in* MODERN LAW OF CONTRACTS (2017).

36. Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 804 (1941).

37. *Id.*

38. *Id.* at 805.

Public policy demands that a signer be protected from "merely drifting" into signing an important document, as opposed to a person who signs something only after careful deliberation.[39]

There are two types of form requirements under Louisiana law: *ad solemnitatem* and *ad probationem*.[40] First, an *ad solemnitatem* formality requires the document's formal requirements to be fulfilled before the agreement gives rise to any obligation.[41] This requirement ensures that the signers of the agreement are fully aware of the intended act.[42] Thus, this type of formality is intended to serve as a cautionary function.[43] In the past, a seal satisfied this type of form requirement, as Fuller notes that "[t]he affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future."[44] A donation inter vivos provides an excellent illustration of this concept because the donor must perform a variety of form requirements to give her an opportunity to realize that she is irrevocably transferring her property.[45] Even the process of locating an adequate notary and bringing along two witnesses implicitly conveys to the donor that this transaction is important and serious.

The second type of formality of a writing required by the law is *ad probationem*.[46] Unlike *ad solemnitatem*, this formality is only required for evidentiary purposes, so the ensuing agreement still results in a valid and enforceable juridical act when the form requirement is missing.[47] However, a juridical act lacking this type of formality is subject to the "uncertainty of securing proof other than witnesses or presumptions."[48] An example of this type

39. Fuller, *supra* note 36, at 806.

40. SAUL LITVINOFF & RONALD J. SCALISE JR., IN THE PRESENCE OF THE NOTARY § 12.17, *in* 5 LA. CIV. L. TREATISE, LAW OF OBLIGATIONS (2nd ed. 2017); *see also* Fuller, *supra* note 36, at 800–01 (noting that form requirements generally satisfy three types of functions: (1) the evidentiary function, (2) the cautionary function, and (3) the channeling function (this form requirement must be fulfilled before the agreement is enforceable)).

41. LITVINOFF & SCALISE, *supra* note 40.

42. *Id.*

43. *Id.*

44. Fuller, *supra* note 36, at 800.

45. LITVINOFF & SCALISE, *supra* note 40.

46. *Id.*

47. *Id.*

48. *Id.*

of formality is an oral sale of immovable property.[49] This agreement is valid between the parties once the property has been actually delivered and the transferor recognizes the transfer when questioned under oath.[50]

B. AUTHENTIC ACTS

An authentic act is an *ad solemnitatem* formal requirement.[51] An authentic act must be: in writing; executed before a notary public in the presence of two witnesses; and signed by each party executing it, each witness, and the notary public.[52] As described in *Succession of Tete*:

> The effect given by law to authentic acts, rests upon the presumption, that a public officer, exercising a high and important trust, under the solemnity of an oath, has done his duty when acting within the scope of his authority. Selected for their character, capacity and probity, as notaries are presumed to be, the law attaches full credit to their official acts. This prerogative is established in the interest of public order, to maintain peace among men, and to prevent contestations concerning the proof or evidence of their conventions.[53]

An authentic act serves two main purposes: evidentiary and cautionary.[54] First, an authentic act serves an evidentiary purpose because it constitutes full proof of the agreement and what transpired before the notary in the completion of the act.[55] As stated by Civil Code article 1835, "An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title."[56] Further, an authentic act prevents a signer from arguing that the parties never actually agreed to the contract.[57]

---

49. LITVINOFF & SCALISE, *supra* note 40.

50. LA. CIV. CODE ANN. art. 1839 (2018).

51. LITVINOFF & SCALISE, *supra* note 40.

52. LA. CIV. CODE ANN. art. 1833 (2018).

53. Succession of Tete, 7 La. Ann. 95, 96 (1852).

54. DIAN TOOLEY-KNOBLETT & DAVID GRUNING, THE ACT UNDER PRIVATE SIGNATURE DULY ACKNOWLEDGED § 6:14(D), *in* 24 LA. CIV. L. TREATISE, SALES (Aug. 2017); LITVINOFF & SCALISE, *supra* note 40.

55. *Succession of Tete*, 7 La. Ann. at 98; LITVINOFF, *supra* note 40; *see* Crosby v. Stinson, 33, 628, p. 6 (La. App. 2 Cir. 8/23/00); 766 So. 2d 615, 619.

56. LA. CIV. CODE ANN. art. 1835 (2018).

57. Succession of Tete, 7 La. Ann. 95, 97 (1852).

Second, an authentic act serves a cautionary purpose because the signers must clear a few procedural hurdles to properly complete this act.[58] The process of appearing before a notary and two witnesses creates an "air of solemnity and formality" that instills reflection on the finality and seriousness of the act.[59] Thus, the signer is put on notice that he is conducting a serious action that has real legal effects.

C. ACT UNDER PRIVATE SIGNATURE DULY ACKNOWLEDGED

In *Acurio*, the Louisiana Supreme Court considered whether an act under private signature duly acknowledged creates an *ad solemnitatem* formal requirement. The overarching rule governing acts under private signature duly acknowledged, Civil Code article 1836, provides that "[a]n act under private signature is regarded prima facie as the true and genuine act of a party executing it when his signature has been acknowledged, and the act shall be admitted in evidence without further proof."[60] A party can acknowledge a signature either before a court, a notary public, or other officer authorized to perform that function, in the presence of two witnesses.[61] This list is not exclusive because article 1836 further notes that "[a]n act under private signature may be acknowledged also in any other manner authorized by law."[62] Even though an act under private signature duly acknowledged is similar to an authentic act, article 1836 provides that this function cannot serve as a substitute when the law specifically requires an authentic act.[63]

Article 1836 is closely tied to Civil Code article 1838, which provides that a party may either acknowledge or deny a signature after being served by the other party with a written request for admission.[64] If the signer acknowledges the signature, the signed document may be given evidentiary weight.[65] The history of article 1836 for acts under private signature strongly indicates the evidentiary purpose of the "duly acknowledge" condition. Under the Civil Code of 1870, the corresponding article defining an act under private signature duly acknowledged provided that

58. LITVINOFF & SCALISE, *supra* note 40, at § 12.17.
59. *Id.*
60. LA. CIV. CODE ANN. art. 1836 (2018).
61. *Id.*
62. *Id.*
63. *Id.*
64. LA. CIV. CODE ANN. art. 1838 (2018).
65. LITVINOFF & SCALISE, *supra* note 40, at § 12.31.

"[a]n act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act."[66] Further, comments to the 1984 revision explain that this article "reproduces the substance of articles 2240 and 2242 (1870). It changes the law in part, making an acknowledged act under private signature not equivalent to an authentic act, but merely admissible in evidence as prima facie genuine."[67] Therefore, aside from making an act under private signature duly acknowledged nonequivalent to an authentic act, it appears the legislature intended the concepts within article 1836 to remain unchanged.[68]

It is significant that the 1984 revision preserved the substance of the 1870 act under private signature duly acknowledged because the courts have historically interpreted the phrase "duly acknowledged" as strictly an evidentiary safeguard to prevent forgery.[69] For example, in *Szmyd v. Wingate*, the plaintiff claimed the defendant forged the plaintiff's sibling's signature on a deed.[70] However, the second circuit declared the signed deed genuine because a witness acknowledged the authenticity of the sibling's signature.[71] This case demonstrates that court interprets "duly acknowledged" to mean any person, either the signer or a witness, may acknowledge the signature as genuine.[72] Therefore, the phrase "duly acknowledged" under the 1870 Code was merely concerned with the evidentiary validity of signatures and never seemed to require acknowledgement as a cautionary procedural safeguard.[73]

D. DEBATE OVER THE INTERPRETATION OF THE ACT UNDER PRIVATE SIGNATURE DULY ACKNOWLEDGED

Even before *Acurio* was decided, courts and legal scholars have debated the role of the "duly acknowledged" requirement of article 2331 and when acknowledgement must occur to be

66. LA. CIV. CODE ANN. art. 2242 (1870).

67. LA. CIV. CODE ANN. art. 1836 cmt. (a) (2018).

68. *Id.*

69. Szmyd v. Wingate, 341 So. 2d 1271, 1272 (La. Ct. App. 1977).

70. *Id.*

71. *Id.*

72. *Id.* at 1273.

73. LA. CIV. CODE ANN. art. 2242 (1870); LA. CIV. CODE ANN. art. 1836 cmt. (a) (2018); *Szmyd*, 341 So. 2d at 1273.

effective.[74] Some scholars believe this is merely an evidentiary function and can be completed at any time: "Consistent with the policy that the interest at stake is evidentiary rather than cautionary, it should be permissible to authenticate a matrimonial agreement at any time. No statute seems to require that the authentication occur before the marriage."[75] Others argue, however, that this acknowledgement serves as a cautionary safeguard and must be completed before the marriage occurs. As one writer suggests, "Despite recognizing that there is no expressed temporal requirement for when an acknowledgment [under article 2331] must be made, statutory interpretation canons, jurisprudence, and legislative policy require that one be imputed."[76] Therefore, some believe that the acknowledgement arguably serves as a cautionary function because the parties recognize the seriousness of their actions. In other words, this requirement hints to the parties that they are performing an extraordinary agreement and not a run of the mill type of transaction.

Except for the second circuit, the other four Louisiana circuit courts have held that each spouse's signature must be acknowledged before their marriage occurs.[77] The first time the Louisiana circuit courts ruled on this issue occurred in the fourth circuit case *Lauga v. Lauga*.[78] In that case, the parties tried to execute a premarital agreement while the future husband was still incarcerated.[79] The parties failed to acknowledge their signatures before the marriage occurred, and the court declared their agreement invalid.[80] Interestingly, the fourth circuit failed

74. *See* Deshotels v. Deshotels, 13-1406, pp. 5–6 (La. App. 3 Cir. 11/05/14); 150 So. 3d 541, 545; Lauga v. Lauga, 537 So. 2d 758 (La. Ct. App. 1989); Ritz v. Ritz, 95-683, pp. 11–12 (La. App. 5 Cir. 12/13/95); 666 So. 2d 1181, 1185. *But see* Johnson v. Johnson, 614 So. 2d 884, 885 (La. Ct. App. 1993) (holding that the premarital agreement was valid even though the spouses only executed the document by an act under private signature).

75. ANDREA CARROLL & RICHARD MORENO, MATRIMONIAL AGREEMENTS-FORM REQUIREMENTS § 8:7, *in* 16 LA. CIV. L. TREATISE, MATRIMONIAL REGIMES (4th ed. 2017).

76. Leigh B. Ackal, *What's Mine Is Yours, or Is It? The Bright Line Between Marital Agreements Executed Before Marriage and Those Executed After Marriage*, 91 TUL. L. REV. 789, 799 (2017).

77. *Deshotels*, 13-1406, pp. 5–6; 150 So. 3d at 545; *Lauga*, 537 So. 2d at 761; *Ritz*, 95-683, pp. 11–12; 666 So. 2d at 1185; Rush v. Rush, 2012-1502 (La. App. 1 Cir. 03/25/13); 115 So. 3d 508.

78. *Lauga*, 537 So. 2d at 761.

79. *Id.* at 759.

80. *Id.* at 760.

to provide any legal reasoning for its opinion on this issue but plainly stated that the "document [was] neither an authentic act, nor an act under private signature duly acknowledged."[81]

After *Lauga* was decided, *Ritz v. Ritz* was the next case on this issue to reach the Louisiana appellate courts.[82] On the night before their wedding, the future husband told his fiancé that he would not marry her unless she signed a separate property premarital agreement.[83] Although the parties signed the document before their wedding, they acknowledged their signatures after they were married.[84] Similar to the court in *Lauga*, the fifth circuit in *Ritz* found the premarital agreement invalid by assuming that the plain wording of Civil Code article 2331 requires acknowledgment to occur before the marriage.[85] The court stated, "We note that La. C.C. art. 2331 has made acknowledgment a requisite to the validity of a matrimonial contract under private signature."[86] Surprisingly, the court provided no reasoning or codal support to lend credence to its position.[87]

After *Lauga* and *Ritz*, *Rush v. Rush* became the leading case because the first circuit provided a detailed analysis as to why it believed an acknowledgment must occur before the parties enter into marriage.[88] The Louisiana Third Circuit Court of Appeal has also addressed this issue in *Deshotels v. Deshotels* and resolved it by relying on the first circuit's reasoning in *Rush*.[89] In *Rush*, the premarital agreement was executed before a notary, but it was not signed by two witnesses.[90] Thus, it failed to meet the form requirements of an authentic act.[91] Although the signatures were later acknowledged by both spouses years after their marriage, the court found the agreement to be unenforceable.[92] In *Rush*,

81. Lauga v. Lauga, 537 So. 2d 758, 760 (La. Ct. App. 1989).

82. Ritz v. Ritz, 95-683, pp. 11–12 (La. App. 5 Cir. 12/13/1995); 666 So. 2d 1181, 1185.

83. *Id.* at p. 4; 666 So. 2d at 1182.

84. *Id.* at p. 12; 666 So. 2d at 1185.

85. *Id.* at pp. 11–12; 666 So. 2d at 1185.

86. *Id.* (citations omitted).

87. *Ritz*, 95-683, pp. 11–12; 666 So. 2d at 1185.

88. Rush v. Rush, 2012-1502, p. 1 (La. App. 1 Cir. 03/25/13); 115 So. 3d 508, 508.

89. Deshotels v. Deshotels, 13-1406, pp. 5–6 (La. App. 3 Cir. 11/05/14); 150 So. 3d 541, 545.

90. *Rush*, 2012-1502, pp. 2–3; 115 So. 3d at 510.

91. LA. CIV. CODE art. 1833 (2018).

92. *Rush*, 2012-1502, p. 5; 115 So. 3d at 511.

the first circuit noted that article 2329[93] pertaining to marital agreements and article 2331[94] pertaining to the form of these marital agreements both relate to the execution of matrimonial agreements; therefore, they both must be read in relation to each other.[95] Further, the court acknowledged that "if two statutes can be reconciled by a fair and reasonable interpretation, the court must read the statutes so as to give effect to each."[96]

The first circuit in *Rush* established a two-step analysis.[97] First, the marital agreement is not completely perfected until both signatures are "duly acknowledged" by the spouses.[98] Second, if the marital agreement is not perfected before the spouses are married, then article 2329 applies, and the premarital agreement is invalid.[99] Thus, the only way the spouses can change their marital regime is by filing a joint petition and receiving the court's approval.[100]

Interestingly, neither the *Rush*, *Deshotels*, *Lauga*, nor *Ritz* cases were discussed in the fourth circuit opinion, *Johnson v. Johnson*.[101] In *Johnson*, the fourth circuit ruled that the parties' premarital agreement was valid, even though the spouses executed the document only by an act under private signature.[102] Thus, this case suggests that only an act under private signature is necessary to form a valid premarital agreement.[103] The fourth circuit concluded:

> There was some discussion in the record as to whether the contract was in authentic form, but the evidence supports that even at the very least the marriage contract was executed by an act under private signature. Thus, we affirm the trial court's finding that a separate property agreement existed between the parties and it was valid as to form.[104]

---

93. LA. CIV. CODE ANN. art. 2329 (2018).

94. LA. CIV. CODE ANN. art. 2331 (2018).

95. Rush v. Rush, 2012-1502, p. 5 (La. App. 1 Cir. 03/25/13); 115 So. 3d 508, 511.

96. *Id.* (citing *In re* First Columbia Life Ins. Co., 97-1083, p. 6 (La. App. 1 Cir. 09/29/1998); 724 So. 2d 790, 794)).

97. *Id.* at p. 5; 115 So. 3d at 511–12.

98. *Id.*

99. *Id.*

100. *Rush*, 2012-1502, pp. 5–6; 115 So. 3d at 511–12.

101. Johnson v. Johnson, 614 So. 2d 884, 885 (La. Ct. App. 1993).

102. *Id.*

103. *Id.*

104. *Id.*

Further, four years after *Johnson*, the fourth circuit in *Lauga* contended that parties must acknowledge their signatures before their marriage to form a valid premarital agreement.[105] Unfortunately, neither the Louisiana Supreme Court in *Acurio* nor any lower circuit cases discussed this apparent inconsistency created by *Johnson* and *Lauga* in the fourth circuit. Only a few legal scholars were able to detect this problematic situation.[106]

Some legal scholars disagree with the circuit courts and believe that article 2331 does not impose a time requirement for acknowledgement of premarital agreements.[107] Rather, they believe that spouses may acknowledge their signatures at any time, even after their marriage, and the premarital agreement will still be valid.[108] Scholars bolster their reasoning by showing how no statute explicitly stating that authentication must occur before marriage.[109] Particularly, "the policy behind this requirement, then, is simply an evidentiary one adding to the reliability of the writing as what was actually executed by the parties."[110]

Further, two civil legal scholars, Katherine Spaht and Cynthia Samuel, expand on this idea by explaining that the process of acknowledging an act under private signature lacks any precautionary function;[111] it only serves an evidentiary function.[112] Unlike an authentic act, the notary does not reread the contract to the parties.[113] Instead, the parties are merely acknowledging that they signed the agreement.[114] Therefore, the fact that the parties are recognizing the genuineness of their signatures points more toward an evidentiary function than a cautionary one. As pointed out by another civilian scholar, "Consistent with the policy that the interest at stake is evidentiary rather than cautionary, it should be permissible to

105. Lauga v. Lauga, 537 So. 2d 758, 760 (La. Ct. App. 1989).

106. Kenneth Rigby, *Matrimonial Regimes: Recent Developments*, 67 LA. L. REV. 73, 83 (2006).

107. CARROLL & MORENO, *supra* note 75. *But see* Ackal, *supra* note 76.

108. CARROLL & MORENO, *supra* note 75.

109. *Id.*

110. *Id.*

111. Katherine Spaht & Cynthia Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 92 (1979).

112. *Id.*

113. *Id.*

114. *Id.*

authenticate a matrimonial agreement at any time. No statute seems to require that the authentication occur before the marriage."[115] If the legislature truly wanted the form requirement to have a cautionary component, it would have required premarital agreements be executed only by an authentic act. It is unrealistic to think that an acknowledgment will alert the parties to the degree envisioned by the court.[116] At most, the public will merely view the acknowledgment as another empty procedural hoop that must be cleared to complete their established agreement.

E. JURISPRUDENCE FOR SIMILAR LEGAL PRINCIPLES

In addition to analyzing the relevant Civil Code articles and supporting jurisprudence on acts under private signature duly acknowledged, courts and scholars look to other areas of law to draw analogies to broaden their understanding of this topic. For instance, *Francois v. Tufts* dealt with an issue similar to the one in *Acurio*, but it involved trusts. Louisiana Revised Statute § 9:1752 provides that an inter vivos trust may be created either by an authentic act or an act under private signature executed in front of two witnesses and duly acknowledged by one of the attesting witnesses.[117] Thus, the form requirements for trusts in *Francois* aligned almost perfectly with article 2331 requirements for premarital contracts in *Acurio*. However, in *Francois*, the parties failed to create their trust through an authentic act, and the witness did not acknowledge her signature until after the trust was formed.[118] Yet, the court still found the trust to be valid, reasoning that "[i]t is clear from the Civil Code articles governing acknowledgement of acts under private signature and the cases interpreting those articles that acknowledgment at the time of signature is not contemplated."[119]

Further, the Louisiana Supreme Court in *Southern Enterprises v. Foster* analyzed this issue in the context of a vendor selling a piece of property secured by a chattel mortgage.[120] In order for this type of mortgage to be effective against third parties, the document must either be passed by

115. CARROLL & MORENO, *supra* note 75.
116. Spaht & Samuel, *supra* note 111, at 90–91.
117. Francois v. Tufts, 491 So. 2d 673, 676 (La. Ct. App. 1986).
118. *Id.*
119. *Id.*
120. S. Enter. v. Foster, 13 So. 2d 491, 493 (La. 1943).

notarial act, act under private signature duly acknowledged, or subscribing witness.[121] The court noted how acknowledgement primarily serves as an evidentiary function, stating:

> The requirement of the law that a chattel mortgage executed in the form of an act under private signature must be acknowledged before a notary public as a prerequisite to recording the instrument is for the purpose of authenticating the instrument and giving solemnity to its execution. The acknowledgment makes prima facie proof that the instrument is true and genuine and authorizes its reception in evidence without further proof of its execution.[122]

Thus, as seen in the *Francois* and *Foster* cases, Louisiana jurisprudence seems to imply that acknowledgement merely serves as an evidentiary function and lacks any type of timing requirement. However, the Louisiana Supreme Court took advantage of the fact that article 2331 is silent on this aspect for the purpose of asserting its agenda of protecting the "weaker" party—the party with less financial resources and less bargaining power.[123]

For instance, in *Duhon v. Activelaf*, the supreme court protected the "weaker" party by declaring an arbitration agreement invalid.[124] In this case, a patron of a trampoline amusement park signed a waiver containing an arbitration agreement, and his child subsequently sustained injuries while participating in the park's activities.[125] Ultimately, the court declared the arbitration agreement invalid as a contract of adhesion because of the patron's unequal bargaining power when signing the agreement.[126]

---

121. S. Enter. v. Foster, 13 So. 2d 491, 493 (La. 1943). A subscribing witness is a witness who attests to a signature on an instrument. *Subscribing witness*, BLACK'S LAW DICTIONARY (9th ed. 2009).

122. *Foster*, 13 So. 2d at 494.

123. This Note does not intend to imply any type of gender stereotypes by describing a spouse as a "weaker" party. Instead, this Note merely recognizes that Louisiana courts seem to believe that it must protect the party with less financial resources and less bargaining power from the party who will use its superior bargaining position to exert its will on to the other party.

124. Duhon v. Activelaf, LLC, 2016-0818, p. 13 (La. 10/19/16); 2016 WL 6123820 at *6.

125. *Id.* at p. 1; 2016 WL 6123820 at *1.

126. *Id.* at pp. 9, 13; 2016 WL 6123820 at *4, *6. Similar examples of "weaker" parties would include consumers in purchase agreements or employees in employment contracts. *See* Saul Litvinoff, *Consent Revisited*, 47 LA. L. REV. 699, 757 (1987).

Justice Weimer dissented, stating that "there was no evidence that the plaintiff was not in an equal bargaining position with [the amusement park] because the plaintiff could have avoided arbitration and the contractual provisions as a whole by simply not signing the [the amusement park's] [a]greement and pursuing an alternative recreational activity."[127] Therefore, the majority disregarded prior case law and strong public policy favoring arbitration agreements to protect a party that the court saw as a weak and defenseless plaintiff.[128]

As illustrated above, the legal history and theory surrounding the issues illustrated in *Acurio* made for an interesting case for the Louisiana Supreme Court to decide. The court had an opportunity to clarify whether the signatures had to be acknowledged prior to marriage and pick which competing view it favored the most. On the one hand, the court could look towards the line of lower circuit cases that chose to invalidate signed premarital agreements that were not acknowledged before marriage. Siding with this line of thinking would allow the Louisiana Supreme Court to solidify its position as protector of the "weaker" party, as demonstrated in the *Activelaf* case. On the other hand, the court could turn towards the numerous scholars who championed the idea that acknowledgment may occur at any time. Siding with the scholars' line of reasoning would more align with the Codal articles on acts under private signature duly acknowledged from the 1870 Code and more easily match jurisprudence seen in other areas of Louisiana law. The following will illustrate how the court arrived at its opinion to declare the premarital agreement invalid and why this decision was incorrect.

IV. REASONING BEHIND THE COURT'S MAJORITY OPINION

In holding that Dr. and Mrs. Acurio's premarital agreement was invalid, the court reiterated how public policy strongly favors a community property regime.[129] Further, the Civil Code presumes that things owned by a spouse belong to a community property regime.[130] Thus, the court concluded that spouses must

127. Duhon v. Activelaf, LLC, 2016-0818, p. 6 (La. 10/19/16); 2016 WL 6123820 at *9 (Weimer, J., dissenting).

128. *See generally Duhon*, 2016-0818; 2016 WL 6123820.

129. Acurio v. Acurio, 2016-1395, p. 9 (La. 5/3/17); 224 So. 3d 935, 940.

130. LA. CIV. CODE. ANN. art. 2340 (2018); Acurio v. Acurio, 2016-1395, p. 4 (La. 5/3/17); 224 So. 3d 935, 938.

acknowledge their signatures before their marriage for two reasons: (1) reading article 2329 on marital agreements together with article 2331 on the form of these agreements implies a temporal requirement; and (2) coupling the option of an authentic act with an act under private signature duly acknowledged is designed to implement a steep procedural safeguard that the parties must hurdle.[131]

When reading the two articles together, the court applied a similar approach to the fourth circuit's opinion in *Rush*.[132] First, because of the community property presumption in article 2340 and the strong legislative policy favoring community rights, the court stated that it must interpret the relevant Civil Code articles on waiving community property rights *stricti juris*.[133] Applying a *stricti juris* interpretation means that the deciding court must apply a strict interpretation and cannot determine definitions by implication or analogy.[134]

Second, after defining its interpretation method, the court noted that articles 2331 and 2329 on premarital contracts must be read *in pari materia*, or in reference to each other, because they deal with the same subject matter.[135] The court reasoned that when read together, these two articles convey the legislature's intent that the parties must "consider the consequences of entering into a matrimonial agreement that is not favored by public policy."[136]

The supreme court further pointed out that the procedural hurdle in article 2329,[137] which requires the court to approve alteration to marital regimes, illustrates how the legislature intended to make opting out of the presumed community property regime an arduous task.[138] The court concluded its reasoning by stating that "if procedural burdens are placed on the spouses by way of authentic act before marriage and court approval during marriage, it logically follows that the relaxed act of signing one's private signature, without the accompanying requirement of it

131. Acurio v. Acurio, 2016-1395, pp. 5–6 (La. 5/3/17); 224 So. 3d 935, 938.
132. *Id.* at p. 5; 224 So. 3d at 938.
133. *Id.*
134. *See* Grant v. Fiol, 17 La. 158, 162 (1841).
135. *Acurio*, 2016-1395, p. 5; 224 So. 3d at 938.
136. *Id.* at pp. 5–6; 224 So. 3d at 938.
137. *Id.* at p. 5; 224 So. 3d at 938.
138. *Id.*

being duly acknowledged, is disallowed."[139]

Third, the court similarly pointed out how the legislature purposefully placed an act under private signature duly acknowledged as an alternative option to an authentic act.[140] An authentic act has numerous procedural safeguards built into it.[141] First, it is supposed to constitute full proof of the agreement and convey that the parties' execution was genuine.[142] Next, it is also supposed to provoke reflection and discernment before the parties enter into the agreement.[143] Therefore, the court reasoned that it seems impractical that the legislature would allow the parties to choose between one option, which involves a notary and two witnesses, and another less strenuous option which only involves the parties' signatures.[144]

Finally, the court declared that an act under private signature duly acknowledged is a hybrid between an authentic act and an act under private signature.[145] It is not merely an act under private signature, which may be acknowledged at any time.[146] Like an authentic act, the court reasoned that the phrase "duly acknowledged" elevates this normally evidentiary aspect to one that helps prove the genuineness of the executed document and implements a temporal form requirement.[147] Therefore, the majority held that parties must sign the document and acknowledge their signatures prior to marriage for the agreement to become valid.[148]

Justices Weimer and Hughes each wrote dissenting opinions expressing why the court should have declared the premarital agreement valid.[149] Specifically, as in *Activelaf*,[150] Justice Weimer's dissent pointed out how there is no provision in the articles on acts under private signature duly acknowledged that

139. Acurio v. Acurio, 2016-1395, p. 6 (La. 5/3/17); 224 So. 3d 935, 938.

140. *Id.* at p. 7; 224 So. 3d at 939.

141. *Id.* at p. 6; 224 So. 3d at 938.

142. *Id.* at p. 4; 224 So. 3d at 937.

143. *Id.* at p. 8; 224 So. 3d at 939–40.

144. *Acurio*, 2016-1395, p. 8; 224 So. 3d at 939–40.

145. *Id.* at p. 5; 224 So. 3d at 938.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Acurio*, 2016-1395, pp. 1–10; 224 So. 3d at 940–946 (Weimer & Hughes, JJ., dissenting).

150. Duhon v. Activelaf, LLC, 2016-0818, p. 13 (La. 10/19/16); 2016 WL 6123820 at *6.

require acknowledgment to occur within a particular time after the document's execution.[151] Further, Justice Weimer rejected how the majority opinion imputed the strictness seen in the provisions on agreements made during marriage onto premarital agreements by stating that "[s]imply because the legislature has made a conscious decision to make it more onerous to change the regime during marriage (once rights and obligations have attached) does not mean that the legislature intended the same with respect to agreements confected prior to marriage."[152] Finally, Justice Weimer concluded that the concept of freedom of contract mentioned in article 2328 should allow parties to choose a marital regime of their choice, especially if the parties honored their agreement during their marriage.[153] Justice Hughes's dissent, which specifically pointed out how the parties honored the premarital agreement for so many years before the dispute occurred, agreed with Justice Weimer's reasoning.[154]

V. THE COURT ERRED BY PROTECTING THE "WEAKER" PARTY INSTEAD OF HONORING THE CIVIL CODE

In *Acurio*, Louisiana's highest court overstepped by attempting to prevent the "stronger" spouse from taking advantage of the weaker spouse.[155] Historically, Louisiana courts have assumed that the husband has amassed all the financial and bargaining power in the relationship, leaving the wife subservient to the demands and whims of her husband. Therefore, consistent with its jurisprudential history, the Louisiana Supreme Court used this case to affirm its antiquated viewpoint that the wife has inherently less bargaining power against her husband.[156] However, as a result of using policy to justify the court's interpretation of the Civil Code, Louisiana citizens are now left with an illogical interpretation of acts under private signature duly acknowledged for premarital agreements. Thus, the court's decision in *Acurio* is flawed for three main reasons: (1) reading articles 2331 and 2329 together does not

151. Acurio v. Acurio, 2016-1395, p. 3 (La. 5/3/17); 224 So. 3d 935, 942.

152. *Id.* at p. 6; 224 So. 3d at 943.

153. *Id.* at p. 5; 224 So. 3d at 943.

154. *Id.* at p. 10; 224 So. 3d at 946.

155. Ackal, *supra* note 76, at 798.

156. *Id.*; *see* Benedetto v. Benedetto, 15-373 (La. App. 5 Cir. 12/9/15); 182 So. 3d 344; Deshotels v. Deshotels, 13-1406, p. 7 (La. App. 3 Cir. 11/05/14); 150 So. 3d 541, 546; Lauga v. Lauga, 537 So. 2d 758 (La. Ct. App. 1989); Rush v. Rush, 2012-1502, p. 6 (La. App. 1 Cir. 03/25/13); 115 So. 3d 508, 512.

convey any type of legislative intent towards premarital agreements; (2) the court incorrectly interpreted the phrase "duly acknowledged" by comparing an authentic act to an act under private signature duly acknowledged in article 2331; and (3) the policy implications of the court's decision in this case lead to impractical results.

A. THE COURT ARRIVED AT AN INCORRECT INTERPRETATION AFTER READING ARTICLES 2331 AND 2329 TOGETHER

First, the court reasoned that reading articles 2329, on marital agreements that alter the marital regime, together with article 2331, on the form of these agreements, helped determine the legislature's intent towards implementing procedural safeguards for spouses before marriage. But, as Justice Weimer noted, the wording in article 2329 only conveys a safeguard for agreements made during marriage. Conversely, article 2329 is less protective of marital agreements made before marriage and only states that "spouses may enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy."[157]

Additionally, because the acknowledgement of one's signature does not entail a notary rereading the agreement, the acknowledgement is not likely to invoke the type of discerning and heightened awareness that the court envisioned in *Acurio*.[158] Rather, Louisiana courts should trust that the parties sign their marital agreement because they have spent time reflecting on the implications of the agreement. It is not the court's duty to play a parental role to ensure that adults understand the implications of entering into a contract.

Lastly, the wording in article 2328 titled, "Contractual Regime; Matrimonial Agreement," conveys a sense of freedom of contract[159] by providing that the "spouses are free to establish by matrimonial agreement a regime of separation of property or modify the legal regime as provided by law."[160] This means that the legislature intended to offer wide discretion to the spouses, and this type of authority offers less ground for the courts to step in and try to protect a weaker spouse when the opportunity

157. LA. CIV. CODE ANN. art. 2329 (2018).

158. Spaht & Samuel, *supra* note 111, at 90–91.

159. LA. CIV. CODE ANN. art. 2328 (2018); *see* Acurio v. Acurio, 2016-1395, p. 8 (La. 5/3/17); 224 So. 3d 935, 939–40.

160. LA. CIV. CODE ANN. art. 2328 (2018).

arises.[161]

Aside from the Civil Code's general limitations on contractual freedom,[162] article 2330 titled, "Limits of Contractual Freedom," represents action that the legislature did not intend to allow between the spouses.[163] This provision prevents spouses from creating agreements that renounce the marital portion or change the established order of succession.[164] Further, this article assures third parties, who make agreements with only one of the spouses, that the spouse they transact with is authorized to do so by the marital property regime.[165] One scholar points out that because of article 2330, a spousal agreement may not "limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property."[166] Therefore, spouses enjoy expansive freedom towards contracting between themselves regarding the management of community property, and the court's decision directly contradicts the legislature's intent to maintain contractual freedom between spouses.[167]

B. THE COURT MISINTERPRETED THE PUPROSE OF "DULY ACKNOWLEDGED" IN ARTICLES 2331 AND 1836

Second, by recognizing that an authentic act and an act under private signature were the only two options to satisfy the requirements of article 2329, the court subsequently misinterpreted the purpose of the phrase "duly acknowledged." The court saw this type of act under private signature as a hybrid between an authentic act and a normal act under private signature. However, this interpretation of the phrase "duly acknowledged" contradicts how the courts have interpreted this evidentiary requirement in other areas of law.

Similar to the evidentiary language seen in article 1836, the Louisiana Supreme Court in *Southern Enterprises v. Foster* and the fourth circuit in *Francois* also recognized that the acknowledgement is for the purpose of authenticating the

161. *See* Acurio v. Acurio, 2016-1395, p. 9 (La. 5/3/17); 224 So. 3d 935, 940.

162. Laura Schofield Bailey, *Marital Property Agreements—Being Creative with the New Legislation*, 43 LA. L. REV. 159, 168 (1982).

163. *Id.* at 169.

164. LA. CIV. CODE ANN. art. 2330 (2018).

165. Bailey, *supra* note 162, at 169.

166. *Id.*

167. *Id.* at 167.

genuineness of the parties' signatures.[168] In these cases, the courts saw the juridical acts as valid even though the parties recognized their signatures years after creating a valid agreement.[169]

There is no reason why the courts should apply a different analysis for article 1836 on acts under private signature duly acknowledged when reviewing premarital agreements. Further, as seen in the legislative progression of acts under private signature duly acknowledged from the 1870 Civil Code,[170] article 1836 historically has only served an evidentiary function.[171] Therefore, the Louisiana Supreme Court seems to lack authoritative basis for concluding that acts under private signature duly acknowledged serve a cautionary function in addition to an evidentiary one.[172] As seen in *Activelaf*, where the supreme court declared an arbitration agreement invalid as a contract of adhesion, the court continues to extend its reach by protecting weaker parties whenever it sees fit.[173]

C. THE POLICY IMPLICATIONS OF *ACURIO*

The court's ruling in *Acurio* will likely have negative policy implications. In practice, requiring the signing parties to sign the documents and then acknowledge their signatures immediately after is redundant and nonsensical.[174] This is particularly strange in cases like *Acurio* where a notary or witness was present. It seems absurd that the parties would need to immediately authenticate their signatures; instead, the court should be able to rely on the testimony of the notary or witness to confirm that the parties actually signed the document. Further, parties only question the authenticity of their signatures once the spouses are heading towards divorce.[175] Therefore, it logically follows that they should confirm the authenticity of their

168. S. Enter. v. Foster, 13 So. 2d 491, 494 (La. 1943); Francois v. Tufts, 491 So. 2d 673, 676 (La. Ct. App. 1986).

169. *Foster*, 13 So. 2d at 494; *Francois*, 491 So. 2d at, 676.

170. LA. CIV. CODE ANN. art. 2242 (1870).

171. *See* LA. CIV. CODE ANN. art. 1836 (2018); Szmyd v. Wingate, 341 So. 2d 1271, 1272 (La. Ct. App. 1977).

172. *See* LA. CIV. CODE ANN. art. 1836 (2018); *Szmyd*, 341 So. 2d at 1272.

173. Duhon v. Activelaf, LLC, 2016-0818, p. 13 (La. 10/19/16); 2016 WL 6123820 at *6.

174. Acurio v. Acurio, 50, 709-CA, p. 9 (La. App. 2 Cir. 6/22/16); 197 So. 3d 253, 257.

175. *Id.*

premarital agreement during their divorce proceedings.[176]

Requiring spouses to take their private agreements to an outside party also encroaches on their privacy. Normally, for other contracts, parties are allowed to make valid arrangements without interference from outsiders. Further, there are few things that are more private or sacred than the relationship between husband and wife. However, Louisiana courts still feel the need to step in and manage marital contracts because the courts assume that one spouse will always have unequal bargaining power.[177] The courts specifically fear that one spouse will inevitably take advantage of the other and leave the other spouse with nothing.[178] This feeling by the courts does not reflect the growing trend of dual-earning spouses in today's modern households. Most families cannot enjoy the luxury of one spouse serving the role as a homemaker, like the court seems to envision.

Lastly, notwithstanding the reasoning above, this marital agreement should have been upheld as a matter of justice and equity. As the dissent noted, Mrs. Acurio was not an innocent victim and had experienced divorce before.[179] She even drafted the prenuptial agreement and lived her marital life according to it by signing their family home's deed stating that the house was Dr. Acurio's separate property.[180] The court should not have allowed her to escape their agreement once their marriage went sour.

V. CONCLUSION

In *Acurio*, the Louisiana Supreme Court failed to respect and honor the power of its citizens to make decisions that best suit their individual needs. As stated by Justice Weimer in his dissent, "[T]his should be a case resolved through a logical and straightforward application of the relevant provisions of the Civil Code."[181] Instead, the court invoked a policy argument of "protecting the weaker spouse" to impose a formal time requirement on article 2331 that simply does not exist. The Louisiana legislature must react to the court's misinterpretation

176. Acurio v. Acurio, 50, 709-CA, p. 9 (La. App. 2 Cir. 6/22/16); 197 So. 3d 253, 257.

177. *Id.*

178. *Id.*

179. *Id.* at p. 9; 224 So. 3d at 940.

180. *Id.*

181. *Acurio*, 50, 709-CA, p. 9; 197 So. 3d at 257.

and provide added clarity to the Civil Code articles concerning marital contracts.

Jeffrey M. Surprenant