

A PRIMER ON DIVORCE IN LOUISIANA

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This Article is the fourth in a series of primers on Louisiana Family Law. The Louisiana Civil Code of 1870, as amended to date, operates as the primary source of law, with other ancillary statutes and codes on particular subject matters. The law of divorce appears in Chapter 1 of Title V of Book I of the Civil Code and is followed by the provisional and incidental proceedings attendant to divorce. The divorce laws in Louisiana are relatively straightforward and limited, containing both no-fault and fault-based options. In a covenant marriage, legal separation is available and divorce options are more extensive. Because defenses to divorce are few, litigation typically surrounds the financial aspects of divorce and not the divorce itself.

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I. INTRODUCTION

In Louisiana, a marriage can be terminated by the death of either spouse, a divorce, a judicial declaration of nullity when the marriage itself is relatively null, or the issuance of a court order authorizing the spouse of a person presumed dead to remarry.¹ Death terminates a marriage as of the date provided on a doctor's certification of death or provided in a judicial declaration of death.² Judicial declarations of nullity, which are necessary when a marriage is relatively null, likewise terminate a marriage and are discussed in the primer on marriage.³ A special provision exists that provides for termination of a marriage when a court order is issued authorizing the spouse of a service member who is presumed dead to remarry.⁴ Even if the service member is later found to be alive, the judgment authorizing the spouse to remarry has the effect of terminating the marriage regardless.⁵ For service members, it appears that the judicial declaration of death authorized in the title on absent persons is not necessary if the

1. LA. CIV. CODE ANN. art. 101 (2018).

2. See LA. STAT. ANN. § 9:111 (2018). A judgment of divorce rendered against a deceased person is a nullity. *Pierce v. Gervais*, 425 So. 2d 922, 923 (La. Ct. App. 4 Cir. 1983).

3. See Monica Hof Wallace, *A Primer on Marriage in Louisiana*, 64 LOY. L. REV. 557, 602–08 (2018). Judicial declarations of nullity, although unnecessary, are also sought when a marriage is absolutely null because the parties seek relief incidental to the nullity action. See *id.* at 586–88.

4. See LA. STAT. ANN. §§ 9:301, :1441 (2018).

5. LA. STAT. ANN. § 9:301(B) (2018).

spouse of the service member wishes only to remarry.⁶

This Article focuses on the final cause for termination of a marriage: divorce. Louisiana provides both fault and no-fault options, which are explored in detail below.

II. HISTORICAL PERSPECTIVE ON DIVORCE

Like most United States jurisdictions, Louisiana's divorce laws have seen a slow shift away from a fault-based model toward one in which allegations of fault are unnecessary. The waiting periods to obtain a no-fault divorce have also changed, with the extended seven years of living separate and apart decreasing to only six months or one year, depending on whether the couple has minor children of the marriage.⁷ Cognizant of the changing landscape of divorce and the ease of entering into and getting out of marriage, Louisiana was one of a handful of states to adopt a covenant marriage law in an attempt to strengthen the weakened bond.⁸ Enacting a covenant marriage law, however, did not have the effect that many thought.⁹ Indeed, covenant marriages account for less than 1% of marriages in Louisiana.¹⁰ Regardless, it appears that the Louisiana legislature has reached its tipping point on the waiting periods for divorce, having rejected a 2017 amendment to reduce the no-fault waiting period for all divorces to six months, regardless of whether the couple has minor children.¹¹

The cause of action for divorce entered the Louisiana Civil

6. See LA. CIV. CODE ANN. art. 54 (2018). A declaration of death under the absent persons articles, or a no-fault divorce if the parties lived separate and apart before military service began, may be a quicker option than awaiting the military presumption of death. See *Pierce v. Gervais*, 425 So. 2d 922, 924 (La. Ct. App. 4 Cir. 1983).

7. For an excellent discussion of the development of the marriage and divorce laws, see KATHERINE SHAW SPAHT & JOHN RANDALL TRAHAN, *FAMILY LAW IN LOUISIANA* §§ 7.2–7.8 (2009) and DAVID W. GRUNING, *FAMILY AND OBLIGATION: THE LOUISIANA CIVIL LAW OF PERSONS* 171–74 (1990).

8. See Wallace, *supra* note 3, at 612–14.

9. *Id.* at 612–13 & nn.422–23.

10. From 1997 through 2007, the Department of Health and Hospitals reported that in the eleven-year period, 390,893 marriage licenses were issued and only 4,112 (1.05%) were for covenant marriages. According to records obtained from the Louisiana Department of Health, in 2014, with 31,408 marriage licenses issued, only 186 were for covenant marriages, amounting to 0.6%.

11. House Bill 136 of the 2017 Regular Session sought to amend the time periods for all no-fault divorces to six months. It failed to pass the House with a 42–55 vote. H.B. 136, 2017 Leg., Reg. Sess. (La. 2017).

Code in 1827.¹² Prior to 1827, spouses could only seek a separation from bed and board (legal separation) and only when the other spouse was at fault.¹³ The initial divorce legislation provided that a divorce could be obtained for the same reasons as a separation from bed and board—all of which were fault-based grounds.¹⁴ For adultery or conviction of an infamous crime, the separation and divorce judgments could be rendered at the same time; in any other instance of fault, a judgment of separation was required, followed by a period of living apart, before the divorce could be granted.¹⁵

Under the 1827 legislation, spouses had to live apart for two years without reconciliation after obtaining a judgment of separation before a spouse could petition for and obtain a judgment of divorce.¹⁶ In 1857, Act 149 reduced that period to one year.¹⁷ In addition, only the spouse who obtained the separation could obtain the divorce.¹⁸ Because a separation judgment was only permitted based on the fault of the other spouse, a spouse who was free from fault could choose not to seek a divorce, and the other spouse would be without a remedy—the parties would remain married.¹⁹

In 1898, the legislature made it possible for the at-fault spouse to obtain a divorce.²⁰ Although the at-fault spouse could not file for a separation from bed and board, if the other spouse obtained the judicial separation, the at-fault spouse could seek a divorce upon showing that the parties had lived apart without reconciliation for two years from the judgment of separation.²¹ The waiting period to get a divorce after a judgment of separation was reduced to one year and sixty days in 1932²² and to one year in 1979.²³

The advent of no-fault divorce in Louisiana took place in 1916.

12. *See* Succession of Hernandez, 15 So. 461, 466–67 (La. 1894).

13. Beginning in 1803, the legislature passed specific laws declaring certain individuals to be divorced, but divorce as a general matter was not yet provided for in the law. *See* Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 301 n.371 (2003).

14. *See generally id.* at 301.

15. *See generally id.*

16. *See id.* at 301 n.324.

17. Act No. 149, 1857 La. Acts 137.

18. *Id.*

19. *Id.* Articles 138 and 139 of the Code of 1870 provided the specific fault grounds.

20. Act No. 25, 1898 La. Acts 34.

21. *Id.*

22. Act No. 56, 1932 La. Acts 265.

23. Act No. 360, 1979 La. Acts 1005.

Either spouse could obtain a divorce, without regard to fault, on proof that the spouses had lived separate and apart continuously for seven years or more.²⁴ Opposition by one spouse was no longer relevant. By 1932, the time period had been reduced to four years of living separate and apart continuously;²⁵ in 1938, it was reduced to two years;²⁶ in 1979, to one year;²⁷ and in 1990, to six months.²⁸ In 2006, in the first extension of time for living separate and apart, the legislature required parties with minor children of the marriage to live separate and apart continuously for one year before obtaining a no-fault divorce.²⁹

During the advent of and initial amendments to no-fault divorce, separation from bed and board remained available. To obtain a judgment of separation, the plaintiff had to prove fault.³⁰ In 1956, proving fault was unnecessary, and either spouse could obtain a judgment of separation if the spouses voluntarily lived separate and apart without reconciliation for one year.³¹ In 1977, this time period was reduced to six months if the spouses attested to “irreconcilable differences” between them.³²

By 1990, the legislature determined that separation from bed and board was no longer necessary, and it was eliminated.³³ In its place, the legislature enacted article 102 of the Civil Code along with a specific set of procedural requirements that in large part mimicked the separation-then-divorce scheme, which had existed in the law for over a century. A spouse could file the petition for divorce (much like filing for separation), but the spouse could not obtain a judgment of divorce until the time period of living separate and apart had passed.³⁴ The legislature also pared down the fault-based divorces, leaving only adultery and felony conviction and

24. Act No. 269, 1916 La. Acts 557.

25. Act No. 31, 1932 La. Acts 217.

26. Act No. 430, 1938 La. Acts 1091.

27. Act No. 360, 1979 La. Acts 1005.

28. Act No. 1009, 1990 La. Acts 2507.

29. Act No. 743, 2006 La. Acts 2661.

30. See Act No. 269, 1916 La. Acts 557.

31. Act No. 303, 1956 La. Acts 626.

32. Act No. 735, 1977 La. Acts 2002.

33. Act No. 1009, 1990 La. Acts 2507. Legal separation was eliminated because it served as a legal step in the process of getting the divorce, rather than as a vehicle to encourage reconciliation. See SPAHT & TRAHAN, *supra* note 7, § 7.14.

34. Act No. 1009, 1990 La. Acts 2507; SPAHT & TRAHAN, *supra* note 7, § 7.14; see also discussion *infra* Section IV.C.

sentence.³⁵ The legislature retained what is considered to be the simplest option for divorce—filing the petition for divorce after already having lived separate and apart for the requisite time period.³⁶

These four options for divorce (two fault-based and two no-fault) remained relatively unchanged until 2014 when the legislature added two new fault-based divorce grounds for when abuse of a spouse or a child of one of the spouses occurs during the marriage.³⁷ Additionally, in 2006, the legislature bifurcated the time periods to obtain a no-fault divorce: 180 days of living separate and apart continuously if there are no minor children of the marriage and 365 days if there are.³⁸

III. LOUISIANA CIVIL CODE ARTICLE 102

Article 102 of the Louisiana Civil Code was the first of the two no-fault divorce options, enacted in 1990 after Louisiana eliminated separation from bed and board. A legal separation is no longer available in Louisiana unless the parties contract a covenant marriage.³⁹ Pursuant to article 102, unless the parties have contracted a covenant marriage, “a divorce shall be granted upon the motion of a spouse when either spouse has filed a petition for divorce and upon proof that the requisite period of time . . . has elapsed from the service of the petition, or from the execution of written waiver of the service.”⁴⁰

A separate section in the Code of Civil Procedure provides the procedural requirements for an article 102 divorce.⁴¹ As compared to the article 103(1) divorce, discussed below, either spouse can file, *at any time*, a petition with a verified affidavit requesting that a divorce be granted after the requisite time period of living separate

35. Act No. 1009, 1990 La. Acts 2507.

36. *See id.*

37. Act No. 316, 2014 La. Acts 1882.

38. Act No. 743, 2006 La. Acts 2661, *amended by* Act No. 604, 2010 La. Acts 2198 & Act No. 316, 2014 La. Acts 1882. Before the legislature adopted divorce based on abuse, when parties had minor children of the marriage and abuse was present, the 180-day waiting period, rather than the 365-day period, applied to requests for a no-fault divorce. *Id.* Once the abuse-based divorce was enacted, that particular rule was eliminated. *See* Act No. 316, 2014 La. Acts 1882.

39. *See* LA. STAT. ANN. § 9:309 (2018) (separation from bed and board in a covenant marriage). The legislature passed transitional provisions to address parties who had a legal separation at the time it was repealed. *See* LA. STAT. ANN. §§ 9:383–:384 (2018).

40. LA. CIV. CODE ANN. art. 102 (2018).

41. *See* LA. CODE CIV. PROC. ANN. arts. 3951 *et seq.* (2018).

and apart has passed.⁴² All that is required is a declaration that the plaintiff seeks to be divorced from the defendant, along with allegations of jurisdiction and venue.⁴³ Other allegations of marital breakdown, fault, or living separate and apart for a period of time are not necessary.⁴⁴

The petition is served on the other spouse, and the parties must then live separate and apart continuously for either 180 or 365 days from the date of service or written waiver of service before either party can request a judgment of divorce.⁴⁵ No answer need be made, and no citation will issue.⁴⁶ Only after the requisite time period has passed can either spouse—the spouse who filed the petition or the spouse who was served with the petition—file a rule to show cause to set the matter for hearing.⁴⁷ This process is unique because the defendant can request relief based solely on the plaintiff's prayer in the original petition. The rule to show cause is the “sole means” by which a final judgment of divorce may be obtained under article 102.⁴⁸ Failure to use the procedural rule to show cause can result in reversal on appeal.⁴⁹ At the hearing on the rule, oppositions to the article 102 procedure or allegations of reconciliation can be raised, and if none are present, the court must grant the divorce.⁵⁰

42. See LA. CODE CIV. PROC. ANN. art. 3951 (2018).

43. See LA. CIV. CODE ANN. art. 102 cmt. (b) (2018).

44. *Id.*

45. LA. CIV. CODE ANN. art. 103.1 (2018). When there are no minor children of the marriage, the applicable time period is 180 days. LA. CIV. CODE ANN. art. 103.1(1) (2018). When there are minor children of the marriage at the time the rule to show cause is filed in accordance with article 102, the applicable time period is increased to 365 days. LA. CIV. CODE ANN. art. 103.1(2) (2018).

46. LA. CIV. CODE ANN. art. 102 cmt. (c) (2018); see also *Jefferson Cmty. Health Care Ctr., Inc. v. Roby*, 2015-198, p. 3 (La. App. 5 Cir. 11/19/15); 180 So. 3d 585, 587 (finding that citation is not necessary in divorce actions under article 102).

47. LA. CODE CIV. PROC. ANN. art. 3952 (2018); LA. CIV. CODE ANN. art. 102 cmt. (d) (2018) (noting that the waiting period is “not waivable”).

48. LA. CIV. CODE ANN. art. 102 cmt. (g) (2018).

49. See *Parker v. Parker*, 95-1373, p. 3 (La. App. 3 Cir. 4/3/96); 671 So. 2d 1143, 1145 (reversing the trial court's divorce judgment because no rule to show cause had ever been filed).

50. LA. CIV. CODE ANN. art. 102 cmt. (c) (2018); *Simmons v. Simmons*, 34,942, p. 2 (La. App. 2 Cir. 8/22/01); 795 So. 2d 448, 450 (quoting *Borel v. Borel*, 624 So. 2d 1279 (La. Ct. App. 3 Cir. 1993)) (“The word ‘shall’ as used in article 102 is mandatory and requires the trial court to grant a divorce upon proof that 180 days have elapsed since the date of original separation. . . . Its effects take place, automatically, by operation of law (absent reconciliation) on proof by the moving spouse that the delay period expired.”); see also *Champion v. Champion*, 618 So. 2d 1181, 1182 (La. Ct. App. 3 Cir. 1993).

A. LIVING SEPARATE AND APART

Living separate and apart continuously is a quintessential element in the no-fault divorce scheme.⁵¹ It must be alleged in the rule to show cause and again by affidavit at the hearing on the rule.⁵² This double attestation is intended to prevent collusion by spouses who may wish to get divorced before the statutory waiting period. If the spouses have no minor children of the marriage, they must live separate and apart continuously for 180 days after service of the divorce petition or written waiver of service before filing the rule.⁵³ If the spouses have minor children of the marriage, the waiting period is extended to 365 days.⁵⁴ Any judgment in an article 102 divorce that is rendered before the time periods have elapsed is an absolute nullity.⁵⁵

Because having minor children of the marriage extends the time period for living separate and apart, a woman's pregnancy necessitates a closer look. The Code provides that the 365-day waiting period applies "when there are minor children of the marriage at the time the rule to show cause is filed in accordance with Article 102."⁵⁶ On the date the rule to show cause is filed, if the wife is pregnant, the child born to the wife will be presumed to be the child of the husband as provided in the Civil Code chapter on filiation.⁵⁷ As a result, the spouses must wait the full 365 days of living separate and apart, even though they expected to file the rule to show cause after 180 days of living separate and apart when the divorce was initially filed.

Filing an article 102 divorce petition can precede the spouses' living separate and apart.⁵⁸ In other words, parties have the option of filing for an article 102 divorce while they are still residing

51. Living separate and apart is a requirement for both the article 102 and 103(1) divorce. As a result, the jurisprudence may apply to both. *See* discussion *infra* Section IV.A.

52. LA. CODE CIV. PROC. ANN. arts. 3952, 3956 (2018).

53. LA. CIV. CODE ANN. art. 103.1 (2018).

54. *Id.*

55. *See* LA. CODE CIV. PROC. ANN. art. 3953 (2018); *cf.* *Nelson v. Nelson*, 42,697, pp. 8–9 (La. App. 2 Cir. 12/5/07); 973 So. 2d 148, 153–54 (concluding that if a 103(1) divorce is filed prematurely, it is not absolutely null because the dilatory exception of prematurity can be waived).

56. LA. CIV. CODE ANN. art. 103.1 (2018).

57. LA. CIV. CODE ANN. art. 185 (2018) ("The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of termination of the marriage.").

58. LA. CIV. CODE ANN. art. 102 cmt. (a) (2018).

together.⁵⁹ If the divorce is filed while the spouses are residing together, service of the petition should be made personally on the defendant spouse to prevent any objections based on improper notice.

Living separate and apart, for purposes of obtaining a final divorce, requires that the parties live apart in such a manner that members of the community are aware of the separation.⁶⁰ For example, in *Lemoine v. Lemoine*, the wife appealed an article 102 divorce judgment by arguing that she and her husband did not live separate and apart continuously for the required 180 days.⁶¹ The court disagreed, finding that the spouses occupied separate residences, even though they did “interact intermittently” during the time period.⁶² The court concluded that because others were aware of the separation and the separation was visible to the community, even though they had intermittent sexual encounters, the divorce was properly granted.⁶³ The court also made clear that the issue of living separate and apart is not substantively different from failing to reconcile, so facts tending to show reconciliation are often considered as well.⁶⁴

B. FAULT NOT RELEVANT

Issues of fault need not be decided by the trial court, either

59. ROBERT C. LOWE, LOUISIANA DIVORCE § 6:20, *in* 1 LOUISIANA PRACTICE SERIES 429 (2018).

60. *Lemoine v. Lemoine*, 97-1626, p. 8 (La. App. 3 Cir. 7/1/98); 715 So. 2d 1244, 1248 (citing *Billac v. Billac*, 464 So. 2d 819 (La. Ct. App. 5 Cir. 1985)).

61. *Id.* at p. 4; 715 So. 2d at 1246.

62. *Id.* at p. 8; 715 So. 2d at 1248. *But see* *Woods v. Woods*, 27,199, pp. 1–2 (La. App. 2 Cir. 8/23/95); 680 So. 2d 134, 136–37 (Hightower, J., concurring) (raising the issue of whether living in the garage apartment, traveling together, and doing home projects together gave the outward appearance to the community that the parties were still married and should have defeated the living separate and apart element).

63. Mrs. Lemoine also challenged the ruling of the trial court that there was no reconciliation between the parties, drawing a distinction between reconciliation and simply living separate and apart. *Lemoine*, 97-1626, pp. 9–10; 715 So. 2d at 1248–49. The court explained that its analysis focused on whether the parties lived separate and apart continuously for the required time period without reconciliation and noted that there is no substantive difference between living separate and apart and failing to reconcile. *Id.* *But see* *Woods*, 27,199, p. 2; 680 So. 2d at 137 (Hightower, J., concurring) (questioning whether the court should have considered living separate and apart differently than reconciliation).

64. *Lemoine*, 97-1626, p. 10; 715 So. 2d at 1249; *see also* *Rivette v. Rivette*, 2004-1630 (La. App. 3 Cir. 4/6/05); 899 So. 2d 873 (considering whether the parties lived together at some period of time sufficient to amount to reconciliation); discussion *infra* Section IV.A.

together with or prior to the hearing on the rule to show cause filed pursuant to article 102. Courts have consistently concluded that once the mandates of the no-fault divorce have been met, and there has been no reconciliation, a divorce can be granted, even if issues of fault remain.⁶⁵ The unilateral no-fault divorce was intended to be a streamlined procedure for divorce that parties may select to use.⁶⁶ The inherent requirements are few, the time delays are brief, and the demands on the court are minimal.⁶⁷

If a litigant alleges a fault-based ground for divorce—even if the ground was raised before a no-fault ground was added—courts will award the no-fault divorce without considering fault, provided all of the mandates for the no-fault divorce are met.⁶⁸ Further, when a movant is entitled to a divorce after meeting the codal requirements, issues of fault in matters incidental to divorce should be dealt with in the incidental matter.⁶⁹

Under the law prior to 1998, awaiting a hearing on fault created problems for litigants receiving interim spousal support. For example, in *Vernon v. Vernon*, the wife's hearing to determine final spousal support was set after the rule to show cause hearing for the article 102 divorce.⁷⁰ She urged the court to continue the hearing on the divorce to the date of her final spousal support trial so that her interim support would not be interrupted while she awaited her hearing on final support.⁷¹ The court declined,

65. See, e.g., *Vernon v. Vernon*, 624 So. 2d 1295, 1298 (La. Ct. App. 3 Cir. 1993); *Champion v. Champion*, 618 So. 2d 1181, 1182–83 (La. Ct. App. 3 Cir. 1993); *Borel v. Borel*, 624 So. 2d 1279 (La. Ct. App. 3 Cir. 1993); *Watters v. Watters*, 607 So. 2d 948, 949 (La. Ct. App. 4 Cir. 1992); *Napoli v. Napoli*, 543 So. 2d 98, 100 (La. Ct. App. 1 Cir. 1989).

66. *Vernon*, 624 So. 2d at 1297 (citing *Watters*, 607 So. 2d 948).

67. *Watters*, 607 So. 2d at 949–50.

68. *Id.* In *Watters*, the husband filed an article 102 divorce, and the wife answered and filed a reconventional demand alleging adultery. *Id.* at 949. The husband filed a rule to show cause, and at the hearing, the wife asked that her right to litigate the adultery claim be reserved. *Id.* The court denied her request and granted the husband's divorce under article 102. *Id.* The wife appealed, contending that the trial court erred because issues of fault were still pending. *Id.* The court disagreed, explaining that the wife could still litigate her claims of fault if the findings were necessary, but because the divorce had been granted, finding fault for purposes of an immediate divorce was unnecessary. *Id.* at 950.

69. See LA. CIV. CODE ANN. art. 105 (2018) (“In a proceeding for divorce or thereafter, either spouse may request a determination of custody, visitation, or support of a minor child; support for a spouse; injunctive relief; use and occupancy of the family home or use of community movables or immovables; or use of personal property.”).

70. *Vernon*, 624 So. 2d at 1298.

71. *Id.*

recognizing that her interim support would end at the judgment of divorce, and viewed the situation as one that should be dealt with by the legislature.⁷² Just a few years later, the legislature remedied the problem, allowing interim support to continue past the judgment of divorce if the request for final support was pending at the time the divorce judgment was granted.⁷³ In 2018, the legislature removed the requirement that a request for final support be pending.⁷⁴ Now, interim support continues in all cases for 180 days following the judgment of divorce to allow the economically disadvantaged spouse sufficient time to transition from the marital relationship.⁷⁵

C. PROCEDURAL REQUIREMENTS

A Louisiana court has jurisdiction over an action for divorce if, at the time of filing, one or both of the spouses are domiciled in Louisiana.⁷⁶ If a spouse establishes and maintains a residence in a parish of Louisiana for a period of six months, a rebuttable presumption arises that this parish of residence is the spouse's domicile.⁷⁷ These jurisdictional rules apply not only to the article 102 divorce but to the article 103 divorce as well.

An article 102 divorce proceeding is a summary proceeding.⁷⁸ It is conducted without citation and without all of the formalities required in ordinary proceedings.⁷⁹ A petition for an article 102 divorce has two specific requirements: the petition must contain allegations of jurisdiction and venue, and the petition must be verified by the affidavit of the petitioner.⁸⁰ If the requirements of jurisdiction and venue are not met, any final judgment of divorce rendered in accordance with article 102 will be an absolute

72. *Vernon v. Vernon*, 624 So. 2d 1295, 1298 (La. Ct. App. 3 Cir. 1993); *see also* *Borel v. Borel*, 624 So. 2d 1279, 1283 (La. Ct. App. 3 Cir. 1993).

73. *See* 1997 La. Acts 1078 (enacting LA. CIV. CODE ANN. arts. 111, 113 & cmts).

74. Act No. 265, 2018 La. Acts.

75. *Id.* Interim support can continue past the 180 days for good cause shown. LA. CIV. CODE ANN. art. 113 (2018).

76. LA. CODE CIV. PROC. ANN. art. 10(A)(7) (2018).

77. LA. CODE CIV. PROC. ANN. art. 10(B) (2018).

78. *Hightower v. Schwartz*, 2014-0431, p. 3 (La. App. 4 Cir. 10/15/14); 151 So. 3d 903, 904 (“[T]here is no doubt, that a divorce proceeding under Article 102 is a summary proceeding.”).

79. LA. CODE CIV. PROC. ANN. art. 2591 (2018).

80. LA. CODE CIV. PROC. ANN. art. 3951 (2018); *see also* LA. CIV. CODE ANN. art. 102 & cmt. (b) (2018) (“The petition need not allege marital breakdown, fault on the part of the other spouse, living separate and apart for a period of time, or any other basis for the plaintiff’s demand.”).

nullity.⁸¹

Because the filing of the petition for divorce under article 102 is only the initial step, and the divorce action is not viable until the passage of time required by article 103.1, no answer is required.⁸² Even though no answer is required and citation does not issue, notice by the clerk of court or a deputy clerk is required.⁸³ Service of the notice and accompanying petition can be made on the party,⁸⁴ or the party may expressly waive service and the accompanying notice by a written waiver executed after the filing of the petition.⁸⁵ If such a waiver occurs, the time periods imposed by article 103.1 will run from the date of execution of the waiver.⁸⁶

The rule to show cause is the only procedural mechanism to obtain a final judgment of divorce under article 102;⁸⁷ a motion for summary judgment or judgment on the pleadings may not be used.⁸⁸ The rule to show cause must allege proper service of the initial petition for divorce, that the requisite period of time, in accordance with article 103.1, or more has elapsed since service, and that the spouses have lived separate and apart continuously for that requisite period of time.⁸⁹ The rule to show cause must be verified by the affidavit of the mover and must be served on the defendant, the defendant's attorney of record, or the duly appointed curator for the defendant prior to granting the divorce, unless the defendant waives service.⁹⁰

81. LA. CODE CIV. PROC. ANN. art. 3953 (2018).

82. LA. CIV. CODE ANN. art. 102 cmt. (c) (2018); *Morrow v. Morrow*, 595 So. 2d 367, 368 (La. Ct. App. 2 Cir. 1992).

83. Notice of suit in an article 102 divorce action is statutorily directed. LA. STAT. ANN. § 13:3491 (2018). However, notice of suit is not mandatory, and the absence of such notice will not render a judgment of divorce invalid for that reason alone. LA. STAT. ANN. § 13:3493 (2018) (superseding *Johnston v. Johnston*, 94-1167 (La. App. 3 Cir. 3/8/95); 653 So. 2d 40).

84. Service must be requested within ninety days after the filing of the petition unless waived. LA. CODE CIV. PROC. ANN. art. 3955 (2018).

85. LA. CODE CIV. PROC. ANN. art. 3957 (2018).

86. LA. CIV. CODE ANN. art. 102 (2018).

87. LA. CIV. CODE ANN. art. 102 cmt. (g) (2018).

88. *Id.*; see also *Cobb v. Cobb*, 96-436, pp. 5–6 (La. App. 5 Cir. 11/26/96); 685 So. 2d 342, 344–45. In *Cobb*, a judgment of divorce, rendered in a summary proceeding, was deemed an absolute nullity because the judgment was based on a motion to set a pretrial conference that did not contain the statutorily required information sufficient to substitute for the legislatively mandated rule to show cause. *Cobb*, 96-436, pp. 5–6; 685 So. 2d at 344–45.

89. LA. CODE CIV. PROC. ANN. art. 3952 (2018).

90. *Id.*

Either spouse may file the rule to show cause and obtain the final judgment of divorce.⁹¹ Neither article 102 nor article 3952 of the Code of Civil Procedure specifically states the number of days before the hearing on the rule to show cause that the rule must be served on the opposing party.⁹² Article 966 of the Louisiana Code of Civil Procedure requires a ten-day period between notice and a summary judgment hearing.⁹³ Because article 102 is summary in nature, this time period has been deemed applicable.⁹⁴ Any final judgment of divorce rendered pursuant to a prematurely filed rule to show cause will be absolutely null.⁹⁵

At the rule to show cause hearing, the opposing spouse may raise any defenses or procedural deficiencies in the article 102 divorce. Because no answer is required in an article 102 divorce, a defense can be raised for the first time at the hearing on the rule, which could be unexpected by the moving party. Such was the case in *Hightower v. Schwartz*.⁹⁶ Mr. Hightower raised the defense of reconciliation for the first time at the hearing on the rule, and Mrs. Hightower objected because she had no notice of the defense nor adequate time to refute the allegations.⁹⁷ The trial court sustained her objection but allowed Mr. Hightower to proffer evidence of reconciliation.⁹⁸ He did not.⁹⁹ On appeal, the court recognized that procedurally, because the article 102 divorce does not require an answer, an affirmative defense cannot be pled and therefore cannot be waived for failure to plead.¹⁰⁰ From a policy standpoint, though, the court was concerned that reconciliation—raised for the first time at the hearing—could serve to extinguish the divorce

91. LA. CIV. CODE ANN. art. 102 (2018). The article's reference to "the motion of a spouse" makes clear that the defendant in the divorce petition may file the rule and obtain the divorce if the defendant presents the requisite evidence. *See* Bishop v. Bishop, 98-59, p. 4 (La. App. 5 Cir. 5/27/98); 712 So. 2d 697, 700.

92. *Hirstius v. Hirstius*, 618 So. 2d 423, 425 (La. Ct. App. 5 Cir. 1993) (noting lack of guidance but concluding that six days was insufficient notice).

93. *Id.*

94. *Id.* ("Inasmuch as an Art. 102 hearing is summary in nature, a similar 10-day period seems appropriate. In any event, a notice of six days or less is not enough, particularly if the opposing party has filed an exception to the Art. 102 petition.")

95. *See* LA. CODE CIV. PROC. ANN. art. 3953 (2018); *see also* Shewbridge v. Shewbridge, 28,981, p. 2 (La. App. 2 Cir. 12/11/96); 685 So. 2d 418, 420.

96. *Hightower v. Schwartz*, 2014-0431 (La. App. 4 Cir. 10/15/14); 151 So. 3d 903.

97. *Id.* at p. 2; 151 So. 3d at 904.

98. *Id.*

99. *Id.*

100. *Id.*

action.¹⁰¹ Ultimately, the court did not have to decide the issue because, although Mrs. Hightower opened the door to evidence of reconciliation when she testified that the parties had lived separate and apart “without reconciliation,” Mr. Hightower failed to proffer any evidence of reconciliation.¹⁰² The court therefore affirmed the judgment of divorce.

Failure to receive notice and prepare for a reconciliation defense can be a serious concern for litigants at a rule to show cause hearing. Because of the unique nature of the article 102 proceeding, the hearing is an appropriate time to raise the defense; no responsive pleadings are required before that hearing. Certainly, a litigant could make the same argument about procedural deficiencies that are raised for the first time at the rule hearing, but those challenges seem less troublesome because the documents ordinarily speak for themselves. Courts may consider continuing the hearing to allow both sides to adequately prepare for any unexpected defenses.

1. ABANDONMENT

Special rules for abandonment and voluntary dismissal apply in an article 102 divorce. Under Louisiana Code of Civil Procedure article 3954, the article 102 divorce is deemed abandoned “if the rule to show cause . . . is not filed within two years of service of the original petition or written waiver of service of the original petition.”¹⁰³ This two-year period is only applicable to article 102 divorce actions; divorce actions filed under article 103 are subject to the general three-year abandonment provision.¹⁰⁴ Although the

101. Historically, reconciliation was raised as an affirmative defense, in a motion to dismiss or in a peremptory exception of no cause of action, all of which occurred in ordinary proceedings before the institution of the article 102 divorce. *Hightower v. Schwartz*, 2014-0431, pp. 4–5 (La. App. 4 Cir. 10/15/14); 151 So. 3d 903, 905.

102. *Id.* at pp. 7–8; 151 So. 3d at 906–07.

103. LA. CODE CIV. PROC. ANN. art. 3954 (2018). When the article was originally passed, the abandonment period was one year. *See* Act No. 1009, 1990 La. Acts 2507.

104. *See* LA. CODE CIV. PROC. ANN. art. 561 (2018); *see also* Kenneth Rigby & Katherine Shaw Spaht, *Louisiana's New Divorce Legislation: Background and Commentary*, 54 LA. L. REV. 19, 82–83 (1993); *Sharp v. Sharp*, 2005-1046, p. 7 (La. App. 1 Cir. 6/28/06); 939 So. 2d 418, 422 (“[T]he legislature was aware of the general abandonment rule at the time article 3954 was enacted, and by making it applicable to article 102 divorces, manifested its intent that that provision control in those cases. If the legislature wanted the general abandonment rule to come into effect in situations such as the one presently before this court, or if it wanted to enact other provisions to resolve a situation where abandonment can occur following the timely filing of the rule to show cause, it could have provided for same, but it failed to do so.”).

article 102 petition is deemed abandoned without formal order after the passage of two years, any party or interested person may file an ex parte motion with the trial court, and the trial court must then enter an order of dismissal as of the date of abandonment.¹⁰⁵

It is not necessary that a final judgment of divorce is entered within two years of the filing of the divorce petition; only *filing* the rule to show cause is statutorily required.¹⁰⁶ In *Sharp v. Sharp*, Mrs. Sharp filed an article 102 divorce petition and, seven months later, filed a rule to show cause.¹⁰⁷ The hearing was set shortly thereafter, but no further action was taken to obtain the judgment of divorce.¹⁰⁸ Mr. Sharp died ten years later, and Mrs. Sharp sought unpaid interim spousal support payments from his estate.¹⁰⁹ His succession representative argued that the divorce had long been abandoned, relying on the general abandonment article that requires three years without “any step in its prosecution or defense.”¹¹⁰ The court concluded that the rule to show cause had been timely filed and the general abandonment article did not apply in an article 102 divorce context, as the more specific statute controlled over the more general.¹¹¹ As a result, Mrs. Sharp was able to collect spousal support arrearages because the marriage did not terminate until Mr. Sharp’s death.¹¹² The dissent persuasively argued that the general abandonment period should have applied after Mrs. Sharp filed her rule to show cause, but not before.¹¹³

Two well-established exceptions under the general abandonment article apply in an article 102 divorce.¹¹⁴ First, when a plaintiff is prevented, by circumstances beyond his control, from filing the rule to show cause within the two-year period, the period

105. LA. CODE CIV. PROC. ANN. art. 561 (2018).

106. See *Sharp v. Sharp*, 2005-1046, p. 6 (La. App. 1 Cir. 6/28/06); 939 So. 2d 418, 421; see also *Simons v. Simons*, 96-832, p. 2 (La. App. 5 Cir. 4/9/97); 694 So. 2d 999, 1000.

107. *Sharp*, 2005-1046, p. 5; 939 So. 2d at 421.

108. *Id.* at p. 6; 939 So. 2d at 421.

109. *Id.* at p. 3; 939 So. 2d at 420.

110. See LA. CODE CIV. PROC. ANN. art. 561(A) (2018).

111. *Sharp*, 2005-1046, pp. 5–7; 939 So. 2d at 421–22.

112. Mrs. Sharp was subject to the general five-year prescriptive period for seeking alimony arrearages. *Id.* at p. 7; 939 So. 2d at 422.

113. *Id.* at pp. 1–3; 939 So. 2d at 423–24 (Kuhn, J., dissenting).

114. Exceptions inherent in Louisiana Code of Civil Procedure article 561 are applicable to Louisiana Code of Civil Procedure article 3954. See *Sibley v. Sibley*, 1997-1912, p. 2 (La. App. 1 Cir. 12/28/98); 724 So. 2d 275, 277.

may be suspended.¹¹⁵ Second, under a theory of estoppel, if a defendant takes any action inconsistent with the intent to treat the case as abandoned, he waives the right to plead abandonment.¹¹⁶ Therefore, the jurisprudence interpreting the exceptions to the general abandonment article should apply in the context of an article 102 divorce.

The two-year abandonment period for an article 102 divorce is important when considering the effect on the community property regime. A spouse's community property regime is terminated "retroactively to the date of filing of the petition in the action in which the judgment of divorce is granted."¹¹⁷ For an article 102 divorce, the community could terminate up to two years prior to the divorce judgment, or longer, if extensions are permitted. In light of the retroactive effect on property, a shortened abandonment period should prevent a spouse from threatening divorce and the consequences that could result therefrom for an extended period of time.¹¹⁸

2. VOLUNTARY DISMISSAL

A special rule likewise applies when a spouse seeks to voluntarily dismiss an article 102 divorce petition.¹¹⁹ A judgment of voluntary dismissal in an article 102 divorce action must be rendered on joint application of the parties and payment of all costs, or on contradictory motion of the plaintiff.¹²⁰ A judgment of dismissal will be without prejudice to any separation of property decree that terminates the community property regime.¹²¹

A special rule for dismissal is needed in the article 102 divorce context because either spouse can file the rule to show cause.¹²² If one spouse no longer wants to get divorced but the other spouse now desires the divorce, the spouse who did not file the petition can

115. *Sibley v. Sibley*, 1997-1912, p. 2 (La. App. 1 Cir. 12/28/98); 724 So. 2d 275, 277 (suspending the two-year abandonment period because the trial court and appellate court were considering an article 103 divorce in the same case).

116. *Id.* Also note that abandonment provisions are to be interpreted liberally in favor of maintaining the action. *See id.* at p. 3; 724 So. 2d at 277; *Sharp v. Sharp*, 2005-1046, p. 6 (La. App. 1 Cir. 6/28/06); 939 So. 2d 418, 421.

117. LA. CIV. CODE ANN. art. 159 (2018).

118. Obtaining a judgment of separation of property from the outset of the proceeding could eliminate any uncertainty.

119. *See* LA. CODE CIV. PROC. ANN. art. 3958 (2018).

120. *Id.*

121. *Id.*

122. *See* LA. CODE CIV. PROC. ANN. art. 3952 (2018).

still file the rule. As a result, the other spouse must join in the petition to dismiss or must be brought into court contradictorily before the court will authorize a dismissal.

IV. LOUISIANA CIVIL CODE ARTICLE 103(1)

Louisiana Civil Code article 103(1) is the second no-fault divorce option and provides an alternative to the article 102 divorce.¹²³ In contrast to article 102, article 103(1) allows spouses to obtain an immediate divorce when the parties have already lived separate and apart for the required period of time.¹²⁴ The article 103 divorce is a simpler, less costly option, but can only be filed *after* the parties have been physically separated for either 180 or 365 days continuously; it is only “immediate” in the sense that the spouses do not have to wait any length of time after the petition is filed, like in an article 102 divorce. If a spouse wishes to file a no-fault divorce *before* having lived separate and apart for the required time period, the only option is an article 102 divorce.¹²⁵ Under article 102, the time period to live separate and apart will begin to run after service or waiver of service of the petition. By necessity, obtaining the judgment of divorce will take longer.

If, after filing an article 102 divorce petition, the spouses live separate and apart for the requisite time period to then obtain an article 103(1) divorce, the article 102 petition could be amended to seek an article 103(1) divorce, but this route may have a significant impact on the community property regime. As the community property regime terminates retroactive to the filing of the petition on which the divorce is granted,¹²⁶ the regime would terminate when the article 103(1) claim was added (at a later date), not when the article 102 divorce was originally filed.¹²⁷

123. LA. CIV. CODE ANN. art. 103(1) (2018) (“Except in the case of a covenant marriage, a divorce shall be granted on the petition of a spouse upon proof that: (1) The spouses have been living separate and apart continuously for the requisite period of time, in accordance with Article 103.1, or more on the date the petition is filed.”).

124. LA. CIV. CODE ANN. art. 103 & cmt. (a) (2018).

125. *See* Parker v. Parker, 95-1373, p. 4 (La. App. 3 Cir. 4/3/96); 671 So. 2d 1143, 1145 (failing to grant a 103(1) divorce because the parties had only lived apart three and a half months at the time the petition was filed).

126. LA. CIV. CODE ANN. art. 159 (2018).

127. *See* Warner v. Warner, 2002-1380, p. 6 (La. App. 1 Cir. 8/13/03); 859 So. 2d 146, 150; *see also* Gray v. Gray, 463 So. 2d 14 (La. Ct. App. 5 Cir. 1985); Naquin v. Naquin, 572 So. 2d 1075 (La. Ct. App. 5 Cir. 1990); ANDREA CARROLL & RICHARD D. MORENO, MATRIMONIAL REGIMES § 7:2, *in* 16 LOUISIANA CIVIL LAW TREATISE 559 (4th ed. 2013). Obtaining a judgment of separation of property could eliminate the issue. *See* LA. CIV. CODE ANN. art. 2374 (2018).

A. LIVING SEPARATE AND APART

Article 103(1) requires that parties live separate and apart continuously for a period of either 180 days or 365 days or more *on the date the petition is filed*.¹²⁸ If there are no minor children of the marriage, the spouses must live separate and apart continuously for 180 days; if there are minor children of the marriage on the date the petition is filed, the spouses must remain separate and apart continuously for 365 days.¹²⁹ Because having minor children of the marriage extends the time period for living separate and apart, a woman's pregnancy will necessitate a longer waiting period. If the wife is pregnant at the time either spouse files the article 103(1) petition, the child born to the wife will be presumed to be the child of the husband as provided in the Civil Code chapter on filiation.¹³⁰ As a result, even if the wife is not pregnant at the time the parties separate, and a spouse therefore expects to file the article 103(1) divorce at the end of 180 days, that spouse must wait the full 365 days if, at the time of filing, she is pregnant.¹³¹

Because no court filing is initially made when the spouses begin living separate and apart, the separation contemplated by article 103(1) must be voluntary on the part of at least one of the spouses.¹³² When a spouse evidences an intent to terminate the marital association and the spouses physically separate, the statutorily required separation period begins to run; this occurs regardless of the cause of the initial physical separation.¹³³

The Louisiana Supreme Court, in *Adams v. Adams*, explained the need for voluntary separation in an article 103(1) divorce.¹³⁴ In *Adams*, the wife filed for divorce after the parties had lived separate and apart continuously for over two years.¹³⁵ The trial

128. LA. CIV. CODE ANN. art. 103(1) (2018).

129. LA. CIV. CODE ANN. art. 103.1 (2018).

130. LA. CIV. CODE ANN. art. 185 (2018) ("The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of termination of the marriage.").

131. *See supra* Section III.A.

132. LA. CIV. CODE ANN. art. 103 & cmt. (c) (2018); *Adams v. Adams*, 408 So. 2d 1322, 1325 (La. 1982); *Nelson v. Nelson*, 42,697, p. 4 (La. App. 2 Cir. 12/5/07); 973 So. 2d 148, 151.

133. *Nelson*, 42,697, p. 4; 973 So. 2d at 151 (citing *Gibbs v. Gibbs*, 30-367 (La. App. 2 Cir. 4/8/98); 711 So. 2d 331); *Tarbutton v. Tarbutton*, 51,486, p. 5 (La. App. 2 Cir. 5/2/17); 217 So. 3d 1281, 1285.

134. *Adams*, 408 So. 2d 1322.

135. *Id.* at 1323.

court denied the divorce because the couple initially separated when the husband was committed to a mental hospital.¹³⁶ On appeal, the wife argued that the law only required the parties to live apart for one year; the law provided no requirement that the separation be voluntary.¹³⁷ The husband argued that the separation must be voluntary, which exists when the separation begins due to institutional commitment.¹³⁸ The court rejected both approaches, explaining that the separation contemplated by the statute must be voluntary on the part of at least one of the spouses, which can be established when the spouse evidences an intent to end the marital association.¹³⁹ Because the wife in *Adams* told individuals close to her husband that she was separating from him permanently, and because she filed for a separation (available at the time), she evidenced her intent to end the marriage, and the divorce should have been granted.¹⁴⁰

Intent to end the marriage can be implied by the conduct of the spouse leaving, even without an express communication to the other spouse.¹⁴¹ For example, in *Gibbs v. Gibbs*, the husband initially moved to Texas to find work, but after a few months, he decided not to return to his marriage.¹⁴² He came home infrequently, never stayed overnight, and had no sexual contact with his wife.¹⁴³ When the husband filed for divorce under article 103(1), his wife argued that she had no knowledge of his intent to live separate and apart for purposes of a divorce.¹⁴⁴ The trial court found, and the appellate court affirmed, that the husband evidenced his intent to terminate the marriage by his infrequent, short visits and his failure to have conjugal relations with his wife.¹⁴⁵

Likewise, in *Elliott v. Elliott*, the husband moved in with his parents, but according to the wife, he “left because of his father’s health, his own health, and work-related pressures.”¹⁴⁶ The trial

136. *Adams v. Adams*, 408 So. 2d 1322, 1323 (La. 1982).

137. *Id.* at 1324.

138. *Id.*

139. *Id.* at 1327.

140. *Id.* at 1328.

141. *See generally* *Gibbs v. Gibbs*, 30-367 (La. App. 2 Cir. 4/8/98); 711 So. 2d 331.

142. *Id.* at p. 1; 711 So. 2d at 331.

143. *Id.* at p. 3; 711 So. 2d at 332.

144. *Id.* at p. 1; 711 So. 2d at 332.

145. *Id.* at pp. 2–3; 711 So. 2d at 332.

146. *Elliott v. Elliott*, 458 So. 2d 634, 635 (La. Ct. App. 3 Cir. 1984).

court felt constrained to grant the article 103(1) divorce, explaining, "I have no discretion in this matter once it is proven to me as the judge of this court that the parties have lived separate and apart for a year and one party asked for a divorce . . ." ¹⁴⁷ Based on *Gibbs* and *Elliott*, a spouse's intent to end the marriage can be implied by that spouse's actions without communicating his intent directly to the other spouse. Notwithstanding the difficulty in determining implied intent, it is troublesome that one spouse need not express an intent to the other spouse to end their marriage. While one spouse may be hoping for and working towards reconciliation, the other spouse can say nothing, stay away, and then file for divorce. Because a no-fault divorce is relatively quick to obtain, the requirement of express communication to the other spouse would be more appropriate.

For military personnel, separation resulting from military service will not be considered living separate and apart, ¹⁴⁸ but if the separation occurred prior to and independent of the spouse's departure into the armed services, the time while in the service is properly considered living separate and apart for purposes of a divorce. ¹⁴⁹

Furthermore, living separate and apart contemplates living in separate residences, not simply different rooms in the same house. ¹⁵⁰ And separation by the spouses should be visible in the community such that others are aware of the separation. ¹⁵¹ For example, living in different apartments, even in the same building, has been sufficient because the apartments were autonomous and

147. *Elliott v. Elliott*, 458 So. 2d 634, 635–36 (La. Ct. App. 3 Cir. 1984).

148. *See, e.g., De Maupassant v. Clayton*, 38 So. 2d 791 (La. 1949); *Pierce v. Gervais*, 425 So. 2d 922, 925 (La. Ct. App. 4 Cir. 1983).

149. *Pierce*, 425 So. 2d at 925 (citing *Gardner v. Gardner*, 125 So. 2d 463 (La. Ct. App. 2 Cir. 1960); *Davis v. Watts*, 23 So. 2d 97 (La. 1945)).

150. *See, e.g., Singleton v. Rogers*, 106 So. 781 (La. 1926) (finding that separate rooms in one house was not sufficient); *Billac v. Billac*, 464 So. 2d 819, 821 (La. Ct. App. 5 Cir. 1985) (finding that separate rooms in one house was not sufficient); *Succession of LeJeune*, 59 So. 2d 446, 449 (La. 1952) (finding insufficient evidence where the husband occupied the outside apartment because he was ill, but the wife cooked him meals and he acted as a handyman for the home); *cf. Riley v. Riley*, 501 So. 2d 814, 815 (La. Ct. App. 4 Cir. 1986) (finding that living in autonomous separate apartments in the same building was sufficient).

151. *Riley*, 501 So. 2d at 815; *Boyd v. Boyd*, 348 So. 2d 121, 122 (La. Ct. App. 4 Cir. 1977); *LeJeune*, 59 So. 2d at 449. *But see Woods v. Woods*, 27,199, pp. 1–2 (La. App. 2 Cir. 8/23/95); 660 So. 2d 134, 136–37 (Hightower, J., concurring) (noting that living in the garage apartment and participating in family activities looked to the community like the parties were still married).

others in the community were aware of the separation.¹⁵² Ultimately, once the parties have been living separate and apart continuously without reconciliation for the required time period, the court has no discretion and must grant the divorce.¹⁵³

B. FAULT NOT RELEVANT

As discussed in Section III.B above, relative to an article 102 divorce, fault is not relevant when granting an article 103(1) divorce.¹⁵⁴

C. PROCEDURAL REQUIREMENTS

In contrast to a divorce obtained under article 102, a divorce sought pursuant to article 103 is handled as an ordinary proceeding where citation must issue and ordinary delays apply.¹⁵⁵ To initiate proceedings, a party must file a petition for divorce.¹⁵⁶ In the petition, the movant must allege proper jurisdiction and provide the specific grounds for divorce.¹⁵⁷ Because the divorce is based on living separate and apart continuously at the time suit is filed, this condition must be alleged in the petition.¹⁵⁸

A hearing in an article 103(1) divorce is not required unless the judge so directs.¹⁵⁹ As is common in family law proceedings, the plaintiff must submit with the petition a verified affidavit attesting to the truth of the factual allegations in the petition.¹⁶⁰

152. See *Riley v. Riley*, 501 So. 2d 814, 815 (La. Ct. App. 4 Cir. 1986).

153. *Williams v. Williams*, 491 So. 2d 732, 735 (La. Ct. App. 2 Cir. 1986); *Saunders v. Saunders*, 422 So. 2d 245, 246 (La. Ct. App. 4 Cir. 1982); *Brady v. Brady*, 388 So. 2d 57, 58 (La. Ct. App. 1 Cir. 1980).

154. See *supra* notes 65–75 and accompanying text; see also *Roy v. Florane*, 119 So. 2d 849, 854 (La. 1960); *Ogea v. Ogea*, 378 So. 2d 984, 991 (La. Ct. App. 3 Cir. 1979).

155. *Nelson v. Nelson*, 42,697, p. 4 (La. App. 2 Cir. 12/5/07); 973 So. 2d 148, 151; *Rando v. Rando*, 31-366, p. 4 (La. App. 2 Cir. 12/9/98); 722 So. 2d 1165, 1167.

156. See LA. CIV. CODE ANN. art. 103 (2018).

157. See *id.* The grounds for divorce enumerated in article 103 are: (1) continuous physical separation for at least 180 days where there are no minor children of the marriage or 365 days where there are minor children of the marriage; (2) adultery; (3) conviction of a felony; (4) during the marriage, the other spouse physically or sexually abused the spouse seeking divorce or a child of one of the spouses, regardless of whether the other spouse was prosecuted for the act of abuse; and (5) after a contradictory hearing or consent decree, a protective order or an injunction was issued during the marriage, in accordance with law, against the other spouse to protect the spouse seeking the divorce or a child of one of the spouses from abuse. *Id.*

158. See LA. CIV. CODE ANN. art. 103 cmt. (a) (2018).

159. *LOWE*, *supra* note 59, § 6:36.

160. *Id.* The affidavit and petition must be submitted with an original and at least

When the defendant does not waive formal citation and service but instead files an answer, the proceeding moves forward as an ordinary proceeding.¹⁶¹ At the trial, the plaintiff must present a prima facie case to support the judgment of divorce, as with any other civil proceeding.

Default judgments are appropriate in article 103(1) proceedings.¹⁶² Although generally, judgments on the pleadings and summary judgments are not available in divorce proceedings, they are available in a 103(1) divorce proceeding when both spouses are represented by counsel and both counsel jointly agree to the facts and the proposed judgment, which is also verified by each spouse.¹⁶³ The process can be quick and relatively painless, as the court may sign the judgment in chambers without a formal hearing.¹⁶⁴

While a divorce judgment rendered under article 102 is an absolute nullity if the required time period has not passed at the time of filing the rule to show cause, a distinction has been made with the 103(1) divorce.¹⁶⁵ Generally, if the petition under 103(1) is filed prematurely, courts refuse to grant the divorce, finding that living separate and apart before filing is a jurisdictional requirement.¹⁶⁶ However, in *Nelson v. Nelson*, the court explained in dicta that it would grant an article 103(1) divorce based on a prematurely filed petition.¹⁶⁷ The court distinguished the article 103(1) divorce from the article 102 divorce, explaining that the dilatory exception of prematurity is available in an article 103(1) divorce, unlike in an article 102 divorce, and that exception can be waived.¹⁶⁸ In *Nelson*, because no challenge to prematurity had

one copy of a proposed final judgment. LOWE, *supra* note 59, § 6:36.

161. See *Nelson v. Nelson*, 42,697, p. 4 (La. App. 2 Cir. 12/5/07); 973 So. 2d 148, 151.

162. A defendant in an article 103(1) divorce action may waive citation, service of process, all legal delays, notice of trial, and appearance at trial, so long as the defendant acknowledges, by sworn affidavit, receipt of a certified copy of the petition. Then, on the date of the affidavit or thereafter, a judgment of default may be entered against the defendant in open court or by written motion mailed to the court. LA. CODE CIV. PROC. ANN. art. 1701(b) (2018). For an excellent discussion of the procedure followed in an article 103(1) divorce, see LOWE, *supra* note 59, § 6:35.

163. LA. CODE CIV. PROC. ANN. art. 969 (2018).

164. See *id.*

165. *Nelson*, 42,697, p. 9; 973 So. 2d at 153–54.

166. See, e.g., *Canatella v. Canatella*, 11-618, pp. 6–7 (La. App. 5 Cir. 3/13/12); 91 So. 3d 393, 396; *Parker v. Parker*, 95-1373, p. 4 (La. App. 3 Cir. 4/3/96); 671 So. 2d 1143, 1145; *Williams v. Williams*, 491 So. 2d 732, 734–35 (La. Ct. App. 2 Cir. 1986).

167. *Nelson*, 42,697, p. 9; 973 So. 2d at 154.

168. *Id.*

been raised and the plaintiff acknowledged at the hearing that the parties had been living separate and apart for the required time period, the court concluded that no prejudice would befall the defendant spouse, even if the filing had been premature.¹⁶⁹

V. ADULTERY-BASED DIVORCE

Adultery by a spouse is grounds for an immediate divorce.¹⁷⁰ Filing a petition for divorce based on adultery is “immediate” in that no statutory waiting period is required before a court can issue the judgment of divorce; the parties are only constrained by the procedural time delays required in any lawsuit.¹⁷¹

A. ACTIONS CONSTITUTING ADULTERY

Adultery in Louisiana is not limited to sexual intercourse. Although the jurisprudence does not define adultery per se, the Louisiana Supreme Court has equated adultery to some degree of sexual connection.¹⁷² Guilty parties often attempt to limit the definition of adultery to traditional coitus, but the jurisprudence has taken a contrary position. For example, Louisiana law recognizes homosexual adultery, which by definition does not include coitus.¹⁷³ Additionally, the commission of non-coital acts, such as oral sex or sexual activities short of intercourse, can constitute adultery.¹⁷⁴

B. SUFFICIENCY OF EVIDENCE

Allegations of adultery must be expressly set forth in the petition for divorce; it will not suffice to simply set out conduct from

169. *Nelson v. Nelson*, 42,697, p. 9 (La. App. 2 Cir. 12/5/07); 973 So. 2d 148, 154.

170. LA. CIV. CODE ANN. art. 103(2) (2018).

171. *See* LA. CODE CIV. PROC. ANN. arts. 3941 *et seq.* (2018).

172. *See* *Simon v. Duet*, 148 So. 250, 251 (La. 1933) (“It must be alleged that the offending party was guilty of adultery, or was guilty of having sexual connection or intercourse, which mean the same thing.”).

173. *See* *Menge v. Menge*, 491 So. 2d 700, 702 (La. Ct. App. 5 Cir. 1986); *Adams v. Adams*, 357 So. 2d 881, 882 (La. Ct. App. 1 Cir. 1978) (“Like heterosexual adultery, the commission of acts of homosexual adultery, alleged as a ground for separation (or divorce), may be established by indirect or circumstantial evidence.”).

174. *See* *Menge*, 491 So. 2d at 702 (finding getting in bed together and admissions of oral sex enough to constitute adultery); *Bonura v. Bonura*, 505 So. 2d 143, 144 (La. Ct. App. 4 Cir. 1987) (finding that repeated acts of marital infidelity sufficient to constitute adultery included sleeping in the same bed on several occasions, laying on top of each other, and touching each other’s sexual organs, even though the spouse vehemently denied ever engaging in actual intercourse).

which adultery could be inferred.¹⁷⁵ The spouse alleging adultery bears the burden of proof.¹⁷⁶ Proof must be made by a preponderance of the evidence, and the plaintiff may rely on direct or circumstantial evidence.¹⁷⁷ In most cases, because circumstantial evidence is offered to sustain the spouse's burden, the spouse alleging adultery must prove facts and circumstances that "lead fairly and necessarily to the conclusion that adultery has been committed as alleged in the petition, i.e., the proof must be so convincing as to exclude any other reasonable hypothesis but that of guilt of adultery."¹⁷⁸

Several factors are considered in the analysis, including the "propensity of the parties to commit adultery, the amount of time the parties spent together, whether there was an obvious amorous relationship between the parties, whether other persons were present when the alleged illicit rendezvous occurred, and whether the association between the parties is open and surreptitious."¹⁷⁹ The evidence must be viewed "in light of experiences and observations of life,"¹⁸⁰ which can lead to an inference that people "do what comes naturally when they have the opportunity."¹⁸¹ The burden of proof, however, is not satisfied by evidence that the other spouse had the *opportunity* to commit adultery.¹⁸² The fact that one spouse is alone with another person does not create the

175. *Simon v. Duet*, 148 So. 250, 251 (La. 1933).

176. *Sibley v. Sibley*, 96-1544, p. 2 (La. App. 1 Cir. 11/10/04); 693 So. 2d 1270, 1271.

177. *Tidwell v. Tidwell*, 49,512, p. 2 (La. App. 2 Cir. 11/19/14); 152 So. 3d 1045, 1047; *see also* *Massa v. Thompson*, 56 So. 2d 422, 423 (La. 1952) (finding that the wife failed to prove adultery by a preponderance of the evidence).

178. *Marcotte v. Marcotte*, 2004-293, p. 2 (La. App. 3 Cir. 11/10/04); 886 So. 2d 671, 673 (citing *Lewis v. Lewis*, 446 So. 2d 995, 997 (La. Ct. App. 3 Cir. 1984)); *see also* *Tidwell*, 49,512, p. 2; 152 So. 3d at 1047; *Bennett v. Bennett*, 97-1150, p. 3 (La. App. 5 Cir. 7/28/98); 716 So. 2d 454, 456; *Arnoult v. Arnoult*, 96-730, p. 4 (La. App. 5 Cir. 2/12/97); 690 So. 2d 101, 102.

179. *Sibley*, 96-1544, p. 3; 693 So. 2d at 1271; *see also* *Emfinger v. Emfinger*, 550 So. 2d 754, 759 (La. Ct. App. 2 Cir. 1989) ("[Adultery] cannot be proved by second hand gossip or allegations of 'community knowledge.'").

180. *Bennett*, 97-1150, p. 3; 716 So. 2d at 456.

181. *Menge v. Menge*, 491 So. 2d 700, 702 (La. Ct. App. 5 Cir. 1986); *Everett v. Everett*, 345 So. 2d 586, 590 (La. Ct. App. 4 Cir. 1977).

182. *Wynn v. Wynn*, 513 So. 2d 489, 491 (La. Ct. App. 2 Cir. 1987); *see also* *Bennett*, 97-1150, pp. 3-4; 716 So. 2d at 456 (finding no adultery where surveillance showed that man and woman were together on three separate occasions, and on one occasion throughout the night); *Sibley*, 96-1544, p. 8; 693 So. 2d at 1274 (reversing trial court's finding of adultery because there was no evidence of sexual touching or hugging, only staying overnight).

presumption that adultery has been committed.¹⁸³

A trial court's findings concerning evidence of adultery, a factual issue, depend heavily on credibility evaluations, which are entitled to "very substantial weight on review."¹⁸⁴ Factual findings will not be disturbed on appeal unless they are clearly wrong—when there is no reasonable basis in the record to support them.¹⁸⁵ In a close case, the court found adultery based on the testimony of two different men, who were admitted drug users that had been convicted of various offenses and who testified about having sex with the defendant.¹⁸⁶ The defendant wife denied the allegations and offered the testimony of character witnesses.¹⁸⁷ The appellate court affirmed the finding of adultery based on the deference given to the trial court when making credibility determinations, recognizing that it may have reached a different result.¹⁸⁸

Frequently, parties will present the testimony of private investigators hired by one spouse to watch the other.¹⁸⁹ A prima facie case can be established on a private investigator's testimony alone,¹⁹⁰ although most courts prefer corroboration with facts, circumstances, and the direct testimony of other witnesses.¹⁹¹ The prima facie case cannot be made on the admission of the adulterous spouse alone, as courts are concerned about untrustworthy confessions.¹⁹²

183. See *Hermes v. Hermes*, 287 So. 2d 789, 790 (La. 1973); *Marcotte v. Marcotte*, 2004-293, p. 2 (La. App. 3 Cir. 11/10/04); 886 So. 2d 671, 673; *Bennett v. Bennett*, 97-1150, p. 3 (La. App. 5 Cir. 7/28/98); 716 So. 2d 454, 456.

184. *Pearce v. Pearce*, 348 So. 2d 75, 78 (La. 1977); *McFall v. Armstrong*, 10-1041, pp. 5-6 (La. App. 5 Cir. 9/13/11); 75 So. 3d 30, 35.

185. *Arceneaux v. Domingue*, 365 So. 2d 1330, 1333 (La. 1978).

186. *Poole v. Poole*, 2008-1325, pp. 5-8 (La. App. 3 Cir. 4/1/09); 7 So. 3d 806, 809-12.

187. *Id.* at pp. 8-9; 7 So. 3d at 811.

188. *Id.* at pp. 8-9; 7 So. 3d at 812.

189. See, e.g., *Arnoult v. Arnoult*, 96-730, pp. 2-3 (La. App. 5 Cir. 2/12/97); 690 So. 2d 101, 101-02.

190. *Hermes*, 287 So. 2d at 791; cf. *Larocca v. Larocca*, 606 So. 2d 53, 55 (La. Ct. App. 3 Cir. 1992) (noting the trial court's reliance on "the rule that uncorroborated testimony of private investigators cannot be the basis of a judgment of adultery").

191. *Arnoult*, 96-730, p. 4; 690 So. 2d at 102 (citing *McCartan v. Filkins*, 64 So. 717 (La. 1914)); see also *Bennett*, 97-1150, p. 3; 716 So. 2d at 456; *Tampira v. Tampira*, 539 So. 2d 981, 982-83 (La. Ct. App. 4 Cir. 1989).

192. *Bonura v. Bonura*, 505 So. 2d 143, 145 (La. Ct. App. 4 Cir. 1987) (quoting *Ogea v. Ogea*, 378 So. 2d 984, 992 (La. Ct. App. 3 Cir. 1979)) ("This evidence, standing alone, is deemed untrustworthy because of the possibility that spouses may prove adultery by confessions, thereby being granted an immediate divorce."); cf. *Tidwell v. Tidwell*, 49,512, p. 3 (La. App. 2 Cir. 11/19/14); 152 So. 3d 1045, 1049 (finding that the wife's

How far courts will extend the definition of adultery remains to be seen. One case that reached the outer limits pronounced adultery based on two encounters with evidence of hugging and kissing.¹⁹³ Two private investigators testified to seeing the couple get out of a steamy car and remain alone in a dark home for two hours after a night of drinking.¹⁹⁴ The wife and her paramour testified to what happened on both occasions, yet the court granted the divorce based on adultery.¹⁹⁵ The decision was met with a strong dissent.¹⁹⁶ Given the proliferation of online dating and sexual relationships, will the definition of adultery reach even farther?¹⁹⁷

VI. FELONY CONVICTION AND SENTENCE DIVORCE

Commission of a felony resulting in a sentence to death or imprisonment at hard labor is another ground for divorce.¹⁹⁸ Similar to the divorce based on a spouse's adultery, the felony conviction divorce is "immediate," as there is no statutory waiting period required before a court can grant the divorce.¹⁹⁹ To entitle a spouse to an immediate divorce, the spouse must present evidence of the other spouse's conviction and sentencing.²⁰⁰ A guilty plea has been found to be the equivalent of a conviction for purposes of a divorce action.²⁰¹ All delays for appeal need not expire, nor must the convicted spouse have actually served any portion of the sentence.²⁰² From a policy standpoint, the irreparable harm to the marriage occurs at the initial determination of guilt and sentencing; therefore, the divorce can

admissions along with the testimony of private investigators was enough to find adultery).

193. *Arnoult v. Arnoult*, 96-730, pp. 4-5 (La. App. 5 Cir. 2/12/97); 690 So. 2d 101, 102.

194. *Id.* at p. 2; 690 So. 2d at 102.

195. *Id.* at pp. 4-5; 690 So. 2d at 102-03.

196. *Id.* at p. 5; 690 So. 2d at 103 (Gaudin, J., dissenting).

197. *See Marcotte v. Marcotte*, 2004-293, pp. 2-5, 13 (La. App. 3 Cir. 11/10/04); 886 So. 2d 671, 673-74, 679 (finding that phone sex without evidence of a physical sexual relationship was not enough to prove adultery). *But see* Sandi S. Varnado, *Avatars, Scarlet "A"s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371 (2013).

198. LA. CIV. CODE ANN. art. 103(3) (2018).

199. *See* LA. CODE CIV. PROC. ANN. arts. 3941 *et seq.* (2018).

200. *See generally* *Nickels v. Nickels*, 347 So. 2d 510 (La. Ct. App. 2 Cir. 1977).

201. *Scheppf v. Scheppf*, 430 So. 2d 370, 372 (La. Ct. App. 3 Cir. 1983).

202. *Tauzier v. Tauzier*, 466 So. 2d 565, 567 (La. Ct. App. 5 Cir. 1985); *Nickels*, 347 So. 2d at 510. A suspended sentence "does not lessen the impact of a conviction." *Kitchen v. Kitchen*, 480 So. 2d 494, 495 (La. Ct. App. 5 Cir. 1985).

be obtained without the delays associated with an appeal.²⁰³

VII. ABUSE-BASED DIVORCE

Reaffirming that domestic violence is a significant problem in Louisiana, the legislature created the Domestic Violence Prevention Commission in 2014 to review and make recommendations regarding existing domestic violence programs and to ensure that laws on domestic violence are properly implemented.²⁰⁴ At the same time, the legislature added two additional causes of action for immediate divorce when a spouse commits physical or sexual violence against a spouse or a child of a spouse, based on proof of abuse presented at trial or proof of a preexisting protective order or injunction.²⁰⁵ In 2015, the legislature amended the article to clarify that the abuse had to occur during the marriage or that the protective order or injunction had to be issued during the marriage.²⁰⁶

Louisiana Civil Code article 103(4) permits a divorce based on proof of physical or sexual abuse against the spouse or a child of one of the spouses, regardless of whether the other spouse was prosecuted for the act of abuse.²⁰⁷ Article 103(5) permits a divorce based on the same type of abuse but allows the plaintiff to prove the abuse through a preexisting protective order or injunction that was issued during the marriage, but only if the order or injunction was issued after a contradictory hearing or consent decree.²⁰⁸ The protective order necessary to secure a divorce under subsection (5) can be a criminal or civil protective order.²⁰⁹ Although the definition of abuse is not articulated in the article, guidance can be found in the Post Separation Family Violence Relief Act²¹⁰ and the

203. *Nickels v. Nickels*, 347 So. 2d 510, 511 (La. Ct. App. 2 Cir. 1977).

204. *See* LA. STAT. ANN. §§ 46:2145–2147 (2018). According to a national survey, “domestic violence inflicts physical, emotional, and financial injury on its victims and exists in every segment of our population. Approximately 32.9% of women and 28.1% of men in the United States have experienced physical violence by an intimate partner in their lifetime.” Act No. 663, 2014 La. Acts 2977.

205. Act No. 316, 2014 La. Acts 1881–82.

206. Act No. 221, 2015 La. Acts 1642–44; *see also* JESSICA G. BRAUN, LOUISIANA HANDBOOK ON FAMILY LAW 188–89 (2018). In 2018, a clean-up amendment removed the phrase “in accordance with law” to describe the protective order or injunction as it was unnecessary and superfluous. *See* Act No. 265, 2018 La. Acts.

207. LA. CIV. CODE ANN. art. 103(4) (2018).

208. LA. CIV. CODE ANN. art. 103(5) (2018).

209. LA. CIV. CODE ANN. art. 103 cmt. (2018).

210. LA. STAT. ANN. § 9:362 (2018).

Domestic Abuse Assistance Act.²¹¹

A. ABUSE BY PROOF

The first of the two abuse-based divorces is available when the spouse seeking the divorce submits proof that during the marriage the other spouse physically or sexually abused the spouse or a child of one of the spouses, regardless of whether there was a prosecution for the abuse.²¹² The abuse can beset “a child of one of the spouses,” not just a child of the marriage between the spouses.²¹³ As this divorce option is relatively new, there is scant jurisprudence interpreting the law. In *Soto v. Sadeghi*, the wife petitioned for an immediate divorce under article 103(4) based on allegations that her husband physically and sexually abused her during their marriage.²¹⁴ The trial court denied the wife’s request because the only proof of physical or sexual abuse offered by the wife was her own testimony, and she offered no other corroborating evidence in the form of witnesses, medical reports, or emergency room records to support her claim.²¹⁵ Under the deferential manifest error standard, the appellate court affirmed.²¹⁶

B. ABUSE BY PROTECTIVE ORDER

The second of the two abuse-based divorces is available when the spouse presents a protective order or injunction that was issued during the marriage, which protects the spouse or a child of one of the spouses from abuse.²¹⁷ Again, the child can be a child of either spouse and does not need to be a child of the marriage.²¹⁸ The protective order or injunction must be the result of a contradictory hearing or consent decree.²¹⁹

211. LA. STAT. ANN. § 46:2132 (2018).

212. LA. CIV. CODE ANN. art. 103(4) (2018).

213. See LA. CIV. CODE ANN. art. 103(4) (2018).

214. *Soto v. Sadeghi*, No. 2016-0471, 2016 WL 7387427 (La. App. 4 Cir. 12/21/16). In *Soto*, the plaintiff alleged that her husband forced her to participate in anal sexual intercourse and obtained nude photographs of her from a webcam that had been placed in the couple’s bedroom without her permission. *Id.* at *1–2.

215. *Id.* at *1, *5; see also *Ennis v. Ennis*, No. 2016-0423, 2017 WL 1900328 (La. App. 1 Cir. 5/8/17) (noting that the husband may have been entitled to a divorce based on the wife’s actions of throwing a chair that narrowly missed her husband).

216. *Soto*, 2016 WL 7387427, at *1, *5; see also *Ficarra v. Ficarra*, 15-368, p. 3 (La. App. 5 Cir. 12/23/15); 184 So. 3d 161, 162; *Saacks v. Saacks*, 612 So. 2d 925, 926 (La. Ct. App. 4 Cir. 1993) (discussing the deference to a trial court’s fact-finding abilities).

217. LA. CIV. CODE ANN. art. 103(5) (2018).

218. See *id.*

219. *Id.*

Given the ease with which protective orders and injunctions are issued, concern has arisen that unsuspecting spouses may later discover that agreeing to a protective order in the spirit of conciliation can later result in an immediate divorce, without having to live separate and apart.²²⁰ Further, spouses may be unaware of the financial consequences affecting spousal support when obtaining an abuse-based divorce.²²¹ For example, an award of attorney fees and costs is available when a divorce is granted based on abuse.²²² In addition, when the abuse-based divorce entered the Code in 2014, if a spouse was awarded a divorce based on abuse, courts were mandated to award final spousal support, and interim support could extend beyond an award of final support if it were greater than the final support award.²²³ Further, for final spousal support, the one-third limitation of net income for obligors did not apply if the divorce was based on abuse.²²⁴

In 2018, the legislature eliminated the mandatory award of final support as well as the extended interim support when a spouse obtains a divorce based on abuse.²²⁵ The law now provides that a spouse is presumed to be entitled to final spousal support when a divorce is awarded based on any of the fault-based grounds: adultery, felony conviction, or abuse.²²⁶ The exception to the one-third limitation remains, allowing spouses who obtain a divorce based on abuse to receive awards that exceed one-third of the obligor's net income.²²⁷ With these modifications, even for the unwitting spouse, the financial consequences of the abuse-based divorce are more palatable.

220. See BRAUN, *supra* note 206, at 102.

221. See LA. CIV. CODE ANN. arts. 112–113 (2018); see also *infra* Section VII.C.

222. LA. STAT. ANN. § 9:314 (2018); LA. CIV. CODE ANN. art. 2362.1 (2018). The divorce can be based on articles 103(4) or (5), or can be no-fault with proof of domestic abuse.

223. See LA. CIV. CODE ANN. arts. 112–113 (2014) (as amended in 2014 by Act 316 and then repealed in 2018 by Act 265; the law was in effect from August 1, 2014, through August 1, 2018).

224. *Id.*

225. Act No. 265, 2018 La. Acts.

226. See LA. CIV. CODE ANN. art. 112 (2018). Final spousal support is also available when the party or a child of one of the spouses was a victim of domestic abuse committed by the other party during the marriage, even if a no-fault divorce was granted. *Id.*

227. LA. CIV. CODE ANN. art. 112(D) (2018). In addition, the one-third limitation does not apply to victims of domestic violence committed during the marriage, even without obtaining an abuse-based divorce. *Id.*

C. INCIDENTAL RELIEF AVAILABLE WITH ABUSE DIVORCE

When the legislature enacted two new divorces based on spousal abuse in 2014, it likewise amended the provisions on interim and final spousal support²²⁸ and added a provision to permit an award of attorney fees and costs.²²⁹ On the issue of interim support, if the claim for final support was pending at the time of the judgment of an article 103(4) or (5) divorce and the final support award did not exceed the interim award, the interim award terminated no less than 180 days from the judgment of divorce.²³⁰ In other words, when the interim support award was greater than the final support award (assuming the final support award was not yet decided at the judgment of divorce), the greater interim award continued for at least six months past the judgment of divorce. This allowed the abused spouse to continue to receive a higher interim award even after final support had been awarded.²³¹

On the issue of final support, the legislature made an award of final support mandatory when the spouse was not at fault prior to filing a petition for divorce and the court determined that the party was a “victim of domestic abuse committed by the other party during the marriage.”²³² The court could award periodic payments or a lump sum.²³³ Mandatory final support was not conditioned on the spouse obtaining an article 103(4) or (5) divorce, but was broader in scope and allowed litigants to prove that the spouse was a victim of domestic abuse committed during the marriage, even if that spouse sought a no-fault divorce. Further, a factor was added for courts to consider in determining the amount and duration of final support, which included “the existence, effect, and duration of any act of domestic abuse” by the spouse, even if the spouse was not prosecuted for the act.²³⁴ Finally, the one-third limitation that applied to obligors of final spousal support was eliminated for spouses who were victims of domestic abuse during the marriage.²³⁵

228. Act No. 316, 2014 La. Acts 1881–84.

229. Act No. 221, 2015 La. Acts 1643.

230. LA. CIV. CODE ANN. art. 113 (2018).

231. *Id.* The obligation to pay final support does not begin until the interim award has been terminated. *Id.*

232. LA. CIV. CODE ANN. art. 112(C) (2018).

233. *Id.*

234. LA. CIV. CODE ANN. art. 112(B)(9) (2018).

235. Act No. 316, 2014 La. Acts 1883.

After the legislation was passed, several issues arose, including the question of whether a spouse subject to abuse must show a need for what appeared to be mandatory support, regardless of need. Further, some questioned the wisdom of a punitive award that would lead to additional, unnecessary litigation to refute the fact, generating more unstable interactions between the spouses. Spouses may agree to standard protective orders to eliminate friction, but with the possibility that a consent agreement could have detrimental effects on them financially, consent agreements would be less likely. Further, parity between victims of fault was considered. Arguably, spouses who are victims of other fault-based grounds for divorce, like adultery and felony conviction, should be treated similarly to those who withstood the fault of abuse.

As a result of these concerns, the Marriage-Persons Committee of the Louisiana State Law Institute suggested, and the legislature agreed, that substantive amendments to the law on interim and final support were needed. In 2018, the legislature passed Act 265, which eliminated the mandatory final spousal support for domestic violence victims and instead provided a presumption of entitlement to final spousal support for a spouse who obtains a divorce based on fault, which includes adultery, felony conviction, or abuse, or can prove that the spouse or a child was a victim of domestic abuse during the marriage.²³⁶ The law clearly provides that need for support, ability to pay, and pre-filing fault are all relevant considerations in any request for final support.²³⁷ The extended interim support for abuse-based divorces was eliminated in favor of a general extension of interim support for all types of divorces, which now permits interim support to continue in all cases for 180 days from the judgment of divorce.²³⁸ No longer must a claim for final support be pending; interim support is simply tied to the judgment of divorce.²³⁹

Throughout the revisions, neither domestic violence nor domestic abuse has been defined in the article or in any other section of the Code, although it is present in various statutes with slightly differing definitions.²⁴⁰ Both the Post-Separation Family

236. Act No. 265, 2018 La. Acts.

237. *Id.*

238. *Id.*

239. LA. CIV. CODE ANN. art. 113 (2018). Interim support may extend beyond the 180 days from divorce for good cause shown. *Id.*

240. *See, e.g.*, LA. STAT. ANN. § 9:362(4), (6) (2018); LA. CHILD. CODE ANN. arts.

Violence Relief Act²⁴¹ and the Domestic Abuse Assistance Act²⁴² include “physical or sexual abuse [as well as] any offense against the person, physical or non-physical as defined in the Criminal Code, except negligent injury and defamation.”²⁴³ These broad definitions, with an exclusion for reasonable acts of self-defense,²⁴⁴ would be appropriate in an analysis on the issue of final support. In 2017, recognizing the need for consistent and comprehensive definitions related to domestic violence, the legislature passed H.R. Con. Res. 79, which asked the Law Institute to study and recommend definitions for “physical abuse” and “sexual abuse” and other related relief that is available under the divorce laws as well as other criminal laws.²⁴⁵

Finally, on the issue of attorney fees and costs, a provision was added in 2015 to permit an award of attorney fees and costs in any action for divorce under article 103(4) or (5) and in any incidental actions against the abuser.²⁴⁶ This legislation was originally placed in the “Matrimonial Regimes” Title, article 2362.1, which also classified the obligation as a separate one.²⁴⁷ Appropriately, the legislature relocated the ability to assess attorney fees and costs into Title 9, section 314 of the Civil Code Ancillaries, and kept the classification article in the title on matrimonial regimes in the Civil Code.²⁴⁸ Nonetheless, these additional measures assure victims of domestic abuse that further financial assistance is available in the event of a divorce.

1103(5), 1565(1) (2018); LA. STAT. ANN. §§ 46:2121.1(2), :2132(3), :2151(C) (2018). The legislature recognized the lack of a consistent and comprehensive definition and directed the Law Institute to study the laws of domestic violence and address the need for revisions and recommendations to the area of law. H.R. Con. Res. 79, 43d Leg., Reg. Sess. (La. 2017).

241. See LA. STAT. ANN. § 9:362 (2018).

242. See LA. STAT. ANN. § 46:2132 (2018).

243. LA. STAT. ANN. §§ 9:362, 46:2132 (2018).

244. The Post-Separation Family Violence Relief Act contains an exclusion for self-defense used by one parent against the other parent to protect himself or a child from abuse. See LA. STAT. ANN. § 9:362(4) (2018).

245. H.R. Con. Res. 79, 43d Leg., Reg. Sess. (La. 2017). The United Against Domestic Violence Coalition, comprised of the Public Policy Committee of the United Way of Southeast Louisiana, the Louisiana Coalition Against Domestic Violence, and the New Orleans Family Justice Center Alliance, also proposed revisions and enactments of several laws in Louisiana to protect victims. *Id.*

246. Act No. 221, 2015 La. Acts 1643 (amending LA. CIV. CODE ANN. art. 2362.1).

247. *Id.*

248. Act No. 264, 2018 La. Acts.

VIII. SEPARATION AND DIVORCE UNDER COVENANT MARRIAGE

In 1997, the Louisiana State Legislature adopted the Covenant Marriage Act.²⁴⁹ Covenant marriage exists as an alternative to traditional marriage and requires the parties to obtain premarital counseling and to express their intent to enter into covenant marriage when they apply for a marriage license.²⁵⁰ The statute proclaims that “[o]nly when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.”²⁵¹

A covenant marriage can only be terminated by one of the causes enumerated in article 101 of the Civil Code, which includes divorce.²⁵² Louisiana Revised Statutes § 9:307 provides the exclusive grounds for separation and divorce in a covenant marriage.²⁵³ Although separation from bed and board was abolished in 1990,²⁵⁴ the Covenant Marriage Act served to reinstate a new version of the law as applied to a covenant marriage.²⁵⁵

A. SEPARATION IN A COVENANT MARRIAGE

A spouse to a covenant marriage may choose to pursue a legal separation, called a “separation from bed and board,” rather than a divorce; this option does not exist for couples in a standard marriage. A judicial separation from bed and board in a covenant

249. Act No. 1380, 1997 La. Acts 2848 (enacting LA. STAT. ANN. §§ 9:272 *et seq.* (2018)).

250. LA. STAT. ANN. §§ 9:272–:275 (2018). For two excellent articles chronicling the passage and use of the Covenant Marriage Act, see Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998) [hereinafter Spaht *Social Analysis*] and Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605 (2005).

251. LA. STAT. ANN. § 9:272(A) (2018).

252. LA. STAT. ANN. § 9:272(C) (2018); LA. CIV. CODE ANN. art. 101 (2018).

253. LA. STAT. ANN. § 9:307 (2018).

254. Act No. 1009, 1990 La. Acts 2505.

255. *Id.* Some commentators expressed concern that enacting covenant marriage legislation in Louisiana ran contrary to the goal of uniformity in state divorce laws. Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Law*, 32 CREIGHTON L. REV. 1085, 1100–20 (1999). This lack of uniformity will result in increased instances of the migratory divorce, i.e., when one or both spouses who entered into a Louisiana covenant marriage seek a divorce in another state. Spaht & Symeonides, *supra*, at 1100–01. Also see LOWE, *supra* note 59, at 420–25, for a discussion of separation from bed and board in a covenant marriage.

marriage does not dissolve the bond of marriage.²⁵⁶ The separated husband and wife are not free to marry again, but it does put an end to their conjugal cohabitation.²⁵⁷ Spouses judicially separated retain that status until they either reconcile or divorce.²⁵⁸

Once the parties experience marital difficulties, which would be prior to filing a petition for legal separation, the parties must attend counseling in an attempt to preserve the marriage.²⁵⁹ While counseling may be required before a judicial separation can be rendered, it is not a prerequisite to a spouse filing a petition for separation to seek support and custody awards.²⁶⁰ In *Johnson v. Johnson*, the wife filed a petition for separation and in the alternative for divorce of her covenant marriage, and she requested custody and support.²⁶¹ The husband filed an exception of no cause of action because the parties had not attended marital counseling.²⁶² The court recognized that the Covenant Marriage Act requires the couple to receive counseling prior to obtaining a *judgment* of divorce or separation, but found no requirement for counseling before obtaining incidentals to divorce, like child custody, child support, and spousal support.²⁶³

After attending counseling, a spouse may obtain a judgment of separation only upon proof of any of the following:²⁶⁴ (1) the other spouse committed adultery;²⁶⁵ (2) the other spouse committed a felony and was sentenced to death or imprisonment at hard labor;²⁶⁶ (3) the other spouse abandoned the matrimonial domicile for a period of one year and constantly refuses to return;²⁶⁷ (4) the

256. LA. STAT. ANN. § 9:309 (2018).

257. *Id.*

258. *Id.*

259. LA. STAT. ANN. § 9:307(A)–(C) (2018). “Counseling . . . shall not apply when the other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.” LA. STAT. ANN. § 9:307(D) (2018). The law does not specify the type of counseling or the counselor the parties must use.

260. *Johnson v. Johnson*, 2014-0564, p. 7 (La. App. 1 Cir. 12/23/14); 168 So. 3d 641, 645.

261. *Id.* at p. 2; 168 So. 3d at 642.

262. *Id.*

263. *Id.* at p. 7; 168 So. 3d at 645.

264. LA. STAT. ANN. § 9:307 (2018).

265. *Id.*; *see also supra* Part V. The jurisprudence interpreting adultery applies to adultery committed in both a covenant marriage and a standard marriage.

266. LA. STAT. ANN. § 9:307 (2018); *see also supra* Part VI. The jurisprudence interpreting the meaning of a commission of a felony applies to both a covenant marriage and a standard marriage.

267. Abandonment requires proof that one of the parties withdrew from the marital

other spouse physically or sexually abused the spouse seeking the divorce or a child of one of the spouses;²⁶⁸ (5) the spouses have been living separate and apart continuously without reconciliation for a period of two years; or (6) on account of habitual intemperance²⁶⁹ of the other spouse, or excesses, cruel treatment,²⁷⁰ or outrages of the other spouse, if such habitual intemperance or such ill-treatment is of such a nature as to render their living together insupportable.²⁷¹

domicile without lawful cause to do so, and that the withdrawing party constantly refused to return. *Clary v. Clary*, 341 So. 2d 628, 628 (La. Ct. App. 4 Cir. 1977); *Chamblee v. Chamblee*, 340 So. 2d 378, 381 (La. Ct. App. 4 Cir. 1976). As such, a party “cannot merely prove [that the] spouse left the common dwelling and then rely on the spouse’s failure to prove a case [based on marital] fault.” *Bergeron v. Bergeron*, 372 So. 2d 731, 733 (La. Ct. App. 4 Cir. 1979). Constructive abandonment, when one spouse prevents the other from entering the marital home, can likewise qualify as abandonment. *See Quinn v. Quinn*, 412 So. 2d 649, 652 (La. Ct. App. 2 Cir. 1982).

268. LA. STAT. ANN. § 9:307 (2018). As the jurisprudence under article 103(4) and (5) develops, it will apply to the covenant marriage laws as well. Consideration of the jurisprudence under the Post-Separation Family Violence Relief Act and the Domestic Abuse Assistance Act would also be appropriate.

269. Habitual intemperance references constant and repetitive alcohol and drug use. *See generally* *Michelle v. Michelle*, 93-2128 (La. App. 1 Cir. 5/5/95); 655 So. 2d 1342; *Crifasi v. Crifasi*, 94-0962 (La. App. 4 Cir. 1/19/95); 650 So. 2d 347; *Roland v. Roland*, 519 So. 2d 1177 (La. Ct. App. 1 Cir. 1987). One commentator noted that “[t]here may be a question as to whether a gambling addiction is habitual intemperance or cruel treatment.” *Spaht Social Analysis, supra* note 250, at 120 n.401 (citing *Olivier v. Abunza*, 76 So. 2d 528 (1954)); *see also* *Halley v. Halley*, 480 So. 2d 869 (La. Ct. App. 2 Cir. 1985).

270. Mental cruelty can include the refusal of sexual relations or sexual excess, failure to adequately perform housecleaning and the preparation of meals, religious fervor and constant proselytizing, harassment beyond mere nagging and griping, serious monetary irresponsibility, or an accumulation of such offenses. *See generally* *Von Bechman v. Von Bechman*, 386 So. 2d 910 (La. 1980); *Mudd v. Mudd*, 20 So. 2d 311 (La. 1944); *Lamb v. Lamb*, 460 So. 2d 634 (La. Ct. App. 3 Cir. 1984) (finding that because of couple’s financial ability to afford a maid, wife’s ineptitude in cleaning and preparing meals did not constitute fault); *Daigle v. Breaux*, 477 So. 2d 798 (La. Ct. App. 5 Cir. 1985); *Minella v. Minella*, 97-1264 (La. App. 5 Cir. 5/27/98); 713 So. 2d 816; *Roussel v. Roussel*, 96-682 (La. App. 5 Cir. 1/28/97); 688 So. 2d 160; *Wagner v. Wagner*, 96-1420 (La. App. 4 Cir. 12/18/96); 686 So. 2d 946; *Guillory v. Guillory*, 626 So. 2d 826 (La. App. 2 Cir. 1993); *Allen v. Allen*, 94-1090 (La. 12/12/94); 648 So. 2d 359, *on remand*, 25,281 (La. App. 2 Cir. 4/5/95); 653 So. 2d 169 (finding proof insufficient because of mitigating circumstances). *But see* *Butts v. Butts*, 426 So. 2d 302 (La. Ct. App. 4 Cir. 1983). *See also, e.g.,* *Simon v. Simon*, 96-876 (La. App. 5 Cir. 5/14/97); 696 So. 2d 68 (stating that spousal fussing does not ordinarily support a finding of cruel treatment).

271. These grounds are similar to the former article 138, and therefore the jurisprudence interpreting that article could be instructive. LA. CIV. CODE art. 138 (repealed 1991); *see also* *Spaht Social Analysis, supra* note 250, at 108–09 (discussing some of the differences between the covenant marriage law and the former divorce and separation laws).

The judgment of separation from bed and board terminates the community regime retroactive to the date on which the original petition was filed in the action in which the judgment of separation is rendered.²⁷² As is the case for standard marriages, if the spouses reconcile, the community is reestablished as of the date of filing the original petition, unless the spouses execute a matrimonial agreement providing otherwise prior to reconciliation.²⁷³ This agreement does not require court approval.²⁷⁴

Jurisdiction to render a separation from bed and board in a covenant marriage is more narrow than jurisdiction to grant a divorce in both covenant marriages and standard marriages.²⁷⁵ For jurisdiction to render a legal separation, one or both of the spouses must be domiciled in Louisiana (necessary for divorce) and the ground for separation must be committed in or must have occurred in Louisiana or while the matrimonial domicile was in Louisiana (not required for divorce).²⁷⁶ The action for separation must be brought in a parish where either party is domiciled or in the parish of the last matrimonial domicile; the venue is non-waivable and is therefore jurisdictional.²⁷⁷ Consequently, a judgment of separation rendered by a court of improper venue is an absolute nullity.²⁷⁸ Further, judgments on the pleadings and summary judgments are not available in an action for separation.²⁷⁹

In connection with a proceeding for separation, a court may

272. LA. STAT. ANN. § 9:309(B)(1) (2018). The retroactive effect is “without prejudice to the liability of the community for the attorney fees and costs incurred by the spouses in the action in which the judgment is rendered, or to the rights validly acquired [during the time] between commencement of the action and recordation of the judgment.” *Id.*

273. LA. STAT. ANN. § 9:309(B)(2) (2018).

274. *Id.* The reestablishment of the community is “effective toward third persons only upon filing notice of the reestablishment for registry” and will not “prejudice the rights of third persons validly acquired prior to filing notice of the reestablishment nor shall it affect a prior community property partition between the spouses.” LA. STAT. ANN. § 9:309(B)(3) (2018).

275. Spaht *Social Analysis*, *supra* note 250, at 112.

276. LA. STAT. ANN. § 9:308(B)(1)(a) (2018). If the cause for separation occurred outside of Louisiana while one or both spouses were domiciled outside of Louisiana, then jurisdiction can also be proper if the person requesting the separation was domiciled in Louisiana prior to the time the cause of action accrued and is domiciled in Louisiana at the time the action is filed. LA. STAT. ANN. § 9:308(B)(1)(b) (2018).

277. LA. STAT. ANN. § 9:308(B)(2)–(3) (2018).

278. LA. STAT. ANN. § 9:308(B)(3) (2018).

279. LA. STAT. ANN. § 9:308(C) (2018).

award a spouse incidental relief available in a proceeding for divorce, which could include spousal support, claims for contributions to education, child custody, visitation rights, child support, injunctive relief, and possession and use of a family residence or community movables or immovables.²⁸⁰ Because spousal support requires the claimant spouse to be free from fault prior to a “proceeding to terminate the marriage,” the relevance of the petition for separation in the context of spousal support has been considered, albeit in dicta. In *Shirley v. Shirley*, the court noted that a judgment of separation does not dissolve the bond of marriage because the spouses “are not at liberty to remarry,” so that a petition for judgment of separation is not a “proceeding to terminate the marriage.”²⁸¹ As the marital bond and duties subsist even with a judicial separation, fault that occurs during the separation but before a petition for divorce would likely trigger the support bar under article 111.

B. DIVORCE IN A COVENANT MARRIAGE

Divorce in a covenant marriage can be more difficult and time-consuming than divorce in a standard marriage.²⁸² The first five grounds for divorce are the same as the grounds for separation—the first four are based on fault and the fifth is a no-fault option.²⁸³ The sixth and last ground for divorce is another no-fault option that applies after the spouses have received a judgment of separation.²⁸⁴ If a judgment of separation was entered, either spouse could obtain a divorce by waiting one additional year of living separate and apart continuously from the date the judgment of separation was signed.²⁸⁵ That time is extended to one year and six months if there is a minor child of the marriage.²⁸⁶ If, however, the separation was granted based on abuse, then the spouse need only wait one year, even if there is a minor child of the marriage.²⁸⁷ Unlike in separation, there is no option for divorce based on habitual intemperance, excesses, cruel treatment, or outrages that

280. LA. STAT. ANN. § 9:308(D) (2018).

281. *Shirley v. Shirley*, 48-635, p. 14 (La. App. 2 Cir. 10/16/13); 127 So. 3d 935, 943 n.5 (internal quotation marks omitted).

282. Spaht *Social Analysis*, *supra* note 250, at 107–08.

283. *See id.*

284. *See* LA. STAT. ANN. § 9:307(A)(6) (2018).

285. *Id.* Reconciliation during the separation extinguishes the divorce option and thereby restarts the clock. LA. CIV. CODE ANN. art. 104 (2018).

286. LA. STAT. ANN. § 9:307(A)(6) (2018).

287. *Id.*

render living together insupportable.²⁸⁸

Couples in a covenant marriage must rely on the covenant divorce provisions if the suit is filed in Louisiana, but a spouse could obtain a divorce outside of the covenant marriage contract if the spouses are domiciled elsewhere. In *Blackburn v. Blackburn*, the parties entered into a covenant marriage in Louisiana and during their marriage moved to Alabama.²⁸⁹ The husband filed suit in Alabama, and the wife asked the Alabama court to enforce the covenant marriage contract and apply Louisiana law.²⁹⁰ The trial court declined and issued a judgment of divorce based on Alabama law.²⁹¹ The appellate court agreed, explaining that the authority of the court to grant a divorce is purely statutory, and, given that both parties were domiciled in Alabama, it could find no reason to apply the laws of a state other than Alabama.²⁹² Whether the result would change if one spouse was still domiciled in Louisiana is a more difficult question. Traditional choice of law questions, including the relationship of the parties to the state and their expectations, would affect the analysis.²⁹³

IX. DEFENSES TO DIVORCE

The only defense to divorce in the Civil Code is reconciliation.²⁹⁴ The jurisprudence has also applied the common

288. See Spaht *Social Analysis*, *supra* note 250, at 120 & n.392 (citing LA. CIV. CODE art. 138(3) (repealed Jan. 1, 1991)).

289. *Blackburn v. Blackburn*, 180 So. 3d 16, 17 (Ala. Civ. App. 2015).

290. *Id.*

291. *Id.* The court granted the divorce based on incompatibility and also noted that Alabama considered and rejected covenant marriage in its state. *Id.* at 19–20.

292. *Id.*; see also Spaht & Symeonides, *supra* note 255, at 1109 n.127 (noting that Louisiana would cease being an interested state in the marriage if neither party retained a domicile in Louisiana).

293. See Spaht & Symeonides, *supra* note 255, at 1109 (suggesting that a choice of law analysis would often lead to an application of Louisiana law).

294. LA. CIV. CODE ANN. art. 104 (2018).

law defenses of connivance,²⁹⁵ justification,²⁹⁶ and mental illness²⁹⁷ as defenses to marital fault, either for the purpose of divorce or to prevent an award of alimony. Recrimination is not a defense to divorce in Louisiana.²⁹⁸

A. RECONCILIATION

Reconciliation of the parties extinguishes the cause of action for divorce.²⁹⁹ In other words, if a spouse files an article 102 divorce and the parties thereafter reconcile, the cause of action is extinguished and the spouse will need to file a new petition to reurge a divorce.³⁰⁰ Further, if the divorce is based on the fault of one spouse and the parties reconcile, the spouse can no longer seek a divorce based on the act that gave rise to the original claim of divorce, although the act can be used in a later divorce petition to corroborate evidence of later fault.³⁰¹ Reconciliation is an

295. *Schwartz v. Schwartz*, 103 So. 438, 440 (La. 1925). In *Schwartz*, the wife was involved in entrapping the husband by sending her husband to two parties with women, booze, and dancing to cause her husband to commit adultery so that she could obtain a divorce. *Id.* at 439–40. The court denied her petition for divorce. *Id.* at 440. The court found that connivance involves conduct by the other spouse that indicates intent to have his spouse transgress, or at least intent to allow the spouse to do so “undisturbed and unprevented.” *Id.*; see also *Bourgeois v. Chauvin*, 1 So. 679, 681 (La. 1887).

296. *Firstly v. Firstly*, 427 So. 2d 76, 77 (La. Ct. App. 4 Cir. 1983). Justification involves a reasonable reaction to the fault of the other spouse, which, if considered alone, would constitute fault. In *Firstly*, the husband beat the wife throughout the marriage, and after one of the beatings, she shot her husband twice. *Id.* The husband urged that her fault should preclude an award of alimony. *Id.* The court found that her actions were justified in light of the husband’s history of physical abuse against his wife. *Id.*

297. See *Cory v. Cory*, 395 So. 2d 937 (La. Ct. App. 2d Cir. 1981). In *Cory*, a wife with diminished brain capacity was brought to Louisiana by her sister who initiated interdiction proceedings. *Id.* at 937–38. The husband previously cared for his wife in California, where the couple had resided for many years. *Id.* This court found that the husband had not abandoned his wife, and she was not entitled to separation on grounds of abandonment. *Id.*; see also *Poitevent v. Poitevent*, 152 So. 2d 256 (La. Ct. App. 4 Cir. 1963) (recognizing that insanity at the time of abandonment constitutes a defense to separation on that ground).

298. *Ogea v. Ogea*, 378 So. 2d 984, 991 (La. Ct. App. 3 Cir. 1979); *Thomason v. Thomason*, 355 So. 2d 908, 911 (La. 1978).

299. LA. CIV. CODE ANN. art. 104 (2018).

300. See *Schiro v. Farrell*, 13-635, pp. 9–10 (La. App. 5 Cir. 12/19/13); 131 So. 3d 997, 1001–02 (finding that the wife’s article 102 divorce should have been filed as a new matter under a new case number because her original petition was extinguished by reconciliation of the spouses).

301. See *Bercier v. Bercier*, 431 So. 2d 31, 32 (La. Ct. App. 1 Cir. 1983); *Gilberti v. Gilberti*, 338 So. 2d 971, 974 (La. Ct. App. 4 Cir. 1976); *Bloodworth v. Bloodworth*, 306 So. 2d 812, 814 (La. Ct. App. 3 Cir. 1975); *Virgadamo v. Virgadamo*, 250 So. 2d 460,

affirmative defense that must be proven by a preponderance of the evidence.³⁰²

Although the Code provides no definition of reconciliation, courts have explained that reconciliation is the forgiveness of a spouse, or at least the willingness to ignore the past behavior of a spouse, and the resumption of the common life together as spouses.³⁰³ To establish reconciliation, spouses must exhibit a mutual intent to resume their marital relationship voluntarily.³⁰⁴ Whether the spouses intend to restore or renew their marital relationship is a question of fact that must be determined by the trial judge from the totality of the circumstances.³⁰⁵

Isolated acts of sexual intercourse alone will not constitute reconciliation but will be one factor to consider.³⁰⁶ Separated couples that interact or even cohabit periodically may not have a present intent to resume married life on a permanent basis.³⁰⁷ For example, in *Woods v. Woods*, the husband urged reconciliation to defeat his wife's request for a no-fault divorce.³⁰⁸ Rather than claiming that he and his wife resumed their sexual relationship, he asserted that they had attended social events and special occasions, acting affectionately and forgivingly at these events.³⁰⁹ The wife testified that it was her intent to end the marriage, and she had acted in good faith to ease the pain of divorce on her husband and children.³¹⁰ The court granted the divorce, rejecting

462 (La. Ct. App. 4 Cir. 1971).

302. *Ogea v. Ogea*, 378 So. 2d 984, 990 (La. Ct. App. 3 Cir. 1979); *Brown v. Brown*, 260 So. 2d 66, 68 (La. Ct. App. 4 Cir. 1972).

303. *Bishop v. Bishop*, 98-59, p. 7 (La. App. 5 Cir. 5/27/98); 712 So. 2d 697, 700; *Woods v. Woods*, 27,199, p. 1 (La. App. 2 Cir. 8/23/95); 660 So. 2d 134, 135.

304. *Jordan v. Jordan*, 394 So. 2d 1291, 1292 (La. Ct. App. 1 Cir. 1981); *Bishop*, 98-59, p. 6; 712 So. 2d at 700; *Woods*, 27,199, p. 1; 660 So. 2d at 135; *Garrett v. Garrett*, 324 So. 2d 494, 496 (La. Ct. App. 2 Cir. 1975).

305. *Woods*, 27,199, pp. 1-2; 660 So. 2d at 135 (citing *Jordan*, 394 So. 2d 1291; *Halverson v. Halverson*, 365 So. 2d 600 (La. Ct. App. 1 Cir. 1978)); *Millon v. Millon*, 352 So. 2d 325, 327 (La. Ct. App. 4 Cir. 1977).

306. *Epling v. Epling*, 537 So. 2d 814, 819 (La. Ct. App. 5 Cir. 1989); *Whipple v. Smith*, 428 So. 2d 1114, 1116 (La. Ct. App. 1 Cir. 1983); *Garrett*, 324 So. 2d at 496; see also *Ogea*, 378 So. 2d at 990-91 (reviewing shift in the law from sex-based to intent-based reconciliation); SPAHT & TRAHAN, *supra* note 7, § 8.2, at 180-81. Early jurisprudence tended to treat a single act of sexual intercourse as conclusive evidence of reconciliation. This practice, however, discouraged meetings between spouses that could lead to reconciliation, so it was later abandoned.

307. *Woods*, 27,199, p. 3; 660 So. 2d at 136.

308. *Id.* at p. 1; 660 So. 2d at 135.

309. *Id.* at p. 2; 660 So. 2d at 135-36.

310. *Id.* Letters that she wrote after their encounters corroborated her testimony.

the defense of reconciliation.³¹¹

Likewise, in *Lemoine v. Lemoine*, the spouses traveled together out of town on four separate occasions, stayed together at the marital home on four other occasions, and had sexual relations during some of these occasions.³¹² The husband never intended to return to the home, had a separate residence, and never moved his possessions back into the home.³¹³ Similar to the conclusion in *Woods*, the court rejected the defense of reconciliation.³¹⁴

If, however, the spouses attempt to reconcile, even if the reconciliation is ultimately unsuccessful, the result is nonetheless reconciliation.³¹⁵ Courts consider not only the subjective intent of the spouses but also the outward appearance of reconciliation, including reestablishing a single marital domicile, attending social events together, and having sexual intercourse.³¹⁶ As “living separate and apart continuously” considers the outward appearance of separation to the community, so too does reconciliation.³¹⁷ The husband in *Jordan v. Jordan* admitted that when he initially moved back into the marital home, he intended to “patch up the marriage.”³¹⁸ He moved his personal effects back home, the spouses occupied the same bedroom, had sexual

311. *Woods v. Woods*, 27,199, p. 3 (La. App. 2 Cir. 8/23/95); 660 So. 2d 134, 136. The concurring opinion pointed out the inconsistency in the court’s judgment when it appeared in the community that the couple remained together—traveling, doing home projects—all while the husband lived in the garage apartment on the property. *Id.* at pp. 1–2; 660 So. 2d at 136–37 (Hightower, J., concurring). But, because the husband did not assign error in this aspect of the trial court’s decision, the appellate judge concurred in the decision of the majority. *Id.*

312. *Lemoine v. Lemoine*, 97-1626, p. 3 (La. App. 3 Cir. 7/1/98); 715 So. 2d 1244, 1245–46.

313. *Id.* at p. 3; 715 So. 2d at 1246.

314. *Id.* at p. 10; 715 So. 2d at 1249; *see also* *Noto v. Noto*, 09-1100, p. 8 (La. App. 5 Cir. 5/11/10); 41 So. 3d 1175, 1180 (finding no reconciliation where the spouses vacationed together after the husband confessed his infidelity).

315. *Jordan v. Jordan*, 394 So. 2d 1291, 1293 (La. Ct. App. 1 Cir. 1981). The husband disputed the reconciliation, calling it only an “attempted reconciliation.” *Id.* The couple, however, moved in together, and at the time it was the husband’s intention to “patch up the marriage,” so the court concluded that reconciliation had occurred. *Id.*

316. *See id.* at 1292; *see also* *Bishop v. Bishop*, 98-59, p. 7 (La. App. 5 Cir. 5/27/98); 712 So. 2d 697, 700–01 (noting that husband admitted that he did not want to reconcile even though the wife moved back into the home); *Whipple v. Smith*, 428 So. 2d 1114, 1117 (La. Ct. App. 1 Cir. 1983) (noting that the husband was living in an apartment with another woman); *Orihuela v. Orihuela*, 15-460, p. 7 (La. App. 5 Cir. 12/23/15); 184 So. 3d 182, 186 (noting that the spouses spent a considerable amount of time together and wife expressed her intent to reconcile in text messages).

317. *Lemoine*, 97-1626, p. 8; 715 So. 2d at 1248.

318. *Jordan*, 394 So. 2d at 1293.

intercourse, and attended social events together.³¹⁹ His subjective intent, coupled with the objective indicia of marital association, led the court to find reconciliation.³²⁰

Reconciliation that is induced by fraud or deceit will not suffice as a true reconciliation, but there will come a point, based on the length and quality of the parties' interactions, when reconciliation occurs as a matter of law.³²¹ In *Hickman v. Hickman*, the wife feigned reconciliation to circumvent a prior order depriving her of temporary custody of the couple's children.³²² Based on this scheme to defeat the award of custody to her husband, the court was reluctant to find reconciliation. Ultimately, though, when faced with overwhelming factual evidence of reconciliation³²³ and testimony by the husband that he was aware of her plan but wanted to work to try to save the marriage,³²⁴ the court found reconciliation as a matter of law.³²⁵

Finally, courts have found that reconciliation can be based upon a suspensive condition, such as the end of a spouse's adulterous affair.³²⁶ Fulfilling the condition indicates the spouse's intent to reconcile, but when the spouse fails to fulfill the condition,

319. *Jordan v. Jordan*, 394 So. 2d 1291, 1292 (La. Ct. App. 1 Cir. 1981).

320. *Id.*

321. *Hickman v. Hickman*, 227 So. 2d 14, 16 (La. Ct. App. 3 Cir. 1969); *see also* *Garrett v. Garrett*, 324 So. 2d 494, 496 (La. Ct. App. 2 Cir. 1975) (holding that if one spouse "entices" the other in hopes of dissolving that spouse's cause of action, then the court should find a lack of intent to reconcile).

322. *Hickman*, 227 So. 2d at 16.

323. *Id.* at 15–16. During husband and wife's 78-day reconciliation period, they: [S]lept in the same bed and bedroom; lived as husband and wife and engaged in marital relations; in general, were with each other continuously in private and public, and frequently indulged in public displays of affection, by kissing, holding hands, etc., when meeting or together; were friendly and pleasant in conversation, both in public and in private; ate meals at the family home together; went together to pick up the children after work daily; engaged in family recreational activities, including picnics, church activities and horseback riding for the children; went on a family vacation out of state together; each day rode to and from work with each other; shared their lunch hour with each other almost daily during the work week; deposited their pay checks in the same joint bank account and drew checks on that account for the family expenses and obligations.

Id.

324. *Id.* at 17.

325. *Id.* at 16. The court hinted that if the fraudulent reconciliation was complete within a few hours or days, the result may be different.

326. *Tablada v. Tablada*, 590 So. 2d 1357, 1359 (La. Ct. App. 5 Cir. 1991). In *Tablada*, the parties agreed "that marital counseling and the cessation of defendant's adulterous affair were conditions of reconciliation, and that defendant failed to make such efforts." *Id.* Thus, the defendant was deemed to lack "the requisite intent to reconcile." *Id.* Accordingly, the court found no reconciliation. *Id.*

the spouse lacks the intent necessary to reconcile.³²⁷

In light of the more recent divorces available for physical or sexual abuse, reconciliation as a defense has become an issue. On one hand, can reconciliation from abuse ever be permitted given the dynamics of an abusive relationship? On the other hand, if victims of domestic abuse are never free to reconcile, could the victim hold unwieldy power over a former abuser who has sought help? Under prior law, when cruelty was a ground for separation, courts construed cohabitation after physical abuse as reconciliation but allowed previous acts of violence to corroborate subsequent acts of violence to demonstrate, in some instances, the justification for the spouse's abandonment of the marital home.³²⁸

The degree of abuse may govern whether a court will consider application of the defense of reconciliation, given the more recent understanding of the psychological effects on battered spouses. Conditional reconciliation may also be an avenue for courts to permit reconciliation from abuse but only if the spouse successfully fulfills the conditions of reconciliation, which could include abuse counseling and treatment.

B. MENTAL DISORDER

Preexisting mental illness has been used as a defense to allegations of adulterous conduct and could likewise be argued to excuse any type of marital fault. This defense is based on the premise that actions normally construed as fault that contribute to the termination of the marriage are excused when involuntarily induced by a preexisting mental illness.³²⁹ However, to suffice as an excuse, the mental illness must have caused the behavior that would otherwise constitute marital fault.³³⁰ Thus, the burden of proof is twofold: (1) the spouse's mental illness must have existed before the conduct occurred; and (2) the spouse's mental illness

327. *Tablada v. Tablada*, 590 So. 2d 1357, 1359 (La. Ct. App. 5 Cir. 1991).

328. *See, e.g., Gilberti v. Gilberti*, 338 So. 3d 971, 974 (La. Ct. App. 4 Cir. 1976); *see also Thomas v. Thomas*, 2017-0760, p. 9 (La. App. 4 Cir. 2/21/18); 238 So. 3d 515, 522 (noting that abandonment due to domestic violence in the home was not fault to bar final spousal support).

329. *Seltzer v. Seltzer*, 584 So. 2d 710, 712 (La. Ct. App. 4 Cir. 1991) (citing *Epling v. Epling*, 537 So. 2d 814 (La. Ct. App. 5 Cir. 1969); *Kaplan v. Kaplan*, 453 So. 2d 1218, 1221 (La. Ct. App. 2 Cir. 1984)).

330. *Seltzer*, 584 So. 2d at 712; *Credeur v. Lalonde*, 511 So. 2d 65, 66 (La. Ct. App. 3 Cir. 1987).

must have caused the conduct.³³¹

In *Seltzer v. Seltzer*, the wife argued that her on-going acts of adultery should be excused because of her preexisting mental illness.³³² Medical testimony confirmed that she did suffer from a preexisting mental illness prior to committing adultery.³³³ However, by all reports, during the period when she admitted to engaging in an extra-marital affair, her mental condition was “markedly improved”; medical testimony indicated that she was making significant progress and was not currently suffering from the psychosis as she had been prior to the extra-marital affair.³³⁴ Even more telling, she admitted seeking a supportive relationship because she was lonely.³³⁵ Recognizing the availability of the defense, the court nonetheless found that the wife’s acts of adultery were not caused by her mental illness but were committed voluntarily.³³⁶

Conversely, in *Courville v. Courville*,³³⁷ the wife was legally excused from a claim of cruel treatment based on her preexisting mental condition.³³⁸ She suffered from schizophrenia, which caused her to sink into periods of depression and made her so aggressive that it was difficult for her to get along with others.³³⁹ Based on testimony from lay and expert witnesses, the court found that her actions, which would have otherwise constituted cruelty, were excused by her mental condition.³⁴⁰

331. See generally *Seltzer v. Seltzer*, 584 So. 2d 710 (La. Ct. App. 4 Cir. 1991). In *Seltzer*, the court declined to excuse the wife’s adultery as being caused by a preexisting mental illness. *Id.* at 712. The wife admitted to being motivated “by her own emotional and sexual needs.” *Id.* at 713.

332. *Id.* at 712. In *Seltzer*, the wife raised the defense to a claim of adultery to obtain a divorce.

333. *Id.* at 713.

334. *Seltzer*, 584 So. 2d at 713.

335. *Id.*

336. *Id.*

337. *Courville v. Courville*, 363 So. 2d 954 (La. Ct. App. 3 Cir. 1978).

338. *Id.* at 956. The separation from bed and board suit filed against Mrs. Courville alleged that her actions constituted cruel treatment toward her husband. *Id.*

339. *Id.* at 957. At one point, she was committed to a state hospital, where she received care for her condition for several months. *Id.*

340. *Courville*, 363 So.2d at 957; see also *Kaplan v. Kaplan*, 453 So. 2d 1218 (La. Ct. App. 2 Cir. 1984) (wife was excused from fault due to her mental illnesses of acute depression and anxiety); *Morrison v. Morrison*, 395 So. 2d 909 (La. Ct. App. 2 Cir. 1981) (wife’s actions excused due to her mental condition and paranoia); *Bettencourt v. Bettencourt*, 381 So. 2d 538 (La. Ct. App. 4 Cir. 1980) (wife did not abandon the domicile where she left to be admitted to hospital for preexisting mental condition);

X. EFFECTS OF DIVORCE

Divorce has many effects. To start, the marriage is terminated.³⁴¹ A divorce likewise terminates the community regime retroactively to the date that the divorce petition is filed in the action in which the judgment is granted.³⁴² In connection with a divorce petition, the court can consider incidental relief that arises from the marriage, such as injunctive relief,³⁴³ spousal support,³⁴⁴ the use of the former family home and other community movables and immovables,³⁴⁵ and claims for contribution to education and training.³⁴⁶ The court can also consider rights of custody,³⁴⁷ visitation,³⁴⁸ and child support.³⁴⁹ The court may permit hearings to be conducted in chambers.³⁵⁰

Gipson v. Gipson, 379 So. 2d 1171 (La. Ct. App. 2 Cir. 1980) (wife not at fault due to wife's history of mental illness).

341. LA. CIV. CODE ANN. art. 101 (2018).

342. LA. CIV. CODE ANN. art. 159 (2018) (“The retroactive termination of the community shall be without prejudice to rights of third parties validly acquired in the interim between the filing of the petition and recordation of the judgment.”). Once terminated, the spouses have the right to demand partition of the former community at any time, LA. CIV. CODE ANN. art. 2369.8 (2018), and absent agreement, a spouse may demand judicial partition, LA. STAT. ANN. § 9:2801 (2018). For a comprehensive discussion of the effects of termination on community property, see CARROLL & MORENO, *supra* note 127, at 598–689.

343. See LA. STAT. ANN. §§ 9:37 *et seq.* (2018).

344. LA. CIV. CODE ANN. arts. 111 *et seq.* (2018).

345. LA. STAT. ANN. § 9:374 (2018).

346. LA. CIV. CODE ANN. arts. 121 *et seq.* (2018). See generally LA. CIV. CODE ANN. art. 105 (2018). Not all incidental relief must be associated with a divorce action. Spouses may sue one another for spousal support or support of a child while the spouses are living separate and apart, even without a pending divorce petition. LA. STAT. ANN. § 9:291 (2018).

347. See LA. CIV. CODE ANN. arts. 131–135 (2018); LA. STAT. ANN. §§ 9:331 *et seq.* (2018).

348. See LA. CIV. CODE ANN. arts. 136–137; LA. STAT. ANN. §§ 9:331–:333, :341–:348 (2018).

349. LA. STAT. ANN. §§ 9:315 *et seq.* (2018).

350. “[T]he court by local rule, and only in those instances where good cause is shown, may provide that only with mutual consent, civil hearings before the trial court in divorce proceedings may be held in chambers.” LA. STAT. ANN. § 9:302(A) (2018). “A motion for hearing in chambers . . . may be made by either party or upon the court’s own motion.” LA. STAT. ANN. § 9:302(B) (2018). “Such hearings shall include contested and uncontested proceedings and rules for spousal support, child support, visitation, injunctions, or other matters provisional and incidental to divorce proceedings.” LA. STAT. ANN. § 9:302(A) (2018). Additionally, such hearings “shall be conducted in the same manner as if taking place in open court. The minute clerk and court reporter shall be present if necessary to perform the duties provided by law.” LA. STAT. ANN. § 9:302(C) (2018).

Termination of a marriage likewise ends parental authority over children and begins the regime of tutorship.³⁵¹ A divorce also revokes legacies or other testamentary provisions to the former spouse when the decedent “is divorced from the legatee after the testament is executed and at the time of his death, unless the testator provides to the contrary.”³⁵² Termination of marriage may also give rise to revocation of donations due to ingratitude.³⁵³

Although marriage does not change the surname of a spouse (so court action is not needed to regain one’s name at divorce),³⁵⁴ a spouse should change the name on his or her social security card, driver’s license, and any other form of identification or registration, all in accordance with the regulations for each agency or entity. A married woman is permitted to retain the surname of her spouse even after their divorce and her remarriage.³⁵⁵

XI. APPEAL

A judgment of divorce is a final judgment.³⁵⁶ An appeal from a judgment granting or refusing a divorce can be taken only within thirty days from either the expiration of the time for applying for a new trial or from the date of the court’s refusal to grant a new trial, in accordance with article 2087(A) of the Code of Civil Procedure.³⁵⁷ The appeal suspends the execution of the judgment for claims relating to the annulment, divorce, or any partition of community property or settlement of claims arising from the matrimonial regime³⁵⁸ but not for custody, visitation, or support.³⁵⁹

351. LA. CIV. CODE ANN. art. 246 (2018).

352. LA. CIV. CODE ANN. art. 1608(5) (2018).

353. See LA. CIV. CODE ANN. arts. 1556–1560 (2018); *Whitman v. Whitman*, 31,814 (La. App. 2 Cir. 3/31/99); 730 So. 2d 1048.

354. LA. CIV. CODE ANN. art. 100 (2018); LA. CODE CIV. PROC. ANN. art. 3947 (2018).

355. LA. STAT. ANN. § 9:292 (2018). Because this statute is gender specific, it would not survive an equal protection challenge.

356. *Tarbutton v. Tarbutton*, 51,486, p. 4 (La. App. 2 Cir. 5/2/17); 217 So. 3d 1281, 1285.

357. LA. CODE CIV. PROC. ANN. arts. 2087(A), 3942(A) (2018). “The delay for applying for a new trial shall be seven days, exclusive of legal holidays, . . . [which] commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment.” LA. CODE CIV. PROC. ANN. art. 1974 (2018). *But see Tarbutton*, 51,486, p. 4; 217 So. 3d at 1285 (considering the appeal of the litigant’s divorce even though it was untimely because she appeared pro se). It is not necessary to post an appeal bond. *Post v. Post*, 376 So. 2d 1275, 1276 (La. Ct. App. 2 Cir. 1979).

358. LA. CODE CIV. PROC. ANN. art. 3942(B) (2018).

359. LA. CODE CIV. PROC. ANN. art. 3943 (2018).