

A PRIMER ON MARRIAGE IN LOUISIANA

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This Article is the third 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 marriage appears in Title IV of Book I of the Civil Code to prescribe the rules for marriage, nullity of marriage, and the incidents of marriage. The Civil Code Ancillaries, found in Title 9 of the Revised Statutes, further provide details governing marriage in Louisiana. The title on marriage outlines the prerequisites of marriage, actions for nullity of marriage, and the rights and obligations spouses enjoy as a result of the contract of marriage.

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I. INTRODUCTION

Louisiana recognizes marriage as a legal relationship¹ created by civil contract.² Because marriage is created by civil contract, parties may rely on general contract principles in resolving questions unanswered by the specific laws governing marriage. Unlike ordinary contracts, however, the marriage contract “creates

1. LA. CIV. CODE ANN. art. 86 (2018). As of the time of publication of this Article, the Louisiana Civil Code continues to define marriage as between a man and a woman. *Id.* This code article is unconstitutional in light of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Marriage between members of the same sex is permitted under Louisiana law. See *Robicheaux v. Caldwell*, 791 F.3d 616 (5th Cir. 2015), *remanded to Robicheaux v. Caldwell*, Nos. 13-5090 C/W, 14-97, 14-327, 2015 WL 4090353 (E.D. La. July 2, 2015).

2. LA. CIV. CODE ANN. art. 86 (2018). The use of “civil” to modify “contract” indicates that Louisiana law, rather than ecclesiastical law, applies. See Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 251 (2003).

a social status that affects not only the contracting parties, but also their posterity and the good order of society.”³ Therefore, certain laws governing marriage cannot be contractually altered by the parties.⁴

As in any state, parties must meet certain prerequisites to contract a marriage. To validly marry in Louisiana, the parties must freely consent to take one another as spouses at a marriage ceremony.⁵ The parties must also be free from any legal impediment to marry, which includes being married to someone else or being too closely related.⁶ No physical consummation is necessary.⁷ If one or more of the prerequisites is missing, the marriage can be declared null.⁸ Louisiana also requires parties to meet other ceremonial formalities, which include obtaining a marriage license and having witnesses present; but, even if the parties fail to comply with certain technical formalities, the marriage remains valid and cannot be declared null.⁹ More detail on marriage prerequisites, nullity of marriage, incidents of marriage, and other related topics are presented in the sections below.

3. LA. CIV. CODE ANN. art. 86 cmt. (c) (2018); *Stallings v. Stallings*, 148 So. 687, 688 (La. 1933).

4. *Rhodes v. Miller*, 179 So. 430, 433 (La. 1938) (“[The marriage contract] creates a social status or personal relation which affects not only the contracting parties, but also their posterity and the good order of society. The status or relation thus created has always been subject to legislative control, independent of the will of the parties.”); *see also, e.g.*, *Holliday v. Holliday*, 358 So. 2d 618, 620 (La. 1978) (courts will not enforce an agreement in a prenuptial agreement to waive the obligation of interim support to a spouse); *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App. 4 Cir. 1976) (courts will not enforce an agreed upon sexual obligation between spouses).

5. LA. CIV. CODE ANN. art. 87 (2018); *see also infra* Part VIII. Prior to 1902, first cousins were permitted to marry in Louisiana. Prior to 1972 and 1975, respectively, “white persons” could not marry “Indians” or “colored and black” persons. *See* KATHERINE SHAW SPAHT & JOHN RANDALL TRAHAN, *FAMILY LAW IN LOUISIANA* § 3.7, at 73 (2009). Prior to 1970 and 1972, respectively, widows could not marry within ten months of the dissolution of their marriage, and adulterers could not marry their paramour. *See id.*

6. *See infra* Part VII. Being of the same sex was a legal impediment to marriage prior to 2015 when the United States Supreme Court nationalized same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *See infra* Part III.

7. LA. CIV. CODE ANN. art. 87 cmt. (a) (2018).

8. The marriage will either be absolutely null or relatively null, which corresponds to void or voidable marriages under the common law. *See infra* Section X.A.

9. *See infra* Section VIII.B.

II. THE 1987 REVISION TO THE LAW OF MARRIAGE

As part of an ongoing effort to revise the Louisiana Civil Code, the Marriage-Persons Committee of the Louisiana State Law Institute performed a comprehensive revision of the law on marriage, which resulted in Act 886 of 1987. Specifically, the Law Institute Committee and the Law Institute Council deliberated and recommended revisions to Title IV of Book I, “Husband and Wife,” which included the law on entry into, nullity of, and the personal effects of marriage. Act 886 of 1987 ultimately revised Civil Code articles 86 through 136 and several corresponding sections in the Revised Statutes. While the legislature retained much of the law on marriage, it also made some notable changes, as discussed in the article *Revision of the Law of Marriage: One Baby Step Forward*.¹⁰

III. 2015 CHANGES TO SAME-SEX MARRIAGE

On June 26, 2015, the United States Supreme Court decided the case of *Obergefell v. Hodges*, which nationalized same-sex marriage.¹¹ In a 5-to-4 decision, the Court concluded that the right to marry is a fundamental right inherent in the concept of liberty, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be deprived of that right.¹² The Court also required all states to recognize same-sex marriages validly performed in other states.¹³

This intense shift in the law of marriage began several years earlier when targeted challenges were made across the country to state same-sex marriage bans. The United States Supreme Court, exactly two years before the *Obergefell* decision, on June 26, 2013, decided *United States v. Windsor*¹⁴ and *Hollingsworth v. Perry*,¹⁵ which, in large part, predicted the ultimate decision in *Obergefell*. A firestorm of legislative and judicial changes spread across the country, which is chronicled in *Marriage Equality: The “States” of the Law Post-Windsor and Perry*.¹⁶

10. See Katherine Shaw Spaht, *Revision of the Law of Marriage: One Baby Step Forward*, 48 LA. L. REV. 1131, 1132 (1988).

11. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

12. *Id.* at 2604–05.

13. *Id.* at 2607–08.

14. *United States v. Windsor*, 570 U.S. 744 (2013).

15. *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

16. Monica Hof Wallace & Christopher Gerald Otten, *Marriage Equality: The “States” of the Law Post-Windsor and Perry*, 16 LOY. J. PUB. INT. L. 215 (2014).

At the time of the *Windsor* and *Perry* decisions, Louisiana had an express prohibition against same-sex marriage¹⁷ and recognizing same-sex marriages performed in other states.¹⁸ Louisiana had also enacted a Defense of Marriage Act in its constitution.¹⁹ Similar to the plethora of litigation taking place across the country, the case of *Robicheaux v. Caldwell* was filed in the United States District Court for the Eastern District of Louisiana, challenging Louisiana's ban on same-sex marriage.²⁰ The trial court initially denied the plaintiffs relief, upholding Louisiana's same-sex marriage ban.²¹ Plaintiffs then appealed to the United States Court of Appeals for the Fifth Circuit.²² The Fifth Circuit issued its opinion just five days after the Supreme Court's edict in *Obergefell*, finding Louisiana's laws prohibiting same-sex marriage unconstitutional.²³

The Louisiana Supreme Court spoke next in the case of *Costanza v. Caldwell*, which involved a challenge to the same-sex marriage ban by a lesbian woman who sought to adopt her same-sex spouse's biological child.²⁴ The district court granted the adoption, declaring the Louisiana marriage laws unconstitutional,

17. LA. CIV. CODE ANN. art. 89 (2013).

18. LA. CIV. CODE ANN. art. 3520(B) (2011).

19. LA. CONST. ANN. art. XII, § 15, *declared unconstitutional by Robicheaux v. Caldwell*, Nos. 13-5090 C/W, 14-97, 14-327, 2015 WL 4090353 (E.D. La. July 2, 2015). In 2004, the legislature passed, and the electorate approved, Louisiana's version of the federal Defense of Marriage Act, which provided:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

Id. In 2005, the Louisiana Supreme Court upheld the act in the face of a constitutional challenge under the single object requirement of the state constitution. *See generally* Forum for Equal. PAC v. McKeithen, 2004-CA-2477, 2004-CA-2523 (La. 1/19/05); 893 So. 2d 715.

20. *See generally* Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014), *rev'd*, 791 F.3d 616 (5th Cir. 2015).

21. *See id.* at 927–28.

22. *See generally* Robicheaux v. Caldwell, 791 F.3d 616 (5th Cir. 2015).

23. On July 1, 2015, the Fifth Circuit held that the Louisiana laws violated the fundamental right to marry, and it remanded the case to the district court. *See id.* at 618–19. On July 2, 2015, the United States District Court for the Eastern District of Louisiana likewise declared the laws unconstitutional and granted the plaintiffs relief. *Robicheaux*, 2015 WL 4090353.

24. *Costanza v. Caldwell*, 2014-2090 (La. 7/7/15); 167 So. 3d 619.

and the State appealed.²⁵ The State argued that stepparent adoption was not available because Louisiana law did not recognize the marriage of the two women, who were wed in California.²⁶ The Louisiana Supreme Court, in a brief opinion, held that, in light of the *Obergefell* decision and the subsequent actions of the Louisiana federal court in *Robicheaux*, the issues had been resolved and “the State of Louisiana may not bar same-sex couples from the civil effects of marriage.”²⁷ The appeal was dismissed.

Immediately thereafter, the Marriage-Persons Committee of the Louisiana State Law Institute began the task of considering revisions to the unconstitutional provisions of the Civil Code and suggesting answers to significant questions left unanswered by *Obergefell*. On November 6, 2015, the reporter for the committee presented to the Law Institute Council a proposal to revise the laws that were rendered obsolete or on which the courts would need guidance.²⁸ After a lengthy discussion, the council voted to have the committee prepare a report to the legislature, on which the council would vote at a later meeting.²⁹ The legislature could then decide how to address the issues. Because discussion of the same-sex marriage issues was slated for that day, the council considered the proposal prepared by the committee and voted on various revisions to the laws of marriage and other related matters.³⁰

On February 12, 2016, the reporter returned to the council with the work that was completed in November of 2015, along with a draft report to the legislature.³¹ The council passed the motion to adopt the report,³² and the reporter forwarded it to the Louisiana Speaker of the House and President of the Senate.³³ No bill was introduced by the legislature in the 2016 Regular Session, but to

25. *See In re Adoption of N.B.*, 14-314 (La. App. 3 Cir. 2014); 140 So. 3d 1263.

26. *See id.* at pp. 3–4; 140 So. 3d at 1265.

27. *See Costanza v. Caldwell*, 2014-2090, p. 2 (La. 7/7/15); 167 So. 3d 619, 621. Three justices concurred in the opinion with reasons, and one justice dissented. *See id.* at 622–24 (Knoll, Weimer & Guidry, J.J., concurring & Hughes, J., dissenting).

28. Louisiana State Law Institute, Minutes of the Meeting of the Council, at 1 (Nov. 6–7, 2015) (on file with the Louisiana State Law Institute).

29. *Id.* at 2.

30. *Id.* at 2–5.

31. Louisiana State Law Institute, Minutes of the Meeting of the Council, at 6 (Feb. 12–13, 2016) (on file with the Louisiana State Law Institute).

32. *Id.*

33. Louisiana State Law Institute Marriage-Persons Committee, *Same-Sex Marriage Report to the Legislature* (Mar. 16, 2016) (on file with the Louisiana State Law Institute).

assure the council that its input was requested, Senator Jean-Paul “J.P.” Morrell submitted Senate Resolution 143, which was subsequently adopted by the senate. Senate Resolution 143:

[U]rge[d] and request[ed] the Marriage-Persons Committee of the Louisiana State Law Institute to study, and the Louisiana State Law Institute to make, annual comprehensive and ongoing recommendations to the Legislature regarding state law post *Obergefell v. Hodges*, including but not limited to recommendations in the form of proposed legislation for revisions to laws governing families, persons, community property, successions, immovable property, the rights of third parties, procedure, and the stability and validity of transactions.³⁴

In response to S. Res. 143, the reporter came before the Law Institute Council on January 20, 2017, and requested that the council submit a bill to the legislature with many of the same changes that had been adopted in November of 2015, along with some new changes that were needed to address problems raised by the jurisprudence.³⁵ The council agreed and approved various changes to the laws of marriage and related matters that it had considered previously.³⁶ It also addressed new issues related to community property and its retroactivity, given the retroactive validity of same-sex marriages.³⁷ Because the 2017 Regular Session focused on fiscal matters, no bill was introduced.

In the 2018 Regular Session, Senator Morrell introduced Senate Bill 98.³⁸ In line with the work of the Marriage-Persons Committee shortly after *Obergefell* was decided, the bill performed various “clean-ups” to the verbiage in the Civil Code.³⁹ The definition of marriage was changed to a civil contract “between two natural persons,” rather than “between a man and a woman.”⁴⁰ Where the law referred to a “husband and wife,” the verbiage was changed to “spouses.”⁴¹ Where the law used “father and mother,”

34. S. Res. 143, 2016 Leg., Reg. Sess. (La. 2016).

35. See Louisiana State Law Institute, Minutes of the Meeting of the Council, at 3–6 (Jan. 20–21, 2017) (on file with the Louisiana State Law Institute).

36. See *id.*

37. *Id.* at 3–5.

38. S.B. 98, 2018 Leg., Reg. Sess. (La. 2018).

39. See generally *id.*

40. *Id.* at 2.

41. S.B. 98, 2018 Leg., Reg. Sess., at 2 (La. 2018).

the language was changed to “parents.”⁴² The only substantive change dealt with community property. The bill proposed a new statute to be placed in Title 9, which provided as follows:

Same-sex couples married on or before June 26, 2015, may enter into a matrimonial agreement without court approval until the expiration of one-year from August 1, 2018. . . . For same-sex couples married on or before June 26, 2015, the application of the legal regime of the community of acquets and gains shall be without prejudice to the rights of third parties validly acquired before August 1, 2018.⁴³

Enacting this statute was not intended to affect the validity of any contract entered into by same-sex couples before June 26, 2015, but would give same-sex couples the ability to opt out of the regime without having to go to court, just like couples who move to Louisiana.⁴⁴ Because third parties could be affected by the retroactive creation of a community property regime, the law was drafted to protect those third parties.⁴⁵

The bill was referred to the Judiciary A Committee. Senator Morrell presented the bill, and a representative from the Louisiana Family Forum testified against the bill.⁴⁶ The debate lasted sixteen minutes, and the bill failed by a 4-to-1 vote.⁴⁷ As a result, courts are still without guidance on the issue of community property. In addition, the law, as reflected in our Civil Code and related statutes, remains unconstitutional.

IV. GIFTS IN CONTEMPLATION OF MARRIAGE

Soon-to-be spouses and third parties who celebrate soon-to-be spouses often present gifts prior to and in contemplation of an

42. S.B. 98, 2018 Leg., Reg. Sess., at 3 (La. 2018).

43. *Id.* at 15–16.

44. *See id.*; *see also* LA. CIV. CODE ANN. art. 2329 (2018).

45. For example, if immovable property was transferred without the consent of the other now-community spouse, in violation of article 2347, the transaction would still be valid. *See* LA. CIV. CODE ANN. art. 2347 (2018).

46. The Louisiana Family Forum argued that “compliance with the law is very different than redefinition.” Senator Morrell urged that Louisiana must abide by the law of the Supreme Court even if its citizens do not agree. He pointed out that the Louisiana State Law Institute is a nonpartisan body that can make changes to the Code when the law from the United States Supreme Court changes. Finally, he highlighted economic development, which could suffer when a state fails to follow the rule of law. LOUISIANA STATE SENATE BROADCAST ARCHIVES, http://senate.la.gov/video/videoarchive.asp?v=senate/2018/03/032618JUDA_0 (last visited Dec. 11, 2018).

47. *Id.*

upcoming marriage. Whether these gifts are completed donations in the absence of a future marriage depends on whether a condition is placed on the gift. The law permits donors to place a condition on a gift, provided the condition is not “contrary to law or good morals.”⁴⁸ In the event the condition is not fulfilled, the donation can be dissolved.⁴⁹

Because the donation of an engagement ring is conditioned on a future marriage, it can be dissolved if that marriage does not take place.⁵⁰ When the condition of a future marriage can no longer be fulfilled (e.g., when the former fiancé marries someone else), the donation is dissolved as of right.⁵¹ If the couple could still marry but have simply broken the engagement, however, the donation may be dissolved only by consent of the parties or by judicial decree.⁵² Therefore, the donor may be required to seek judicial intervention to have the gift returned.⁵³ Further, even if the donor initially refuses to accept return of the gift under the belief that the engagement is not over, the gift is still subject to the condition of marriage and can be dissolved if the marriage does not take place.⁵⁴ Actions to dissolve a donation for failure of a condition prescribe five years from the date the donee fails to fulfill the condition.⁵⁵

Gifts made in the hope that marriage will follow, rather than on the condition of marriage itself, should be classified as manual gifts valid upon delivery.⁵⁶ Gifts such as promise rings or objects that the parties expect they may share in the future are not conditioned on the promise of marriage, but only on the hope that marriage will be in the parties’ future.⁵⁷ Once delivered, these gifts are completed manual donations, even absent a later marriage.

48. LA. CIV. CODE ANN. art. 1528 (2018).

49. See LA. CIV. CODE ANN. arts. 1562–1563 (2018).

50. State v. Rubin, 04-1588, p. 2 (La. App. 3 Cir. 4/6/05); 899 So. 2d 187, 189; Glass v. Wiltz, 551 So. 2d 32, 32–33 (La. Ct. App. 4 Cir. 1989); Decuers v. Bourdet, 120 So. 880 (La. Ct. App. 1929). Former article 1740 provided: “Every donation made in favor of marriage falls, if the marriage does not take place.” LA. CIV. CODE art. 1740 (1952) (amended and reenacted by Act No. 619, 2004 La. Acts 2082, presently LA. CIV. CODE ANN. art. 1736 (2018)).

51. See LA. CIV. CODE ANN. art. 1562 (2018).

52. *Id.*

53. *Id.*

54. See Daigle v. Fournet, 141 So. 2d 406, 408 (La. Ct. App. 4 Cir. 1962).

55. LA. CIV. CODE ANN. art. 1564 (2018).

56. See LA. CIV. CODE ANN. art. 1543 (2018).

57. See *generally* Fortenberry v. Ellis, 217 So. 2d 792 (La. Ct. App. 4 Cir. 1969) (finding that gift of stereo was not given in contemplation of marriage).

Third parties also present gifts to soon-to-be spouses in preparation for an upcoming marriage. Chapter 2 of Title II of the Civil Code directly addresses these rules and provides that “[t]he donation shall be made subject to the suspensive condition that the prospective marriage shall take place.”⁵⁸ Shower gifts made to the spouses are not completed gifts until the marriage takes place and are subject to return by the donee in the absence of the future marriage.⁵⁹

V. MARITAL TORTS

The ability of spouses to sue one another or a third person for the breakdown of a marriage is severely limited in Louisiana. Louisiana law prevents spouses from suing one another except in specifically enumerated situations.⁶⁰ A spouse may only sue the other spouse for: (1) causes of action pertaining to contracts or involving the matrimonial regime; (2) restitution of separate property;⁶¹ (3) divorce or nullity of marriage; or (4) causes of action pertaining to spousal or child support or custody while the spouses are living separate and apart.⁶² The four enumerated exceptions are exclusive, not illustrative.⁶³

As a result, tort actions between spouses are unavailable until the spouses are divorced.⁶⁴ The cause of action that one spouse might have against the other is not destroyed by interspousal immunity; rather, once the spouses obtain a judgment of divorce, they are placed “in the same situation with respect to each other

58. LA. CIV. CODE ANN. art. 1736 (2018). For a discussion of the revision to the chapter entitled “Donations *Inter Vivos* Made in Contemplation of Marriage by Third Persons,” see generally ANDREA CARROLL & RICHARD D. MORENO, MATRIMONIAL REGIMES § 8:10, in 16 LOUISIANA CIVIL LAW TREATISE 884 (4th ed. 2013).

59. See LA. CIV. CODE ANN. art. 1736 (2018).

60. See LA. STAT. ANN. § 9:291 (2018).

61. *Id.*; see also *Eckhardt v. Reveley*, 2004-0288, pp. 3–4 (La. App. 4 Cir. 7/21/04); 881 So. 2d 128, 130–31 (concluding that prescription on the restitution claim continued to accrue during the marriage and was not suspended); *Heathcock v. Neuenhaus*, 05-954, pp. 3–4 (La. App. 5 Cir. 4/25/06); 930 So. 2d 1013, 1014 (concluding that the wife could have filed suit against the husband during the marriage to recover money loaned pursuant to a promissory note); *Hinds v. Hinds*, 04-1358, pp. 3–4 (La. App. 3 Cir. 3/9/05); 897 So. 2d 890, 892 (concluding that “restitution of separate property” does not contemplate an eviction proceeding as it is inconsistent with the mutual duties of married persons and the interspousal immunity statute”).

62. LA. STAT. ANN. § 9:291 (2018); see also ROBERT C. LOWE, LOUISIANA DIVORCE § 5:18, in 1 LOUISIANA PRACTICE SERIES 403–04 (2018).

63. *Heathcock*, 05-954, p. 4; 930 So. 2d at 1014.

64. See LA. STAT. ANN. § 9:291 cmt. (d) (2018).

as if no marriage had ever been contracted between them.”⁶⁵ Suits between spouses have been prohibited on the theory that a lawsuit would “disrupt domestic tranquility”; but, once the couple is divorced, the policy reasons for such immunity become moot.⁶⁶ Prescription is thus suspended between the spouses during the marriage.⁶⁷

As to pre-marriage claims related to the contract of marriage, Louisiana law has retained the tort of breach of the promise to marry, but recovery is limited.⁶⁸ Equally limited is the tort of fraudulent inducement to marry that can apply at the termination of a marriage.⁶⁹ Once the marriage is contracted, however, tort claims against third parties due to their involvement in the breakdown of the marriage have been eliminated, as has been the practice in most jurisdictions.⁷⁰

A. BREACH OF THE PROMISE TO MARRY

Louisiana recognizes the claim for breach of the promise to marry, but recovery is rare. The claim is derived from article 1998 in the Title on “Conventional Obligations or Contracts,” which permits a party to recover damages for a nonpecuniary loss. If a contract, like the agreement to marry, is intended to gratify a nonpecuniary interest, the obligor can be liable in damages for his nonperformance if he knew or should have known that his failure to perform would cause a nonpecuniary loss.⁷¹ The action is personal and therefore not heritable by the heirs, but if the claim has been reduced to judgment, it can be enforced against the

65. *Duplechin v. Toce*, 497 So. 2d 763, 765 (La. Ct. App. 3 Cir. 1987) (internal quotation marks omitted) (quoting *Gremillion v. Caffey*, 71 So. 2d 670, 674 (La. Ct. App. 1 Cir. 1954)).

66. *Id.*

67. *Id.*

68. *See infra* Section V.A.

69. *See infra* Section V.B.

70. *See infra* Section V.C. *See generally* Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. AM. ACAD. MATRIM. LAW. 365 (2012). *But see* *Rodriguez v. Lemus*, 810 S.E.2d 1 (N.C. Ct. App. 2018) (retaining torts of alienation of affection and criminal conversation); *Fitch v. Valentine*, 959 So. 2d 1012 (Miss. 2007) (retaining tort of alienation of affection).

71. LA. CIV. CODE ANN. art. 1998 (2018). Nonpecuniary loss is damage of a moral nature that does not affect the tangible part of a person’s patrimony. LA. CIV. CODE ANN. art. 1998 cmt. (b) (2018); *see also* SAÚL LITVINOFF, *THE LAW OF OBLIGATIONS* § 6.4, *in* 6 LOUISIANA CIVIL LAW TREATISE 158 (1999) (discussing nonpecuniary loss in the context of a promise to marry and noting that recovery has been related to a pecuniary loss).

decendent's estate.⁷² Because the action sounds in contract, the prescription that bars a demand in contract applies to a breach of the promise to marry.⁷³

The first case to recognize the claim for breach of the promise to marry was *Morgan v. Yarborough* in 1850.⁷⁴ The Louisiana Supreme Court explained that a promise of marriage is distinct from a marriage contract; therefore, it need not be in writing, and an action will lie when a breach of that promise causes damage.⁷⁵ The unchastity of the plaintiff was a defense to the action, although more recent cases have expanded the defense to include fault generally.⁷⁶ Since inception of the claim, few courts have awarded damages for a breach.⁷⁷

Courts have resisted awarding damages unless the plaintiff can demonstrate freedom from fault and sufficient proof of damage. No court, however, has addressed or adopted a definition of fault.⁷⁸ For example, in one case, the plaintiff was denied recovery for failing to present sufficient evidence of damage caused by the breach,⁷⁹ and in another, the plaintiff was denied recovery for ending the relationship when the donor was attempting to

72. See *Johnson v. Levy*, 43 So. 46, 47 (La. 1907).

73. See *Smith v. Braun*, 37 La. Ann. 225, 226, 228 (La. 1885).

74. *Morgan v. Yarborough*, 5 La. Ann. 316 (La. 1850). See generally *Johnson v. Levy*, 47 So. 422 (discussing the claim of breach of contract to marry and subsequent remedies); *Kuck v. Johnson*, 38 So. 559 (La. 1905) (discussing an award for breach of contract to marry in the context of the sale of a judgment).

75. *Morgan*, 5 La. Ann. at 322. The defendant attempted to prove the "unchaste character" of the plaintiff to excuse his breach of the promise. *Id.* at 321. The court did not find that the evidence was sufficient to prove his defense; but, it recognized that, if proven, the unchaste nature of the plaintiff would have excused the breach. See *id.* at 321-33.

76. See *Spaht*, *supra* note 2, at 269.

77. See generally *Levy*, 47 So. 422. In *Levy*, a suitor proposed to the plaintiff, she became pregnant with his child, and he ended the relationship. *Id.* at 422-24. He was murdered shortly thereafter by the plaintiff's father. *Id.* at 424. The jury awarded the plaintiff \$20,000 in damages, which was subsequently reduced by half by the appellate court. *Id.*; see also *Kuck*, 38 So. 559 (discussing an award for breach of contract to marry in the context of the sale of a judgment); *Braun*, 37 La. Ann. 225 (affirming an award for breach of the contract to marry).

78. See *Spaht*, *supra* note 2, at 269-70.

79. See *Glass v. Wiltz*, 551 So. 2d 32 (La. Ct. App. 4 Cir. 1989). In *Glass*, the groom who broke the engagement sued to recover the engagement ring. *Id.* at 32. The bride reconvened, seeking damages for the breach of the promise to marry. *Id.* While the groom was entitled to recover the ring, the bride was unable to recover because she failed to prove any damage she suffered due to the breach of the promise to marry. See *id.* at 33.

reconcile.⁸⁰

In a notable case, *Sanders v. Gore*, the Louisiana Third Circuit Court of Appeal denied recovery for breach of a promise to marry because the parties were married to other people at the time the promise was made.⁸¹ The court dismissed the action on an exception of no cause of action, concluding that no matter how the action was styled, any damages arising from the promise when the parties are already married is unenforceable as against public policy.⁸² The concurrence and dissents challenged the notion that an action for breach of the promise to marry, when the parties are already married, is contrary to public policy—considering the ease with which parties can get divorced in today’s society.⁸³ Getting divorced to remarry someone else is not condemned by the law; yet, by finding no cause of action for breach of the promise to marry, the court in effect condemned one party (Mrs. Sanders) to suffer pecuniary damages, while the other party (Mr. Gore) was rewarded with immunity.⁸⁴ At the end of the day, however, the majority agreed that enforcing a promise to marry when the other party is knowingly married to another runs afoul of societal mores and, regardless of the attitudinal changes to marriage and divorce, should be discouraged by the state.⁸⁵

80. See *Daigle v. Fournet*, 141 So. 2d 406 (La. Ct. App. 4 Cir. 1962). In *Daigle*, the plaintiff sued to recover the engagement ring given to his fiancée, and she reconvened for breach of the promise to marry. *Id.* at 407. The court denied the fiancée’s request for damages for breach of the contract to marry because she broke off the engagement when he was making “serious” efforts at reconciliation. *Id.* at 408.

81. *Sanders v. Gore*, 95-660 (La. App. 3 Cir. 7/10/96); 676 So. 2d 866. Mrs. Sanders and Mr. Gore agreed to marry during the course of their three-year affair, while both were married to other people. *Id.* at pp. 1–2; 676 So. 2d at 868. Mr. Gore represented Mrs. Sanders in her divorce from her husband of twenty-one years. *Id.* Mr. Gore proposed to Mrs. Sanders, but several months later told Mrs. Sanders that he was “too weak” to leave his wife and that their relationship was over. *Id.* at p. 1; 676 So. 2d at 868. Mrs. Sanders sought damages arising from the breach of the promise to marry, which included nonpecuniary losses, the cost of gifts given to him in contemplation of marriage, and the costs of remodeling her home to be their matrimonial domicile. *Id.* at p. 2; 676 So. 2d at 868. She also sought damages for intentional infliction of emotional distress. *Id.* at p. 3; 676 So. 2d at 868–69.

82. *Sanders*, 95-660, p. 12; 676 So. 2d at 873.

83. *Id.* at pp. 1–5; 676 So. 2d at 875–78 (Yelverton, J., concurring in part and dissenting in part); *id.* at p. 3; 676 So. 2d at 881 (Cooks, J., dissenting).

84. Contracts with concubines are no longer against public policy, and a married paramour and a concubine can acquire real property as co-vendees. *Id.* at p. 5; 676 So. 2d at 877 (Yelverton, J., concurring in part and dissenting in part). Ultimately, Judge Yelverton concurred in the holding, finding that the institution of marriage should transcend the freedom of contract. *Id.* at p. 7; 676 So. 2d at 878.

85. *Sanders*, 95-660, p. 17; 676 So. 2d at 875. See Spaht, *supra* note 2, at 271, for a discussion of the *Sanders* case and its impact on marriage.

B. FRAUDULENT INDUCEMENT TO MARRY

Although acts of fraud by one party to induce another to marry will not provide the basis for annulment of the marriage, the wronged party may have a claim in tort. At least one Louisiana court has permitted a spouse to seek damages as a result of the other spouse's fraud in inducing her to marry knowing that the marriage would be invalid. In *Holcomb v. Kincaid*, Mr. Kincaid married Ms. Holcomb before receiving a final judgment of divorce from his first wife.⁸⁶ The divorce was finalized two weeks after the invalid marriage, but he concealed this fact until Ms. Holcomb filed for divorce twelve years later.⁸⁷ She sought damages for embarrassment, humiliation, mental suffering, lost wages, and retirement pay.⁸⁸ As the claim of fraudulent inducement to marry was *res nova* in Louisiana, the court considered decisions from other jurisdictions.⁸⁹ It concluded that nothing in the Civil Code prevented recognition of the claim under the general tort principle found in article 2315.⁹⁰ The holding was limited, however, to the instance where one person fraudulently induced the other person to enter into an invalid marriage contract.⁹¹

Whether the claim of fraudulent inducement to marry could be extended to cases in which one spouse induced the other to marry based on a misrepresentation essential to the marriage contract is unclear. Although the *Holcomb* court's holding was limited, it opened the door to additional claims under the general principles of tort law.⁹² However, because Louisiana does not permit annulment or divorce based on fraud surrounding the essentials of the marriage contract,⁹³ it is unlikely that a court

86. *Holcomb v. Kincaid*, 406 So. 2d 650 (La. Ct. App. 2 Cir. 1981).

87. *Id.* at 651.

88. *Id.*

89. *Id.*

90. *Id.* at 652.

91. *Holcomb*, 406 So. 2d at 652.

92. Other jurisdictions have extended this claim. *See, e.g.*, *Miller v. Miller*, 956 P.2d 887 (Okla. 1998) (permitting suit for fraudulent inducement to marry based on misrepresentations that plaintiff was the father of her unborn child); *Humphreys v. Baird*, 90 S.E.2d 796 (Va. 1956) (finding for plaintiff after defendant induced plaintiff to leave employment and enter into marriage while defendant was married to another woman).

93. Some states permit annulment if the fraud relates to an essential element of the marital relationship, such as pregnancy by another man or impotence. *See, e.g.*, MISS. CODE ANN. § 93-7-3 (West, Westlaw through 2018 Legis. Sess.); N.C. GEN. STAT. § 51-3 (West, Westlaw through S.L. 2018-145). Of those states that permit a claim for fraudulent inducement to marry, grounds for annulment or divorce based on fraud also

would extend tort liability to cover acts between spouses that would fail to invalidate the marriage or result in divorce.

C. OTHER HEART BALM ACTIONS

Louisiana courts have considered and rejected other heart balm actions for alienation of affection, seduction, and intentional and negligent infliction of emotional distress, all of which arise as a result of a sexual relationship between a spouse and a third party. The Louisiana Supreme Court first considered such a claim in *Moulin v. Monteleone* in 1927.⁹⁴ The court rejected alienation of affection as a valid claim in Louisiana because the remedy is punitive and not authorized by the civil law.⁹⁵ It further noted that the concept originated as a common-law remedy based on the obsolete idea that the wife was the chattel of the husband.⁹⁶ The court explained that no person has a property right in the affections of another.⁹⁷

Mindful that the state of the law and society have developed, courts have continued to reject alienation claims, explaining: “The mere seduction and loss of one’s spouse due to the seduction or affair cannot be the basis for the action. There must be proof that defendant violated some legal duty to plaintiff, so that plaintiff is in fact the victim and not just the jilted party.”⁹⁸ As a result, plaintiffs began to assert the torts of intentional and negligent infliction of emotional distress, urging that the claim is distinguishable from the alienation cause of action.

Undoubtedly, the claim for infliction of emotional distress, whether negligent or intentional, has been successful in non-marital situations.⁹⁹ But, emotional distress based on allegations of adultery alone has not sufficed to recover pecuniary damages; the claim would simply be an alienation of affection claim in disguise.¹⁰⁰ Therefore, courts have explained that when suing the

exist. *See, e.g.*, TENN. CODE ANN. § 36-4-101 (West, Westlaw through 2018 Legis. Sess.).

94. *Moulin v. Monteleone*, 115 So. 447 (La. 1927).

95. *Id.* at 448–49.

96. *Id.* at 450.

97. *Id.* at 451.

98. *See Scamardo v. Dunaway*, 94-545, p. 8 (La. App. 5 Cir. 2/15/95); 650 So. 2d 417, 420; *see also Greene v. Roy*, 604 So. 2d 1359, 1362 (La. Ct. App. 3 Cir. 1992) (recognizing that the law in Louisiana has rejected any cause of action by a spouse for the intentional alienation of the other spouse’s affection).

99. *Scamardo*, 94-545, p. 8; 650 So. 2d at 420–21.

100. *See generally Moulin*, 115 So. 447; *Butler v. Reader*, 573 So. 2d 1159 (La. Ct.

paramour for emotional distress caused by the breakdown of a marriage, the plaintiff must prove not only that the extreme and outrageous conduct of the paramour caused severe emotional distress, which the defendant desired or knew would be substantially certain to follow from his conduct, but also that the paramour violated some legal duty to the plaintiff.¹⁰¹ In every instance in which the tort has been raised, however, the plaintiff has been unsuccessful in pleading facts to show the breach of a legal duty necessary to survive an exception of no cause of action.¹⁰²

The only case in which a breach of duty may have been present involved an affair between a judge and a spouse.¹⁰³ In *Viator v. Miller*, after divorcing his wife, the husband learned that she had been having a decade-long affair with her boss, who was also a judge.¹⁰⁴ The judge had presided over their divorce and had ordered the husband to pay child support for a child who was born during the marriage and could have been the biological child of the judge.¹⁰⁵ The husband sued the judge, alleging various tort theories of recovery, including intentional infliction of emotional distress.¹⁰⁶ The court explained that any damages that arose from the sexual relationship between the wife and the judge were not recoverable, but that a claim may exist if the judge breached a duty when he knowingly rendered a judgment against the husband for child support of a child that the judge believed to be his.¹⁰⁷ Had he

App. 5 Cir. 1991). See also *Price v. Fuerst*, 09-545, p. 2 (La. App. 3 Cir. 11/4/09); 24 So. 3d 289, 290; *Scamardo v. Dunaway*, 94-545, p. 8 (La. App. 5 Cir. 2/15/95); 650 So. 2d 417, 420.

101. *Scamardo*, 94-545, p. 8; 650 So. 2d at 420–21; *Greene v. Roy*, 604 So. 2d 1359, 1363–64 (La. Ct. App. 3 Cir. 1992).

102. See *Price*, 09-545, pp. 1–2; 24 So. 3d at 290 (dismissing claim for intentional infliction of emotional distress when it was based solely on an allegation of an extramarital affair between the plaintiff's wife and her lawyer); *Viator v. Miller*, 2004-1199, pp. 8–9 (La. App. 3 Cir. 4/27/05); 900 So. 2d 1135, 1142 (finding that plaintiff was unable to allege facts sufficient to support a claim for intentional or negligent infliction of emotional distress in connection with his wife's affair with a judge for whom she worked); *Scamardo v. Dunaway*, 96-1036, pp. 3–4 (La. App. 5 Cir. 4/29/97); 694 So. 2d 1041, 1042 (dismissing action because plaintiff failed to allege facts sufficient to meet the heightened burden after the court permitted the plaintiff to amend his petition); *Greene*, 604 So. 2d at 1364 (implicitly recognizing the claim for intentional infliction of emotional distress but ultimately dismissing the plaintiff's claim because the plaintiff failed to allege facts to show intent to cause emotional distress).

103. *Viator*, 2004-1199, pp. 8–9; 900 So. 2d at 1142.

104. *Id.* at p. 2; 900 So. 2d at 1138.

105. *Id.*

106. *Id.* at pp. 2–3; 900 So. 2d at 1138.

107. *Id.* at pp. 9–10; 900 So. 2d at 1142–43.

known, the husband could have disavowed the child at the time of the divorce proceeding, but he did not.

The court considered whether Louisiana would recognize a claim for emotional distress due to “misrepresented paternity,” and concluded that the decision could wait for another day.¹⁰⁸ As no paternity test had been performed to determine whether the husband or the judge was the father of the child, the court remanded the matter to allow the husband to establish the paternity of the child.¹⁰⁹ Regardless of the ultimate outcome, parties can rest assured that a claim for intentional or negligent infliction of emotional distress will not survive based on the underlying fact of adultery; some breach of duty must be present before a court will consider granting relief.¹¹⁰

VI. PROOF OF MARRIAGE

One who claims benefits from a marriage has the burden of establishing that the marriage existed; once a marriage is shown to exist, the burden then shifts to those who object to its validity.¹¹¹ The fact of marriage can be proven through direct and circumstantial evidence.¹¹² Marriage is presumed when spouses live together and have a general and consistent reputation in the community of being married.¹¹³ While illicit cohabitation and blatant disregard for the strictures of marriage will not be tolerated, the law supports recognizing marriages when circumstances suggest that the prerequisites have been met. This presumption, however, can be overcome by positive testimony that, notwithstanding cohabitation and the birth of children, no marriage ceremony took place.¹¹⁴

108. *Viator v. Miller*, 2004-1199, pp. 11–13 (La. App. 3 Cir. 4/27/05); 900 So. 2d 1135, 1144–45.

109. *Id.* at p. 15; 900 So. 2d at 1146.

110. *See generally* *Price v. Fuerst*, 09-545 (La. App. 3 Cir. 11/4/09); 24 So. 3d 289; *Viator*, 2004-1199; 900 So. 2d 1135; *Scamardo v. Dunaway*, 96-1036 (La. App. 5 Cir. 4/29/97); 694 So. 2d 1041; *Greene v. Roy*, 604 So. 2d 1359 (La. Ct. App. 3 Cir. 1992).

111. *Succession of Giordano*, 194 So. 577, 578 (La. 1940). *See generally* *Gaines v. City of New Orleans*, 73 U.S. 642 (1867).

112. *Mazzei v. Gruis*, 55 So. 555, 556 (La. 1911).

113. *See, e.g.*, *Succession of Tyson*, 172 So. 772, 777 (La. 1937); *Howard v. Ingle*, 180 So. 248, 251 (La. Ct. App. 2 Cir. 1938); *Douglas v. Shepard*, 193 So. 264, 266 (La. Ct. App. 2 Cir. 1939); *Cunningham v. Jordan Drilling Co.*, 138 So. 689, 690 (La. Ct. App. 2 Cir. 1932).

114. *See generally* *Succession of Dotson*, 11 So. 2d 488 (La. 1942) (denying existence of marriage even though parties lived together and had four children because wife produced insufficient evidence to show that a marriage ceremony took place, and she subsequently married another man without trying to get a divorce); *Honore v. Jones*,

VII. ABSENCE OF A LEGAL IMPEDIMENT

As do all fifty states, Louisiana prohibits certain persons from entering into a marriage. Those who are already married and those too closely related, according to the standards set forth by the legislature, cannot validly contract marriage in Louisiana. Although minors who marry need the consent of their parents, tutors, or the court, as the case may be, once a minor has contracted marriage, it is valid, even without the necessary consent.¹¹⁵ Louisiana prohibited the marriage of same-sex couples until 2015 when the United States Supreme Court struck down state marriage bans.¹¹⁶ Same-sex marriage is now permitted in Louisiana.¹¹⁷

A. PRIOR MARRIAGE

“A married person may not contract another marriage.”¹¹⁸ A marriage with a person who is already married is absolutely null; it cannot be ratified even after the prior marriage is dissolved, and it can be attacked collaterally or directly, by the parties or any interested person.¹¹⁹ Because the marriage is null from its inception, the non-bigamous party may enter into a valid marriage immediately without having the bigamous marriage declared null.¹²⁰ A party who enters into a bigamous union with the good faith belief that neither party is already married may be entitled to the civil effects of a valid marriage.¹²¹

A marriage is terminated by death, divorce, a judicial declaration of nullity, or a court order authorizing the spouse of a person presumed dead to remarry.¹²² Therefore, if one spouse’s

156 So. 191 (La. 1934) (parties admitted they had no marriage ceremony and no mutual agreement to marry under the common-law marriage statute of Texas). *See also* Succession of Hube, 20 La. Ann. 97 (1868); *Eames v. Woodson*, 46 So. 13 (La. 1908); Succession of Stiles, 11 Teiss. 208 (La. Ct. App. 1914).

115. *See infra* Section IX.B.

116. *See supra* Part III.

117. *Robicheaux v. Caldwell*, 791 F.3d 616, 618–19 (5th Cir. 2015).

118. LA. CIV. CODE ANN. art. 88 (2018). Under prior law, if a party guilty of adultery married the accomplice in adultery, the new marriage could be declared an absolute nullity. *See Rhodes v. Miller*, 179 So. 430, 431–32 (La. 1938) (citing old Louisiana Civil Code article 161, which was repealed in 1990).

119. LA. CIV. CODE ANN. art. 88 cmt. (b) (2018). Parole evidence is permitted to prove a prior undissolved marriage. *See Oliphant v. La. Long Leaf Lumber Co.*, 112 So. 500, 502 (La. 1927).

120. LA. CIV. CODE ANN. art. 88 cmt. (c) (2018).

121. LA. CIV. CODE ANN. art. 96 (2018); *see also infra* Section X.A.1.

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

marriage has not been properly terminated, any subsequent marriage is null.¹²³ A divorce is not final until the signing of the judgment, so any subsequent marriage is null if entered into before the divorce judgment is signed.¹²⁴

Likewise, a relatively null marriage produces civil effects until a declaration of nullity is obtained, so a final judgment of nullity is necessary to terminate the marriage and remove any legal impediment to a subsequent marriage.¹²⁵ A marriage can also be terminated by a doctor's certification of death¹²⁶ or by a judicial declaration of death,¹²⁷ either of which will permit a subsequent, valid marriage. The court order authorizing the person whose spouse is presumed dead to remarry applies only to persons on active duty in the military who are presumed dead.¹²⁸

B. TOO CLOSELY RELATED

Parties who are too closely related, as defined by law, are not permitted to marry. Ascendants and descendants may not marry one another, and collateral relations within the fourth degree, whether related by the whole or half blood, may not marry.¹²⁹ This prohibition applies whether the persons are related by blood or by adoption.¹³⁰ Therefore, parents and grandparents cannot marry children or grandchildren, siblings cannot marry siblings, aunts and uncles cannot marry nephews or nieces, and first cousins cannot validly contract marriage in Louisiana.¹³¹

123. Putative spouse status can be given to the good faith spouse. *See generally* Galbraith v. Galbraith, 396 So. 2d 1364 (La. Ct. App. 2 Cir. 1981) (marriage one day before divorce judgment was signed was invalid but parties were in good faith); Farrell v. Farrell, 275 So. 2d 489 (La. Ct. App. 1 Cir. 1973) (divorce rendered in open court but not signed until two years later, after spouse contracted another marriage); Bhati v. Bhati, 12-707 (La. App. 3 Cir. 12/5/12); 103 So. 3d 1290 (ex-wife could not obtain damages for ex-husband's bigamy because she had already been compensated for a marriage that was never legally perfected).

124. Note that an appeal from a judgment granting or denying a divorce suspends the execution of the judgment. LA. CODE CIV. PROC. ANN. art. 3942 (2018).

125. LA. CIV. CODE ANN. art. 97 (2018).

126. *See* LA. STAT. ANN. § 9:111 (2018).

127. *See* LA. CIV. CODE ANN. arts. 30, 54 (2018); LA. STAT. ANN. § 9:301 (2018); *see also* LA. STAT. ANN. § 9:1441 (2018).

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

129. LA. CIV. CODE ANN. art. 90 (2018). Marriages between collaterals entered into before September 11, 1981, are legal. LA. CIV. CODE ANN. art. 90 cmt. (b) (2018); *see also* Act No. 886, 1987 La. Acts 2438.

130. LA. CIV. CODE ANN. art. 90(B) (2018).

131. *See* LA. CIV. CODE ANN. art. 90 (2018); State v. Guiton, 24 So. 784, 785 (La. 1898) (holding that a half-niece was within the prohibited degrees of kinship).

Relationship prohibitions on marriage stem from scientific and moral objections, but these objections become more attenuated when the parties are related only by adoption.¹³² A court in Louisiana can therefore authorize the marriage of collateral relations within the fourth degree if they are unrelated by blood and legally related only by adoption.¹³³ When hearing the request, courts consider whether family harmony will be preserved or impeded by the union.¹³⁴ For example, if a parent adopted an unrelated, orphaned boyfriend or girlfriend of one of their own children to provide care and ensure health insurance coverage for that child, the two would technically be related as siblings. A court could permit the two, related by adoption only, to wed if family harmony would be preserved.¹³⁵

Even though prohibited under Louisiana law, at least one court has recognized a marriage between first cousins validly contracted in a jurisdiction that permits marriages between first cousins.¹³⁶ Additionally, by special legislation, Louisiana also recognizes marriages between collaterals “within the fourth degree” who are fifty-five years of age or older and whose marriage was entered into on or before December 31, 1992.¹³⁷ Act 7 of 1993 explained that the legislation sought to legalize “collaterals *in* the fourth degree” and the title of the section provides that it applies to “Relations *of* the fourth degree.”¹³⁸ Although the text of the section permits marriage between collaterals “*within* the fourth degree,” it was likely intended to permit marriages only between first cousins after the spouses exceeded child-birthing age.¹³⁹ Given Louisiana’s longstanding laws on marriage and its criminal law on incest,¹⁴⁰ marriages between second- or third-degree

132. LA. CIV. CODE ANN. art. 90(B) (2018).

133. *Id.*

134. LA. CIV. CODE ANN. art. 90 cmt. (e) (2018).

135. *Id.*; see also *Israel v. Allen*, 577 P.2d 762, 765 (Colo. 1978) (finding state statute that prohibited marriage between a brother and a sister related by adoption to be unconstitutional); *State ex rel. Miesner v. Geile*, 747 S.W.2d 757, 758 (Mo. Ct. App. 1988) (permitting uncle and niece related only by adoption to marry).

136. See *Ghassemi v. Ghassemi*, 2007-1927 (La. App. 1 Cir. 10/15/08); 998 So. 2d 731; see also *infra* Section X.A.1.b.

137. LA. STAT. ANN. § 9:211 (2018).

138. Act No. 7, 1993 La. Acts 9 (emphasis added).

139. *Id.* (emphasis added).

140. LA. STAT. ANN. § 14:89 (2018). Crime against nature, or incest, is:

The marriage to, or sexual intercourse with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship. The relationship must be by consanguinity, but it is immaterial whether the parties to the act are related to one another by the whole or half blood.

collateral relations related by blood, no matter when contracted, would not be permitted.

Notably absent from the law is a prohibition when the parties are related only by marriage. For example, after the marriage to a blood or adopted relative has ended, former spouses of parents or grandparents can marry stepchildren or step-grandchildren. In other words, former stepparents can marry their former stepchildren. Additionally, within the collateral line, former spouses can marry former in-laws within what could be considered prohibited degrees of kinship, such as former sisters- and brothers-in-law, aunts and uncles, and first cousins related only by marriage. Moreover, even during the marriage of their parents, children from each spouse's prior relationship (i.e., un-adopted stepchildren) can marry, because they are not related by blood or adoption.

Marriages that are contracted in violation of the above rules are absolutely null but may produce civil effects in favor of a party who entered the marriage in good faith believing that no impediment existed.¹⁴¹ When the parties discover the relationship impediment, however, the civil effects for both parties will terminate.¹⁴²

VIII. CEREMONY

Parties must express their consent to marry at a ceremony in front of a third-party officiant.¹⁴³ Louisiana does not permit parties to create a common-law marriage in the state,¹⁴⁴ although courts will recognize a common-law marriage validly entered into in another state.¹⁴⁵ There are several ceremonial formalities that the parties and the officiant must meet, some of which are mandatory, and others, which although technically required, will not invalidate the marriage if missing. The mandatory provisions of marriage are found in the Civil Code, and those requirements that do not affect the validity of marriage are found in the Revised

LA. STAT. ANN. § 14:89 (2018). The crime is punishable by imprisonment and fines. *See id.*

141. *See* LA. CIV. CODE ANN. art. 96 (2018); *see also infra* Section X.A.2.

142. *See* LA. CIV. CODE ANN. art. 96 (2018).

143. LA. CIV. CODE ANN. art. 91 (2018).

144. *See generally* Succession of Marinoni, 148 So. 888 (La. 1933); Clements v. Folse *ex rel.* Succession of Clements, 2001-1970 (La. App. 1 Cir. 8/14/02); 830 So. 2d 307; State v. Williams, 96-652 (La. App. 3 Cir. 2/5/97); 688 So. 2d 1277; Liberty Mut. Ins. Co. v. Caesar, 345 So. 2d 64 (La. Ct. App. 3 Cir. 1977).

145. Brinson v. Brinson, 96 So. 2d 653, 660 (La. 1957); *see also infra* Part XIV.

Statutes.

A. MANDATORY FORMALITIES

The mandatory formalities for a valid ceremony are two-fold: (1) the parties must be present at a ceremony; and (2) the ceremony must be conducted by a third-party officiant who is qualified or who the parties reasonably believe to be qualified.¹⁴⁶ If no ceremony is held or if these mandatory formalities are not met, the marriage is absolutely null.¹⁴⁷

First, “a marriage may not be contracted by procuration.”¹⁴⁸ Neither party can be absent from the ceremony, and no representative can stand in to represent a party.¹⁴⁹ Therefore, marriage over internet channels or by closed-circuit television is not permitted. By observing both parties expressly consent to marry, the officiant ensures that the third requirement of marriage—free consent of the parties—is met.¹⁵⁰ Although impermissible if contracted in Louisiana, a marriage by procuration has been validated by courts when the marriage was valid under the laws of the state or country where celebrated. For example, Louisiana courts validated the marriage of a couple by proxy under Texas law while the husband was in prison,¹⁵¹ as well as the marriage of a couple by proxy under Turkish law while one spouse remained in Louisiana.¹⁵²

Second, the ceremony must be performed by a third-party officiant who is qualified or reasonably believed by the parties to be qualified.¹⁵³ To be qualified to perform the marriage ceremony, the person must be a state judge, a state justice of the peace, or a clergyman of any religious sect who is authorized by the religion to perform marriages.¹⁵⁴ State judges and justices of the peace have

146. See LA. CIV. CODE ANN. arts. 91–92 (2018); see also LA. CIV. CODE ANN. art. 92 cmt. (b) (2018).

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

148. LA. CIV. CODE ANN. art. 92 (2018).

149. See LA. CIV. CODE ANN. art. 92 cmt. (b) (2018).

150. *Id.* For an interesting discussion on allowing marriage by procuration, see generally Andrea B. Carroll, *Reviving Proxy Marriage*, 76 BROOK. L. REV. 455 (2011).

151. See *Morris v. Morris*, No. 2009-2069, 2010 WL 2342659, at *2 (La. App. 1 Cir. 6/11/10).

152. *United States ex rel. Modianos v. Tuttle*, 12 F.2d 927, 929 (E.D. La. 1925); see also La. Att’y Gen. Op. No. 1950–52, pp. 108–09 (1950); *infra* Part XIV.

153. LA. CIV. CODE ANN. art. 91 (2018).

154. LA. STAT. ANN. § 9:202 (2018). Clergy includes, but is not limited to, priests, ministers, rabbis, and clerks of the Religious Society of Friends. LA. STAT. ANN.

specific territorial limitations, which are generally tied to the jurisdiction of the court,¹⁵⁵ and religious leaders must register with the clerk of court before performing the ceremony.¹⁵⁶ Judges of the courts of the United States are not generally authorized to perform marriages in Louisiana. Several specific provisions of law, however, have given federal judges limited authority to perform marriages during specified time frames.¹⁵⁷ As the time frames set forth in these provisions have long passed, these provisions should be repealed.

Even if the officiant is not qualified to perform the marriage ceremony, the ceremonial requirement can be met if the parties “reasonably believe” that the officiant is qualified.¹⁵⁸ The parties may reasonably believe that any member of the class of persons generally recognized as having the authorization to perform marriage ceremonies is qualified, whether or not properly registered to do so.¹⁵⁹ Reliance on a reasonable belief will prevent the invalidity of marriages for reasons beyond the control of the parties.¹⁶⁰ Parties necessarily have a reasonable belief that religious leaders, whether authorized by their religion or registered with the state, will be qualified. Friends and family, not otherwise authorized or ordained to perform ceremonies, do not qualify as valid officiants and are unlikely to be believed to be qualified by the soon-to-be spouses.

Proof that an authorized officiant performed a ceremony can be established through documentary evidence, such as the marriage license or marriage certificate, and through the testimony of witnesses. In the absence of evidence of a ceremony, marriages have nevertheless been validated based solely on documentary evidence of the marriage license, proof of cohabitation, and the contents of a subsequent marriage license

§ 9:202(1) (2018).

155. See LA. STAT. ANN. § 9:203 (2018). For example, a justice of the Louisiana Supreme Court can perform marriage ceremonies within the state, while a judge of a district court can only perform marriages within the district. *Id.*

156. LA. STAT. ANN. §§ 9:202, :204 (2018). The religious leader must supply “an affidavit stating his or her lawful name, denomination, and address.” LA. STAT. ANN. § 9:204 (2018). The affidavit must be deposited with the clerk of court of the parish where the religious leader “will principally perform marriage ceremonies, or, in the case of Orleans Parish, with the office of the registrar of vital records.” *Id.*

157. LA. STAT. ANN. § 9:203(E) (2018); see also LA. STAT. ANN. §§ 9:202, :204 (2018).

158. LA. CIV. CODE ANN. art. 91 (2018).

159. LA. CIV. CODE ANN. art. 91 cmt. (c) (2018).

160. *Id.*

indicating that the parties had been divorced.¹⁶¹ To the contrary, proof of an unofficial ceremony that fails to meet the prerequisites of law, even if followed by long cohabitation and the birth of several children, will not result in a valid marriage.¹⁶²

B. OTHER CEREMONIAL FORMALITIES

The law requires the parties to meet other ceremonial formalities, none of which, if absent, will render the marriage null. For example, Louisiana law requires the parties to obtain a marriage license,¹⁶³ but a marriage without a marriage license is still valid.¹⁶⁴ If the parties intend to enter into a covenant marriage, the application for the marriage license must include a declaration of their intent, but a marriage without the declaration is still valid.¹⁶⁵ If a minor seeks to marry, the application must include written consent of the minor's parents or tutors, the juvenile court, or both, as required by law.¹⁶⁶ Nevertheless, even if written consent in the marriage application is absent, the marriage is valid.¹⁶⁷

The officiant is instructed not to perform the ceremony until he has received a license authorizing him to do so¹⁶⁸ and twenty-four hours have passed since the license was issued.¹⁶⁹ This delay may be waived by any judge or justice of the peace, or any authorized officiant in Orleans Parish for nonresident parties, upon application of the parties giving serious and meritorious

161. *See* *Allen v. Allen*, 254 So. 2d 489, 490 (La. Ct. App. 3 Cir. 1971).

162. *Sesostrius Youchican v. Texas & P. Ry. Co.*, 86 So. 551, 552 (La. 1920) (finding that a marriage ceremony performed in accordance with Native American tribe custom was not recognized in Louisiana); *see also* *Succession of Cusimano*, 138 So. 95, 96 (La. 1931) (finding that the lack of a marriage ceremony resulted in an invalid marriage).

163. LA. STAT. ANN. § 9:205 (2018). Specific provisions provide the details governing marriage licenses. *See generally* LA. STAT. ANN. §§ 9:221–:228 (2018). A medical certificate is no longer needed to get a marriage license. LA. STAT. ANN. §§ 9:229–:233 (repealed 1988). The license is valid for thirty days from the date it was issued. LA. STAT. ANN. § 9:235 (2018). The license can be reissued if the parties surrender the expired license to the issuing official. LA. STAT. ANN. § 9:236 (2018).

164. LA. CIV. CODE ANN. art. 91 cmt. (a) (2018); *Succession of Jene*, 173 So. 2d 857, 861 (La. Ct. App. 4 Cir. 1965).

165. LA. STAT. ANN. § 9:224(C) (2018).

166. *See* LA. STAT. ANN. § 9:225(A)(2) (2018); LA. CHILD. CODE ANN. art. 1545 (2018).

167. LA. CIV. CODE ANN. art. 91 cmt. (a) (2018).

168. LA. STAT. ANN. § 9:205 (2018).

169. LA. STAT. ANN. § 9:241 (2018). *But see In re State ex rel. Goodwin*, 39 So. 2d 731, 733 (La. 1949) (finding marriage that was in violation of the seventy-two-hour delay valid).

reasons for the waiver.¹⁷⁰ Any person can file an opposition to a marriage, which can result in a hearing if the person presents a sufficient reason to suspend the permission to marry.¹⁷¹

Present at the marriage ceremony must be two competent witnesses of full age, who must sign the marriage certificate along with the parties and the officiant.¹⁷² A medical certificate is no longer required to obtain the license.¹⁷³ Ultimately, marriage licenses and certificates are held by the state division of vital records and by the entity that issued the marriage license.¹⁷⁴ After the acceptance of same-sex marriage in Louisiana, the application for a marriage license was changed to allow applicants to choose “bride,” “groom,” or “spouse,” at their option.¹⁷⁵

Courts have consistently validated marriages when a technical requirement has been unmet.¹⁷⁶ Failing to meet a combination of these technical requirements, with knowledge of the law and blatant disregard thereof, however, may cause a court to invalidate an otherwise valid marriage. In *Malek v. Yekani-Fard*, a couple married in the Islamic Center of New Orleans without obtaining a marriage license or a medical certificate.¹⁷⁷ Two weeks later, the woman married another man to obtain a

170. LA. STAT. ANN. § 9:242 (2018). Any violation of the seventy-two-hour delay, without a valid waiver, may result in revocation of the officiant’s authority to perform marriage ceremonies. LA. STAT. ANN. § 9:243 (2018).

171. See LA. STAT. ANN. §§ 9:261–:263 (2018).

172. See LA. STAT. ANN. §§ 9:244–:245 (2018). *But see* *Tennison v. Nevels*, 2006-2124, p. 2 (La. App. 1 Cir. 6/8/07); 965 So. 2d 425, 426 (finding that marriage of parties with witnesses who were minors was valid); *Parker v. Saileau*, 213 So. 2d 190, 192 (La. Ct. App. 3 Cir. 1968) (finding that marriage without the proper number of witnesses and in violation of the seventy-two-hour delay was valid); *Russell v. Tagliavore*, 153 So. 44 (La. Ct. App. 2 Cir. 1934) (finding that marriage with only one of three witnesses who signed act of celebration was valid).

173. LA. STAT. ANN. §§ 9:229–:233 (repealed 1988) (medical certificates containing proof of blood tests were required to screen for venereal disease and HIV/AIDS).

174. LA. STAT. ANN. §§ 9:251–:256 (2018). Penalties are imposed for failure to complete marriage certificates or falsifying information on the license or certificate. LA. STAT. ANN. §§ 9:254, :256 (2018).

175. LA. STAT. ANN. §§ 9:245, 40:55 (2018). See *Application for Marriage License: State of Louisiana, Orleans Parish*, LA. DEP’T HEALTH, <http://ldh.la.gov/assets/oph/Center-RS/vitalrec/OrleansMarriageApplication.pdf> (last visited Nov. 4, 2018), for a current version of the application for marriage.

176. See, e.g., *Tennison*, 2006-2124, p. 2; 965 So. 2d at 427 (validating marriage even though witnesses were minors); *Parker*, 213 So. 2d at 192 (validating marriage even though number of witnesses was improper and seventy-two-hour delay was not honored); *Landry v. Bellanger*, 45 So. 956, 957 (La. 1908) (validating marriage even though there was no license and the proper number of witnesses were not present).

177. *Malek v. Yekani-Fard*, 451 So. 2d 669, 671–72 (La. Ct. App. 1 Cir. 1984).

“green card” to allow her to work legally in the state.¹⁷⁸ Prior to both alleged marriages, the woman had called the clerk of court’s office and learned of the necessary prerequisites for a valid marriage.¹⁷⁹ The court found the first marriage to be invalid, explaining that “[a]lthough the failure to follow every formal requirement for a valid marriage does not necessarily invalidate it, . . . no attempt was made to follow any of the forms or solemnities prescribed by law.”¹⁸⁰

IX. CONSENT

As in any contract, the parties to a marriage must freely consent to wed. “Consent is not free when given under duress or when given by a person incapable of discernment.”¹⁸¹ Under prior law, consent was also not free when there was a “mistake respecting the person.”¹⁸² “Mistake respecting the person” was interpreted to mean a mistake in the physical identity of a person,¹⁸³ rather than in the qualities of the person, and in the revision of 1987, was eliminated as obsolete.¹⁸⁴

While error and fraud are vices of consent under general contract law, they do not appear in the Civil Code under marriage.¹⁸⁵ Only duress is included in the Civil Code as a vice

178. Malek v. Yekani-Fard, 451 So. 2d 669, 672 (La. Ct. App. 1 Cir. 1984).

179. *Id.* at 672–73.

180. *Id.*

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

182. LA. CIV. CODE art. 91 (1825).

183. *See Verneuille v. Verneuille*, 438 So. 2d 615, 617 (La. Ct. App. 4 Cir. 1983) (concluding that an annulment was inappropriate because “mistake respecting the person” did not include a circumstance when a man married a woman based on her false statement that the child she was carrying was his). *See generally Delpit v. Young*, 25 So. 547 (La. 1899).

184. Act No. 886, 1987 La. Acts 2409. Marriage where one partner has had sex reassignment surgery raises a potential issue in the context of consent to marry if the sex reassignment surgery was never disclosed to the other partner. Under Louisiana law, a new birth certificate can be issued to a transgender individual once sex reassignment surgery is complete. *See* LA. STAT. ANN. § 40:62 (2018). Whether the partner who marries a transgender person without knowledge of the sex reassignment can have the marriage annulled based on error has been left unanswered. Error is no longer expressly included as a vice of consent for marriage, as prior laws’ provisions regarding “mistake respecting the person” were eliminated and rendered obsolete; today, those obsolete provisions could be reinvented in the context of error to annul a marriage when the gender of a party has changed. No Louisiana court has yet to consider the issue.

185. LA. CIV. CODE art. 93 (1948). *But see Spaht*, *supra* note 10, at 1145 (arguing that Civil Code article 93 does not declare that the reasons for defective consent are exclusive and the general articles on error could be applied). Prior to the revision in

that can vitiate a marriage contract under Louisiana law.¹⁸⁶ The Civil Code articles on conventional obligations provide the specifics on duress, and a body of case law has developed applying these rules in the marriage context.

A. DURESS

Duress is defined in the articles on conventional obligations and includes “a reasonable fear of unjust and considerable injury to a party’s person, property, or reputation.”¹⁸⁷ To determine whether the fear is reasonable, courts must consider the age, health, disposition, and other personal circumstances of the party claiming duress.¹⁸⁸ Duress includes both executed and threatened violence, provided “the threat is pending at the time consent is given.”¹⁸⁹ Threats need not only be directed against the party to the marriage; duress can also occur when threats are directed against an ascendant or descendant of the party.¹⁹⁰ Threats of criminal prosecution may likewise amount to duress if the charges are not warranted by the facts.¹⁹¹ If, however, the threatened charges are warranted by the facts, duress may not be found.¹⁹² For example, if a man consented to marry a woman because her father threatened to tell the authorities that he was guilty of the rape of his daughter, the man would be acting under duress if the rape had no basis in fact. Conversely, if the man had sex with the

1987, consent was vitiated when there was a “mistake respecting the person.” See LA. CIV. CODE ANN. art. 91 (repealed and reenacted by Act 886 of 1987). This phrase was interpreted by the courts narrowly to mean mistake regarding the physical identity of the person and was suppressed in the revision as unnecessary. See generally *Delpit v. Young*, 25 So. 547 (La. 1899). If a party’s consent was affected by a true mistake involving the physical identity of the person, the general articles on error should permit annulment of the marriage. See Spaht, *supra* note 10, at 1145; see also Emily Latham, Comment, *Recognizing Error and Fraud in the Contract of Marriage in Louisiana*, 66 LA. L. REV. 563 (2006) (discussing vices of consent in a marriage context and arguing that error and fraud should be included as grounds for annulment of marriage).

186. See LA. CIV. CODE ANN. art. 1959 (2018).

187. *Id.*; see also LA. CIV. CODE ANN. art. 93 cmt. (b) (2018) (“Threats to reputation or fortune might be sufficient to invalidate a marriage under this Article.”).

188. LA. CIV. CODE ANN. art. 1959 (2018).

189. LA. CIV. CODE ANN. art. 93 cmt. (b) (2018); see also *Quealy v. Waldron*, 52 So. 479, 480 (La. 1910).

190. LA. CIV. CODE ANN. art. 1960 (2018). The court has discretion to consider threatened injury to persons other than ascendants or descendants. *Id.* See generally *Lacoste v. Guidroz*, 16 So. 836 (La. 1985).

191. See LA. CIV. CODE ANN. art. 1962 (2018). See generally *Grundmeyer v. Sander*, 143 So. 45 (La. 1932).

192. See generally LA. CIV. CODE ANN. art. 1962 (2018); *Lacoste*, 16 So. at 838.

under-aged daughter, the father's alleged threats would be based in fact because of his daughter's age and the criminal laws on rape,¹⁹³ so consent to marry would be unaffected by duress.

Beyond duress, a person who is incapable of discernment cannot freely consent.¹⁹⁴ A person incapable of discernment may include one who suffers from a mental infirmity, is under the influence of alcohol or drugs, or is too young to understand the consequences of the marriage.¹⁹⁵ Ignorance of the law is not enough to render consent unfree, but insanity may be.¹⁹⁶ Further, because no floor on the age to marry exists under the law, some minors may be too young to understand the consequences of marriage; therefore, a court must determine whether the minor is of an age or mental understanding to consent to wed.¹⁹⁷ Once the person incapable of discernment regains his abilities, or when a minor reaches the age of majority, the action to annul is no longer available, assuming the person confirms the marriage by continuing to live as a married person.

A marriage without free consent is a relative nullity.¹⁹⁸ The party whose consent was not free is the only party who can seek to have the marriage annulled.¹⁹⁹ Because the marriage is considered a valid marriage until declared null by a court, civil effects of the marriage are available to both parties prior to the judgment declaring the marriage null.²⁰⁰

B. AGE TO MARRY

The Code does not provide a mandatory age for marriage, but requires that spouses give their "free consent" to marry.²⁰¹ Free consent is vitiated when given by a person incapable of discernment, such as minors too young to understand the consequences of their actions.²⁰² The Children's Code contains specific restrictions on officiants who are not authorized to perform marriage ceremonies involving minors unless the minor has the

193. See LA. STAT. ANN. §§ 14:41–:43 (2018).

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

195. LA. CIV. CODE ANN. art. 93 cmt. (d) (2018).

196. LA. CIV. CODE ANN. art. 93 cmt. (c) (2018).

197. See Spaht, *supra* note 10, at 1146.

198. LA. CIV. CODE ANN. art. 95 (2018); see also *infra* Section X.B.

199. LA. CIV. CODE ANN. art. 95 (2018); see also *infra* Section X.B.

200. LA. CIV. CODE ANN. art. 97 (2018).

201. LA. CIV. CODE ANN. art. 87 (2018).

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

written consent of both parents, the minor's tutor, a person awarded custody, or the juvenile court.²⁰³ Minors under the age of sixteen must also obtain written authorization to marry from the juvenile court.²⁰⁴ The court may authorize the marriage in writing²⁰⁵ when there is a "compelling reason" to wed.²⁰⁶ Although no court has defined "compelling reason," pregnancy of the minor should meet that standard.

When considering both the Civil Code and the Children's Code, both parties should be over the age of eighteen before contracting marriage. Like most states, however, Louisiana does not include minority as an impediment to marriage. The marriage of a minor is a valid marriage, but the minor whose consent was not free can declare it null based on his minority.²⁰⁷ Because the minor is emancipated by marriage, the right to bring an action to annul belongs to the minor and not to the minor's parents.²⁰⁸

To prevent the marriage of minors, the law requires that applicants for a marriage license must present a valid birth certificate.²⁰⁹ If the minor presents a false birth certificate to the clerk issuing the license or no license is issued at all, however, the minor may still have a valid marriage. If an officiant other than a judge or justice of the peace knowingly marries a minor without the necessary written consent, the officiant will be permanently deprived thereafter of the right to perform marriage ceremonies.²¹⁰

203. LA. CHILD. CODE ANN. art. 1545 (2018).

204. LA. CHILD. CODE ANN. art. 1545(B) (2018). Authority must be sought from the court exercising juvenile jurisdiction in the parish where the minor resides or where the marriage ceremony will be performed. LA. CHILD. CODE ANN. art. 1545(B) (2018); *see also* LA. CHILD. CODE ANN. art. 1546 (2018).

205. LA. CHILD. CODE ANN. art. 1549 (2018). The court may not give its reasons for granting the request, but a copy of the written authorization must be given to the official who issues the marriage license, and it must be attached to the marriage certificate. *Id.*

206. LA. CHILD. CODE ANN. art. 1547 (2018).

207. LA. CIV. CODE ANN. art. 87 cmt. (b) (2018) ("[O]nce a minor has contracted marriage that marriage is valid. This revision does not change the prior jurisprudential rule that the Louisiana statutory provisions imposing an age requirement for marriage in general and special third-party consent requirements for marriage of minors are only directory to officiants."). *See generally* State v. Golden, 26 So. 2d 837 (La. 1946).

208. Delpit v. Young, 25 So. 547, 548 (La. 1899). Minors are emancipated by marriage, *see* LA. CIV. CODE ANN. art. 367 (2018), and thus have the procedural capacity to have their marriages annulled.

209. LA. STAT. ANN. § 9:225 (2018) (declared unconstitutional as applied in Viet Anh Vo v. Gee, 301 F. Supp. 3d 661 (E.D. La. 2017)).

210. LA. CHILD. CODE ANN. art. 1550 (2018).

Nonetheless, the marriage will be valid, assuming, of course, that a valid ceremony was performed and that no legal impediments were present.

X. NULL MARRIAGES

A marriage that fails to meet the necessary prerequisites is null. Rather than file a petition for divorce, those parties whose marriage is defective must file a petition to annul the marriage, distinct from the canon law annulment of the Catholic Church. The marriage is either absolutely null or relatively null depending on the defect.²¹¹ The significance of the marriage prerequisites from a societal standpoint drives the action in nullity.

A marriage is absolutely null when contracted without a valid ceremony, by procuracy, or in violation of an impediment.²¹² Marriages without a ceremony or burdened with a legal impediment violate the public order and are considered no marriage at all.²¹³ In other words, an absolutely null marriage is devoid of effect from the moment of inception. Because of the potential prejudice that could befall a spouse who in good faith enters into an absolutely null marriage unknowingly, Louisiana grants the civil effects of marriage to a good faith putative spouse in an invalid marriage.²¹⁴

In contrast, if a spouse did not freely consent at the ceremony, the marriage is relatively null.²¹⁵ A marriage lacking consent is a valid marriage until pronounced null by a court.²¹⁶ Because consent between the spouses is required to protect the parties to the marriage contract, rather than the public as a whole, the marriage can be confirmed or challenged by the party whose consent was lacking.²¹⁷

A. ABSOLUTELY NULL MARRIAGE

Marriages contracted in violation of an impediment, without a valid ceremony, or by procuracy are absolutely null—the common-law equivalent of a void marriage.²¹⁸ An absolutely null

211. LA. CIV. CODE ANN. arts. 94–95 (2018).

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

213. LA. CIV. CODE ANN. art. 2030 (2018).

214. LA. CIV. CODE ANN. art. 96 (2018); *see also infra* Section X.A.1.

215. LA. CIV. CODE ANN. art. 95 (2018).

216. *Id.*

217. LA. CIV. CODE ANN. art. 2031 (2018).

218. LA. CIV. CODE ANN. art. 94 (2018). By acts of the legislature, all marriages

marriage is void *ab initio* and cannot be cured by confirmation after removal of the impediment.²¹⁹ Although no judicial declaration of nullity is required, either party to the marriage or any other interested party can bring an action to annul the absolutely null marriage.²²⁰ The nullity may be raised in a direct action or collaterally, either as a claim or as a defense to the claim of another.²²¹ One who is in an absolutely null marriage is free to marry without seeking a declaration of nullity,²²² although it is common for parties to seek a declaration to formally announce their status or for the purpose of obtaining incidental relief.²²³ The action to annul an absolutely null marriage does not prescribe.²²⁴

An absolutely null marriage produces no civil effects for either the parties or the children of the null marriage, with one notable exception.²²⁵ If either spouse to the marriage was in good faith when the marriage was contracted, the marriage will be deemed putative, the children born of the putative marriage will be

between collateral relations contracted prior to September 11, 1981, have been validated. *See* Act No. 886, 1987 La. Acts 2438; Act No. 647, 1981 La. Acts 1244.

219. Succession of Minvielle, 15 La. Ann. 342, 342 (1860) (“[T]he nullity . . . is absolute, and cannot be cured by ratification.”); *Farrell v. Farrell*, 275 So. 2d 489, 492 (La. Ct. App. 1 Cir. 1973). Confirmation is the process through which an individual cures a relative nullity. *See* LA. CIV. CODE ANN. art. 1842 (2018).

220. LA. CIV. CODE ANN. art. 94 (2018). Even a bigamist may assert the nullity of a marriage. LA. CIV. CODE ANN. art. 94 cmt. (c) (2018); *see also* *Clark v. Clark*, 192 So. 2d 594, 597 (La. Ct. App. 3 Cir. 1966). Although parties generally attack the validity of their own marriages, other entities, such as the Internal Revenue Service and insurance companies, can attack absolutely null marriages. *See, e.g.*, *Prieto v. Succession of Prieto*, 115 So. 911, 912 (La. 1928) (allowing potential heirs to decedent who contracted a bigamist marriage to bring an action); *Burrell v. Burrell*, 154 So. 2d 103, 105 (La. Ct. App. 1 Cir. 1963) (finding that an action for a judicial declaration of nullity is not restricted to only the prejudiced spouse).

221. LA. CIV. CODE ANN. art. 94 cmt. (c) (2018).

222. In *Gaines v. Relf*, a famous Louisiana successions case that reached the United States Supreme Court, the Court found the plaintiff to be the legitimate child of her deceased father because her mother’s alleged undissolved marriage at the time that she married plaintiff’s father was an absolutely null marriage itself. *Gaines v. Relf*, 53 U.S. 472, 595 (1851). Plaintiff’s mother was therefore recognized as having entered into a valid marriage with plaintiff’s father, even though no declaration of nullity of the first marriage had issued. *Id.*

223. Incidental relief, which includes spousal support, child support, child custody, community property, and use of the community movables and immovables, may be available to a good faith spouse of an absolutely null marriage. *See infra* Section X.A.2.

224. Succession of Gabisso, 44 So. 438, 441 (La. 1907).

225. LA. CIV. CODE ANN. art. 96 (2018); *Burrell*, 154 So. 2d at 106 (finding that spouses who both knew of the impediment to marriage did not reap any civil effects and their children were not legitimate); Succession of Virgin, 24 La. Ann. 485, 485–86 (1872) (finding that children were illegitimate and could not inherit from parents where both spouses were in bad faith).

legitimate, and the spouse or spouses in good faith will receive the civil effects of the marriage.²²⁶

1. GOOD FAITH PUTATIVE SPOUSES

A party who enters into an absolutely null marriage under the mistaken belief that the marriage is valid may nonetheless receive the benefits of a valid marriage if the party contracted the marriage in good faith.²²⁷ The putative marriage rule may apply when one spouse is already married, when the spouses are related within the prohibited degrees of kinship, or when no valid marriage ceremony took place.

Good faith has been defined by jurisprudence as the “honest and reasonable belief” that no legal impediment to the marriage exists.²²⁸ A party must be in good faith at the time the party enters into the marriage, and such good faith can arise from an error of fact²²⁹ or an error of law.²³⁰ The good faith of a party who enters into a null marriage is presumed.²³¹ As such, a presumption exists as to the validity of the second marriage.²³² The burden of proof rests with the party attacking the second marriage to prove its

226. LA. CIV. CODE ANN. art. 96 (2018); *see also infra* Section X.A.2.

227. LA. CIV. CODE ANN. art. 96 (2018). *See generally* Monica Hof Wallace, *The Pitfalls of a Putative Marriage and the Call for a Putative Divorce*, 64 LA. L. REV. 71 (2003); Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1 (1985).

228. LA. CIV. CODE ANN. art. 96 cmt. (d) (2018).

229. *See generally* Succession of Pigg, 84 So. 2d 196 (La. 1955) (putative wife relied on husband’s fraudulent divorce from first wife); *Alfonso v. Alfonso*, 99-261 (La. App. 5 Cir. 7/27/99); 739 So. 2d 946 (putative wife relied on false divorce papers presented from husband’s divorce in Mexico); Succession of Marinoni, 164 So. 797, 805–06 (La. 1935) (putative wife relied on husband’s assurance, and he was a lawyer); *Jones v. Squire*, 69 So. 733, 736 (La. 1915) (putative wife believed husband who told her that the clerk who issued the marriage license told him that if her first husband was missing for ten years that the parties could validly marry).

230. *See* Succession of Buissière, 5 So. 668, 670 (La. 1889) (putative wife was told that marriage between an uncle and a niece was valid if contracted in Mississippi); *Funderburk v. Funderburk*, 38 So. 2d 502, 504 (La. 1949) (putative wife relied on a null divorce obtained in a court of improper venue); *Jones v. Equitable Life Ins. Co.*, 173 So. 2d 373, 377 (La. Ct. App. 1 Cir. 1965) (putative wife had no knowledge that it was illegal for her to contract marriage with her spouse because she was his accomplice in adultery); *Saacks v. Saacks*, 96-736, pp. 7–8 (La. App. 5 Cir. 1/28/97); 688 So. 2d 673, 676 (putative wife believed her marriage in Mexico was invalid under Mexican law); Succession of Lynch v. United States, 17 F. Supp. 674, 676 (W.D. La. 1936) (wife was in good faith believing that a conviction and sentence of her husband to the penitentiary gave her a divorce).

231. LA. CIV. CODE ANN. art. 96 cmt. (d) (2018).

232. *See* Gathright v. Smith, 368 So. 2d 679, 683 (La. 1978); *Lands v. Equitable Life Assurance Soc’y of U.S.*, 120 So. 2d 74, 77 (La. 1960).

invalidity.²³³ The presumption of good faith, however, is not available to a spouse who was in bad faith or whose prior undissolved marriage is the cause of the nullity; instead, that spouse must affirmatively prove that the second marriage was contracted in good faith.²³⁴

Good faith is a subjective, fact-intensive inquiry, although the objective element of reasonableness permeates the analysis. What constitutes good faith is relative and “depends ultimately upon the facts and circumstances in each individual case.”²³⁵ In light of the wide variation in facts, a body of case law has developed interpreting the broad limits of good faith.²³⁶

a. Previous Undissolved Marriage

When examining good faith, courts have considered whether a spouse, who knows that his intended spouse had been previously married, has a duty to investigate the prior marriage to determine whether it was actually dissolved. Courts have generally rejected one spouse’s sheer reliance on the other spouse’s word that the divorce was final, especially when there is reasonable suspicion that an impediment exists.²³⁷ Courts have said that “a party alleging good faith cannot close her ears to information or her eyes to suspicious circumstances” and “[s]he must not act blindly or without reasonable precautions.”²³⁸ Failure to conduct an independent investigation, however, will not preclude a finding of good faith when other circumstances are present to support the conclusion that no impediment existed.

For example, in *Gathright v. Smith*,²³⁹ the court found the putative husband to be in good faith even though he failed to investigate his wife’s prior undissolved marriage because he had not received any information to cast doubt on the validity of his marriage, and his wife’s children had concealed the true facts of her first marriage from him.²⁴⁰ Similarly, in *Succession of*

233. See LA. CIV. CODE ANN. art. 96 cmt. (d) (2018).

234. *Id.*; *Gathright v. Smith*, 368 So. 2d 679, 683 (La. 1978).

235. *Succession of Chavis*, 29 So. 2d 860, 863 (La. 1947).

236. See *supra* Section X.A.1.

237. See, e.g., *Schafer v. Schafer*, 379 So. 2d 864, 866–67 (La. Ct. App. 4 Cir. 1980); *Succession of Hopkins*, 114 So. 2d 742, 744–45 (La. Ct. App. 1 Cir. 1959).

238. *Hopkins*, 114 So. 2d at 744 (internal citations and quotation marks omitted).

239. *Gathright*, 368 So. 2d 679.

240. *Id.* at 685.

Chavis,²⁴¹ the court found the putative wife to be in good faith without an investigation because others told her that her husband had divorced his first wife, his first wife lived in the same city and never asserted herself as his spouse, and she had no reasonable suspicion of the impediment to marriage.²⁴²

To the contrary, in *Succession of Taylor*,²⁴³ the court failed to find good faith for a wife who did not investigate her husband's claim that he was divorced because she had information to show that his claim was false.²⁴⁴ Not only did his first wife tell her that there had been no divorce, but two friends cautioned her that he had not been divorced.²⁴⁵ Based on this evidence, the court concluded that she had a duty to investigate her intended husband's marital status before getting married, which she had not done.²⁴⁶

Courts have considered a spouse's education and age when assessing good faith. For spouses who validly marry at a young age, are illiterate or uneducated, or rely on promises of divorce by an "older, wiser" spouse, courts have found good faith when entering into an invalid second marriage.²⁴⁷ If, however, the

241. *Succession of Chavis*, 29 So. 2d 860 (La. 1947).

242. *Id.* at 864; *see also* *Smith v. Smith*, 10 So. 248, 248–49 (La. 1891) (both putative wife and former husband believed they were validly divorced); *In re Succession of Jones*, 2008-1088, p. 11 (La. App. 3 Cir. 4/22/09); 6 So. 3d 331, 338–39 (putative wife believed that husband was divorced, and statements made by husband's children that "we still have a mother" failed to contain any "certain or authoritative knowledge" that there was an impediment to her marriage).

243. *Succession of Taylor*, 2 So. 581 (La. 1887).

244. *Id.* at 583–84.

245. *Id.* at 584.

246. *Id.*; *see also* *Succession of Hopkins*, 114 So. 2d 742, 745 (La. Ct. App. 1 Cir. 1959) (wife was not in good faith because she had been told about husband's first wife and read letters from his daughter); *Succession of Glover*, 153 So. 496, 497 (La. Ct. App. 1934) (wife should have investigated intended husband's marital status because she had reasons to believe his assertions that he was divorced were false); *Prieto v. Succession of Prieto*, 115 So. 911, 913 (La. 1928) (husband knew that wife had a living husband who she had never divorced and therefore could not be found in good faith); *Jackson v. Swift & Co.*, 151 So. 816, 818 (La. Ct. App. 2 Cir. 1934) (wife was not in good faith because lawyer advised her that her divorce to her first husband was not final); *Hunter v. Richardson*, 346 F. Supp. 123, 125 (M.D. La. 1972) (wife was not in good faith because she knew her husband had been previously married and failed to inquire whether marriage had been terminated); *Schafer v. Schafer*, 379 So. 2d 864, 866 (La. Ct. App. 4 Cir. 1980) (wife was not in good faith because she was aware that her husband's foreign divorce from his first wife was "clouded").

247. *See, e.g.,* *Eddy v. Eddy*, 271 So. 2d 333, 335 (La. Ct. App. 2 Cir. 1987) (wife was sixteen when she married, and her husband told her that he would get a divorce and subsequently told her he actually got a divorce); *Succession of Barbier*, 296 So. 2d 390,

spouse seeking putative status could have located the first spouse with ease or had an understanding of the legal process of divorce, courts are less likely to find good faith.²⁴⁸

Courts have also recognized good faith when the putative spouse relied on an invalid divorce judgment from the first marriage. Putative spouses have relied on: judgments of divorce against a spouse who was falsely alleged to be missing;²⁴⁹ preliminary judgments of divorce that were never finalized;²⁵⁰ and, out-of-state judgments of divorce that were falsified.²⁵¹ Although errors of law as to the propriety of a prior divorce judgment are not likely to impugn the good faith of a putative spouse, the unique facts and circumstances of each case give the courts great discretion when assessing good faith.

b. Too Closely Related

Parties who are related within the prohibited degrees for marriage may obtain the civil effects of marriage if the spouses believed in good faith that the marriage was valid when contracted.²⁵² If, for example, the parties were unaware of their blood relationship at the time of the marriage, the putative spouse

392 (La. Ct. App. 4 Cir. 1974) (wife was sixteen and husband swore to her family he was unmarried and the family did some investigating); *Succession of Primus*, 131 So. 2d 319, 320 (La. Ct. App. 1 Cir. 1961) (wife who was illiterate and thirteen when married was told by her husband that he would get a divorce); *Tillison v. Tillison*, 129 So. 2d 522, 524 (La. Ct. App. 1 Cir. 1961) (wife was illiterate and saw what she thought were divorce papers).

248. *See* *Rebouche v. Anderson*, 505 So. 2d 808, 812–13 (La. Ct. App. 2 Cir. 1987) (noting that even though wife was of low intelligence, she was thirty years old when she left her legal husband, knew how to find him, and was aware of the procedural requirements to obtain a divorce).

249. *Succession of Pigg*, 84 So. 2d 196, 197 (La. 1955); *Funderburk v. Funderburk*, 38 So. 2d 502, 503 (La. 1949).

250. *Prince v. Hopson*, 89 So. 2d 128, 129–30 (La. 1956) (parties relied on a preliminary default judgment of divorce); *see also* *Farrell v. Farrell*, 275 So. 2d 489, 492 (La. Ct. App. 1 Cir. 1973) (spouses relied on a divorce decree rendered in open court, but unsigned by the judge until two years later); *Smith v. Smith*, 10 So. 248, 249 (La. 1891) (spouses relied on an out-of-state divorce decree, which may have been entered into without jurisdiction over the parties); *Galbraith v. Galbraith*, 396 So. 2d 1364, 1369 (La. Ct. App. 2 Cir. 1981) (spouses relied on a divorce rendered in open court, but without having a signed judgment).

251. *See, e.g.*, *Mara v. Mara*, 452 So. 2d 329, 332 (La. Ct. App. 4 Cir. 1984) (married couple relied on false divorce in an Alabama divorce scam); *Tillison*, 129 So. 2d at 524 (prior to second marriage, wife received what she thought were divorce papers from Mississippi, which she signed and returned).

252. A marriage between first cousins that is valid in the state where contracted will be valid in Louisiana. *See supra* Section VII.B.

rule would give effect to their invalid marriage. Because the prohibited degrees of relations extend only as far as first cousins, it is unlikely that parties would be unaware of their blood relationship. Rather, parties are more likely to suffer from an error of law as to the general validity of marriages between certain blood relatives.

To give effects to invalid marriages between prohibited relations, courts have required the error of law to be actual and excusable.²⁵³ In *Succession of Buissière*, a young girl married her uncle in Mississippi under the belief that a marriage between an uncle and a niece could be validly contracted there.²⁵⁴ The woman was a minor, brought over from France by her parents for purposes of the marriage, and she lived as his wife and had his two children.²⁵⁵ The court recognized her status as putative wife because she was in good faith, even though her good faith lacked a legal foundation.²⁵⁶

Several years later, in *Chandler v. Hayden*, a woman who married her first cousin, knowing him to be her first cousin, sought putative spouse status, claiming that she was unaware that marriage between first cousins was prohibited in Louisiana.²⁵⁷ The court rejected her request, finding that her error of law was neither actual nor excusable because she had been made aware that it was against the law for first cousins to marry.²⁵⁸

c. No Marriage Ceremony

Whether parties can obtain putative spouse status without a marriage ceremony has been the subject of debate. Article 96 of the Civil Code permits spouses who “contract” a marriage in good faith to enjoy its civil effects.²⁵⁹ Originally, the Louisiana Supreme Court concluded that civil effects were only available to a marriage actually contracted, denying putative spouse status in an alleged marriage where the parties simply obtained a marriage license but failed to appear before any officiant to perform a ceremony.²⁶⁰ Just

253. *Succession of Buissière*, 5 So. 668, 669 (La. 1889); *Chandler v. Hayden*, 105 So. 80, 81 (La. 1925).

254. *Buissière*, 5 So. at 669.

255. *Id.*

256. *Id.* at 670.

257. *Chandler*, 105 So. at 81.

258. *Id.*

259. LA. CIV. CODE ANN. art. 96 (2018).

260. *See Succession of Cusimano*, 138 So. 95 (La. 1931). In *Cusimano*, the parties

four years later, however, in *Succession of Marinoni*, the court awarded civil effects to the child of an absolutely null union even though the parties failed to have a ceremony.²⁶¹ In *Marinoni*, the putative wife was a young foreign-born woman who was ignorant of the laws and customs of the United States, and her putative husband was an older attorney who told her that getting a marriage license and having their marriage blessed by a priest at a later date would constitute a valid marriage.²⁶² Even without a ceremony, the court deemed the young woman a putative wife, and therefore her daughter was declared legitimate.²⁶³

Courts have been critical of the *Marinoni* decision, expressing concern that giving the status of married to spouses who do not attempt a marriage ceremony will ultimately sanction common-law marriage in Louisiana. *Marinoni* has been limited to its facts²⁶⁴ but nonetheless remains good law.²⁶⁵

At least one court has applied *Marinoni*, without so stating, by awarding civil effects without a formal marriage ceremony to a woman who believed she was married after obtaining a license and visiting an officiant.²⁶⁶ The husband challenged the status of the parties as married, claiming that no ceremony was attempted and the parties knew they were not married.²⁶⁷ The court found the wife's story to be more credible because she had been given a wedding ring, they lived as married for forty years, and they had

only obtained a marriage license and did not appear before any official. *Succession of Cusimano*, 138 So. 95, 96 (La. 1931). The court concluded, "As there was no marriage contracted by [the alleged spouses], even a void one, the status that existed between them cannot be deemed that of a putative marriage . . ." *Id.*; see also *Succession of Rossi*, 214 So. 2d 223, 227 (La. Ct. App. 4 Cir. 1968) (stating that some kind of ceremony should take place for a putative marriage to exist).

261. *Succession of Marinoni*, 164 So. 797, 804 (La. 1935). The parties did secure a marriage license. *Id.*

262. *Id.* The putative wife was born in Italy, emigrated to the United States at thirteen, and was married at seventeen. *Id.* at 802–03. She was unable to read English and understood very little English. *Id.* at 803.

263. *Marinoni*, 164 So. at 812–13.

264. *Rossi*, 214 So. 2d at 227 (distinguishing *Marinoni* on its facts and opining that some kind of ceremony should take place for a putative marriage to exist).

265. See LA. CIV. CODE ANN. art. 96 cmt. (e) (2018); see also David Gruning, *Mapping Society Through Law: Louisiana Civil Law Recodified*, 19 TUL. EUR. & CIV. L.F. 1, 21 (2004).

266. See *Thomason v. Thomason*, 2000-522, p. 5 (La. App. 3 Cir. 12/6/00); 776 So. 2d 553, 556–57. The putative husband and wife lived together as a married couple for forty years and had children during that time. See generally *id.*

267. *Id.* at p. 1; 776 So. 2d at 554.

children during that time.²⁶⁸

In light of *Marinoni* and the cases that have followed, putative spouse status may be available without a marriage ceremony in limited circumstances. Unless the unique circumstances akin to *Marinoni* arise, a putative spouse must demonstrate that some form of marriage ceremony took place—simply obtaining a marriage license will not suffice.²⁶⁹

2. CIVIL EFFECTS

The good faith putative spouse is entitled to civil effects from the marriage, which are not limitless. Civil effects include filial, financial, contractual, and property rights, all derived under state law.²⁷⁰ In fact, the civil effects provide the exclusive remedy to the aggrieved spouse when the marriage is invalid.²⁷¹ The request for civil effects can be made at the death of a spouse²⁷² or incidental to a proceeding for a declaration of nullity of the putative marriage.²⁷³ In connection with the request for a declaration of nullity, the court can award incidental relief that would be permitted incidental to a petition for divorce.²⁷⁴

268. See generally *Thomason v. Thomason*, 2000-522, p. 1 (La. App. 3 Cir. 12/6/00); 776 So. 2d 553, 554.

269. Note that the presumption of validity of a marriage does not apply for a relationship that begins in open concubinage. See *Succession of Rossi*, 214 So. 2d 223 (La. Ct. App. 4 Cir. 1968). While a presumption of marriage may arise from cohabitation and a general reputation that the parties are married, from the beginning, the relationship must be based on a ceremonial marriage. See generally *id.*; see also ELDON E. FALLON, *LOUISIANA PRACTICE: TRIAL HANDBOOK FOR LOUISIANA LAWYERS* § 21:8 (3d ed. 2017).

270. Courts have construed civil effects to encompass rights derived from state law, but not rights derived from federal law. Concern has arisen that defining “spouse” under a federal statute as anything other than a legal spouse would impair the uniform application of the federal statute, depending on each state’s laws. See *United States v. Robinson*, 40 F.2d 14, 16 (5th Cir. 1930). Therefore, putative spouses in Louisiana have been denied benefits under federal statutes—namely, the Federal Employers’ Liability Act. See *Beebe v. Moormack Gulf Lines*, 59 F.2d 319, 320 (5th Cir. 1932) (noting that federal law does not permit a second recovery by a wife entitled to the effects of marriage under state law).

271. See *Bhati v. Bhati*, 2012-707, p. 2 (La. App. 3 Cir. 12/5/12); 103 So. 3d 1290, 1291 (denying a claim for damages due to a spouse’s bigamy because receiving civil effects from the invalid marriage is the proper relief).

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

273. LA. CIV. CODE ANN. arts. 151–152 (2018).

274. *Id.*

a. Children

For children born of a null marriage, once one of the parties is in good faith, any child born during the marriage is legitimate and is treated as born of a valid marriage.²⁷⁵ Conversely, if neither party to the marriage is in good faith, a child born of the absolutely null union is not legitimate and will receive no civil effects as a result of the null marriage. A child, however, may establish filiation to his biological parents, which will entitle the child to rights of support and inheritance as any legitimate child would receive.²⁷⁶

Courts are keenly aware of the troublesome nature of this rule when a child, through no fault of his own, is born into an absolutely null marriage when neither spouse is in good faith. In *Burrell v. Burrell*, the mother of three children born during a null marriage sought child support from her alleged spouse.²⁷⁷ The court denied the request because the mother and her alleged spouse knew that the mother was still married to another man.²⁷⁸ No civil effects flowed to either party; consequently, the children were not legitimate.²⁷⁹ The children were, however, born during the ongoing, valid marriage between the mother and another man.²⁸⁰ The court applied the legal presumption that the husband of the mother is the father of all children born during the marriage, so the husband would be responsible for the children, absent a timely disavowal action.²⁸¹

Without an existing presumed father (as in the *Burrell* case), a child born to an absolutely null union when neither spouse is in good faith would be denied rights from his biological father because the child is not considered to be born during a marriage. Under the law of filiation, however, the child can file a paternity action to establish his biological relationship.²⁸² Because no time restrictions limit the child's right to bring the paternity action, except in the case of succession rights to the alleged father's

275. See generally *Succession of Chavis*, 29 So. 2d 860 (La. 1947); *Farrell v. Farrell*, 275 So. 2d 489 (La. Ct. App. 5 Cir. 1973); *Melancon v. Sonnier*, 157 So. 2d 577 (La. Ct. App. 3 Cir. 1963).

276. See LA. CIV. CODE ANN. art. 197 (2018).

277. *Burrell v. Burrell*, 154 So. 2d 103 (La. Ct. App. 1 Cir. 1963).

278. *Id.* at 105.

279. *Id.* at 108.

280. *Id.* at 104–05.

281. *Id.* at 105.

282. LA. CIV. CODE ANN. art. 197 (2018).

estate,²⁸³ the child is less likely to be prejudiced by this rule.

Further, the adoption of a child by a spouse in an invalid marriage is unaffected by the invalid, but putative marriage. In *In re Koonce*, a good faith putative husband learned that his marriage was null and sought to set aside an adoption decree under which he had adopted the children of his putative spouse.²⁸⁴ The court rejected his demand, finding that the stepparent adoption was unaffected by the status of his marriage as putative.²⁸⁵

b. Support and Other Rights

A putative spouse is entitled to the incidents of marriage, including fidelity, support, and assistance.²⁸⁶ As a result, a putative spouse is entitled to seek spousal support, both interim and final,²⁸⁷ and can also seek the marital portion.²⁸⁸ In either case, the putative spouse entitled to seek relief must meet the codal requirements for receiving support. For final spousal support, the spouse must demonstrate a need, the ability of the other spouse to pay, and freedom from fault.²⁸⁹ While a putative spouse may be in good faith in contracting an invalid marriage, the spouse may nonetheless be guilty of fault in the breakdown of the putative marriage, which could negate an award of final support.²⁹⁰

An interesting issue surrounding the timing of fault in a putative marriage has not yet been addressed by the jurisprudence. For a spouse to receive final support after a divorce, the spouse must be free from fault in the breakdown of the marriage prior to the filing of a proceeding to terminate the marriage.²⁹¹ Because no judicial proceeding to declare its nullity is necessary for an absolutely null marriage, the law does not make

283. LA. CIV. CODE ANN. art. 197 (2018).

284. *In re Koonce*, 380 So. 2d 140 (La. Ct. App. 1 Cir. 1979).

285. *Id.* at 142.

286. *Cortes v. Fleming*, 307 So. 2d 611, 616 (La. 1973).

287. *Id.*; *Galbraith v. Galbraith*, 396 So. 2d 1364, 1370 (La. Ct. App. 2 Cir. 1981) (concluding that when both parties are in good faith, alimony is permitted under the same rules as alimony after divorce; even a good faith spouse to the putative marriage could commit fault sufficient to preclude an award of alimony).

288. *Smith v. Smith*, 10 So. 248, 251 (La. 1891).

289. *See* LA. CIV. CODE ANN. art. 112 (2018).

290. *Galbraith*, 396 So. 2d at 1370. The *Galbraith* court concluded that final support was permitted even when both of the spouses were in good faith in contracting the invalid marriage, but one judge expressed concern that the decision unnecessarily expanded the rights permitted to putative spouses. *Id.* at 1370 (Jones, J., concurring in part and dissenting in part).

291. LA. CIV. CODE ANN. art. 111 cmt. (c) (2018).

clear when support-preclusive fault must occur in the context of a putative marriage. In other words, without a “proceeding to terminate the marriage,” when must fault occur to prevent an incidental award of final spousal support? When no proceeding is filed, it would be reasonable to preclude final spousal support if the fault occurred prior to the time when civil effects terminate under article 96.²⁹² Civil effects terminate either when good faith ends or, in the case of a prior undissolved marriage, when the innocent spouse remarries or the marriage is declared null by a court.²⁹³ In any event, civil effects end when the putative spouse is aware of the marriage defect, and any later occurring fault should not prevent support to the good faith spouse in need.

Incidental to the putative marriage, a spouse can also sue as a surviving spouse under the wrongful death statute.²⁹⁴ Courts have recognized the putative spouse’s rights under an insurance policy as the widow of the putative husband,²⁹⁵ as a survivor under state worker’s compensation laws,²⁹⁶ and as a widow to federal social security benefits.²⁹⁷ The putative spouse can also seek the marital portion²⁹⁸ and general rights of inheritance, with community property rights being the most controversial.²⁹⁹

c. Community Property

A putative spouse is entitled to a share of the community of

292. See *infra* Section X.A.3; see also *Thomason v. Thomason*, 2000-522 (La. App. 3 Cir. 12/6/00); 776 So. 2d 553 (finding that the community property regime terminated when civil effects ended).

293. LA. CIV. CODE ANN. art. 96 (2018).

294. *King v. Cancienne*, 316 So. 2d 366, 366 (La. 1975).

295. *Jones v. Equitable Life Assurance Soc’y of U.S.*, 173 So. 2d 373, 373 (La. Ct. App. 1 Cir. 1965).

296. *Jones v. Powell Lumber Co.*, 101 So. 135, 136 (La. 1924). See generally *Fulton Bag & Cotton Mills v. Fernandez*, 159 So. 339 (La. Ct. App. 1935) (recognizing that although a putative wife is entitled to recover under worker’s compensation laws, when the putative wife is in a contest against the legal spouse who is still dependent on the common spouse, the award must be made in favor of the legal spouse, and the good faith putative spouse cannot recover); *Jackson v. Swift & Co.*, 151 So. 816 (La. Ct. App. 2 Cir. 1934) (recognizing that a bad faith putative spouse is not entitled to recover under worker’s compensation laws).

297. See *Hunter v. Richardson*, 346 F. Supp. 123 (M.D. La. 1972) (finding that the wife was not in good faith and therefore did not qualify as a widow based on the facts); *Kimball v. Folsom*, 150 F. Supp. 482 (W.D. La. 1957) (finding that the wife was in good faith and was entitled to benefits).

298. *Smith v. Smith*, 10 So. 248, 251 (La. 1891).

299. *Zanders v. Zanders*, 434 So. 2d 1213 (La. Ct. App. 1 Cir. 1983); *Succession of Navarro*, 24 La. Ann. 298 (1872); see also *infra* Section X.A.2.c.

acquets and gains that exists during the putative marriage.³⁰⁰ Generally, the community property regime terminates retroactively to the date of filing of the petition for divorce upon which the divorce is granted.³⁰¹ Because neither a divorce action nor an action in nullity is required to end an absolutely null marriage, the Civil Code does not specify when the putative community terminates.

Courts have concluded that the putative community terminates when the civil effects end. In *Thomason v. Thomason*, the putative wife believed her marriage was valid, even though the ceremony was defective.³⁰² The court concluded that her good faith, and hence her civil effects, ended when the putative husband filed an answer to her petition for divorce, claiming that the couple was never validly married.³⁰³ When her civil effects ended, the putative community terminated as well.³⁰⁴

In *Thomason*, the civil effects ended when the putative spouse was no longer in good faith.³⁰⁵ However, civil effects can continue even after good faith ends, when the marriage is absolutely null due to the other spouse's proper undissolved marriage.³⁰⁶ In that case, the putative community terminates at the innocent spouse's remarriage or when the marriage is pronounced null by a court.³⁰⁷ Although the term "pronounced null" has not been interpreted by the courts, it would seem that "pronouncement" occurs at the judgment of nullity. The community would therefore terminate on the date of remarriage or on the date of the final judgment of nullity, rather than retroactively to the filing of the petition for nullity.

One of the most controversial rights of the putative spouse is the right of inheritance at the death of the common spouse when

300. See *Thomason v. Thomason*, 2000-522, p. 5 (La. App. 3 Cir. 12/6/00); 776 So. 2d 553, 555-57 (finding that the community property regime terminated when the civil effects ended, not upon the filing of an action for nullity because no nullity action was necessary); *Mara v. Mara*, 513 So. 2d 1220, 1222 (La. Ct. App. 4 Cir. 1987) (finding that the right to community property includes an interest in the putative spouse's pension plan).

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

302. *Thomason*, 2000-522, p. 2; 776 So. 2d at 555.

303. *Id.* at p. 5; 776 So. 2d at 556-57.

304. *Id.*; see also *Mara*, 513 So. 2d at 1222 (La. Ct. App. 4 Cir. 1987) (finding that the putative community terminated when spouses discovered defect).

305. *Thomason*, 2000-522, p. 5; 776 So. 2d at 556-57.

306. LA. CIV. CODE ANN. art. 96 (2018).

307. *Id.*

the legal spouse is still alive. When a good faith spouse enters a putative marriage, the putative community begins, coterminous with the legal regime.³⁰⁸ A spouse in bad faith at inception of the putative marriage will not receive a share of the putative community at death or divorce, nor will the spouse receive the legal usufruct under article 890 of the Civil Code over any property inherited by descendants.³⁰⁹ A spouse in good faith at inception of the putative marriage is entitled to a share of the putative community and may also be entitled to the legal usufruct under article 890 of the Civil Code.³¹⁰ The good faith putative spouse, however, may be faced with a claim by the legal spouse for a share of the putative community, as the legal regime is still in existence.

The Louisiana Supreme Court, in two lines of cases, has articulated the inheritance rights of the legal and putative spouses at the death of the common spouse. In *Patton v. Cities of Philadelphia & New Orleans*, a husband left his legal wife in New York and represented himself as a widow to a woman who would later become his putative wife.³¹¹ After the husband's death, his children and both the legal and putative wives claimed rights to property acquired during the putative community.³¹² The court concluded that the legal and putative wives should each receive one-half of the property, and his children should receive nothing.³¹³ The legal spouse was entitled to one-half as a spouse in community, and because the husband, acting in bad faith, deceived his putative wife, she was entitled to the husband's half of the property in recompense for the grievous wrong he committed against her.³¹⁴ The effect of this decision prevented his innocent children from inheriting a share of his property.

In a subsequent decision, *Prince v. Hopson*,³¹⁵ the Louisiana Supreme Court criticized its decision in *Patton*, which also involved a dispute over property acquired during a putative marriage. The *Prince* case was factually distinguishable from *Patton* because the

308. See generally Wallace, *supra* note 227.

309. See LA. CIV. CODE ANN. art. 96 (2018). A surviving spouse is entitled to a usufruct over the decedent's share of the community property when the decedent dies intestate and leaves descendants. LA. CIV. CODE ANN. art. 890 (2018).

310. See LA. CIV. CODE ANN. art. 96 (2018); see also A.N. YIANNPOULOS, PERSONAL SERVITUDES § 7.4, in 3 LOUISIANA CIVIL LAW TREATISE 437 (5th ed. 2011).

311. *Patton v. Cities of Philadelphia & New Orleans*, 1 La. Ann. 98, 101 (1846).

312. *Id.*

313. *Id.* at 106.

314. *Id.*

315. *Prince v. Hopson*, 89 So. 2d 128 (La. 1956).

common spouse in *Prince* was in good faith when he married his putative wife.³¹⁶ In fact, both of the legal spouses entered into putative marriages with the good faith belief that their divorce had been finalized.³¹⁷ Because the common spouse was in good faith at the time of his death, the court concluded that it could not deny him, and therefore his heirs, the civil effects of his marriage.³¹⁸ The court therefore awarded one-half of the property to his legal successor, a child from his first marriage.³¹⁹ As to the remaining one-half of the property, the court recognized that both the legal and putative spouses had a valid claim to the half, and finding no other appropriate solution, awarded each of the wives one-quarter of the property.³²⁰

The *Patton* and *Prince* cases remain good law today,³²¹ but their rulings have been the subject of criticism.³²² Under both rulings, the legal spouse's rights are elevated over the innocent children when the common spouse is in bad faith and over the innocent putative wife when both of the putative spouses are in good faith. In awarding property, courts do not consider the good or bad faith of the legal spouse, the loss of property rights to a good faith common spouse when the legal spouse also entered a putative marriage, or the general inequity that befalls the innocent parties in favor of a noncontributing spouse, legal in name only.³²³

316. See generally *Prince v. Hopson*, 89 So. 2d 128 (La. 1956). In *Prince*, the husband was married to his first wife for twelve years and filed for divorce. *Id.* at 129. Although he received a preliminary judgment of divorce, a final decree was never entered. *Id.* at 129–30. He later married his putative wife under the mistaken belief that his first marriage had been terminated, and he stayed married to his putative wife for twenty-one years until his death. *Id.* at 130.

317. See *id.* at 129–30.

318. See *Prince*, 89 So. 2d at 133.

319. *Id.* at 132.

320. *Id.* at 134.

321. *Patton* and *Prince* have been applied when dividing the community property after a declaration of nullity, when the legal, putative, and common spouses were all alive. See generally, e.g., *Succession of Jones*, 2008-1088 (La. App. 3 Cir. 3/4/09); 6 So. 3d 331 (applying *Prince*); *Succession of Gordon*, 461 So. 2d 357 (La. Ct. App. 2 Cir. 1984) (applying *Prince*); *Price v. Price*, 326 So. 2d 545 (La. Ct. App. 3 Cir. 1976) (applying *Prince* and *Patton*); *Succession of Choyce*, 183 So. 2d 457 (La. Ct. App. 2 Cir. 1966) (applying *Patton*); *Succession of Fields*, 62 So. 2d 495 (La. 1952) (applying *Patton*); *Jackson v. Gordon*, 186 So. 399 (La. Ct. App. 1 Cir. 1939) (applying *Patton*); *Ray v. Knox*, 113 So. 814 (La. 1927) (applying *Patton*); *Waterhouse v. Star Land Co.*, 71 So. 358 (La. 1916) (applying *Patton*).

322. See *Prince*, 89 So. 2d at 132 (criticizing *Patton*); Wallace, *supra* note 227, at 83–85. See generally Robert A. Pascal, *The Work of the Louisiana Supreme Court for the 1955–1956 Term*, 17 LA. L. REV. 303 (1957).

323. See Wallace, *supra* note 227, at 93–94.

Additionally, because there are simultaneous communities, it is unclear which spouse would be entitled to the legal usufruct under article 890 of the Civil Code.³²⁴

A putative divorce has been suggested as a way to ameliorate these negative consequences.³²⁵ Instituting a putative divorce at a time when the spouses of the legal marriage sought a divorce or when the common spouse later contracts the putative marriage could create a separate community for the putative spouses and accomplish a just division of ownership.³²⁶ The legal spouse would not share in the putative community unless equity dictated otherwise, and ownership rights would be based on the joint efforts of the spouses who acquired the property.³²⁷ At least one Louisiana court, without so stating, has applied the concept of putative divorce by prohibiting a legal spouse from acquiring a share of property acquired during the putative community when she had no contact with the common spouse and was uninvolved in the acquisition of the property.³²⁸

3. DURATION OF CIVIL EFFECTS

Once in good faith, the spouse receives the civil effects of the marriage as long as that spouse remains in good faith.³²⁹ An exception exists, however, for an innocent party to a bigamous marriage who is without the power to rectify the null union.³³⁰ When the cause for the null marriage is one party's prior undissolved marriage, the civil effects continue in favor of the other, non-bigamous spouse, even after that spouse is no longer in good faith.³³¹ Civil effects terminate when the non-bigamous

324. The issue of legal usufruct would present itself only when the putative spouses are both in good faith. See KATHRYN VENTURATOS LORIO, SUCCESSIONS AND DONATIONS § 2.16(C), in 10 LOUISIANA CIVIL LAW TREATISE 60 (2d ed. 2009).

325. See Wallace, *supra* note 227, at 93–94.

326. See *id.* at 105. If the common spouse in bad faith is still alive, Civil Code article 96 would prevent him from receiving the civil effects of marriage. See LA. CIV. CODE ANN. art. 96 (2018). Application of this article at his death has less appeal. Civil Code article 96 does not address the situation when both putative spouses are in good faith and a legal spouse has a claim to the property.

327. The legal spouse should have a claim to a share of the putative community if circumstances indicate that the legal spouse still had a relationship with the common spouse. Wallace, *supra* note 227, at 109–14.

328. See Succession of Chavis, 29 So. 2d 860 (La. 1947).

329. LA. CIV. CODE ANN. art. 96 (2018).

330. LA. CIV. CODE ANN. art. 96 cmt. (b) (2018).

331. See LA. CIV. CODE ANN. art. 96 (2018). Only the spouse with the prior undissolved marriage has the power to rectify the null union, so the good faith spouse receives greater protection. LA. CIV. CODE ANN. art. 96 cmt. (b) (2018).

spouse remarries, which is permitted immediately without a declaration of nullity, or upon a declaration of nullity by the court.³³² Even though the party to the prior undissolved marriage may be in good faith in contracting the second marriage, his civil effects end once his good faith ends (i.e., when he discovers that his first marriage had not been terminated).³³³ The purpose of this exception is two-fold: to deny the spouse whose actions created the impediment the power to end the civil effects by confessing his prior undissolved marriage to the innocent party, and to protect the innocent party to the null marriage because that party has no power to rectify the union.³³⁴

In *Mara v. Mara*, the parties entered into a putative marriage based on the good faith belief that the wife's first marriage had been dissolved by divorce.³³⁵ When the parties learned, during the marriage, that there was no court record of a divorce having been granted, the putative community terminated on that date.³³⁶ The court explained that any assets acquired or liabilities incurred after the date of termination would be the separate property or obligation of each former putative spouse.³³⁷

After the 1987 revision, however, the effective termination date of the community depends on whether the party who seeks the benefits of the putative marriage is the bigamous spouse. For the non-bigamous, good faith spouse, the civil effects of marriage terminate only at remarriage or when the marriage is pronounced null; therefore, the community terminates at a date later than the other good faith, bigamous spouse, whose civil effects end at knowledge of the impediment.

B. RELATIVELY NULL MARRIAGE

A marriage is relatively null when entered into without free consent.³³⁸ The common-law equivalent of the relatively null

332. See LA. CIV. CODE ANN. art. 96 & cmt. (b) (2018).

333. See, e.g., *Evans v. Eureka Grand Lodge*, 149 So. 305, 308 (La. Ct. App. 2 Cir. 1933) (finding that once the putative spouse was advised that her marriage was invalid, she could not claim life insurance benefits).

334. See *Spaht*, *supra* note 2, at 279; see also LA. CIV. CODE ANN. art. 96 cmt. (b) (2018).

335. *Mara v. Mara*, 513 So. 2d 1220 (La. Ct. App. 4 Cir. 1987).

336. *Id.* at 1222.

337. *Id.*; see also *Thomason v. Thomason*, 2000-522, p. 5 (La. App. 3 Cir. 12/6/00); 776 So. 2d 553, 556-57 (finding that the putative community terminated when the civil effects ended).

338. LA. CIV. CODE ANN. art. 95 (2018).

marriage is the voidable marriage.³³⁹ Unlike the absolutely null marriage, the relatively null marriage produces civil effects until it is annulled by a court of competent jurisdiction based on the request of the party whose consent was not free.³⁴⁰

“Consent is not free when given under duress or when given by a person incapable of discernment.”³⁴¹ Duress is defined in the articles on conventional obligations,³⁴² and those who are “incapable of discernment” include an insane person, “a person under the influence of alcohol or drugs, a mentally retarded person, or a person too young to understand the consequences of the marriage celebration.”³⁴³ Under prior law, consent was also not free when there was a “mistake respecting the person.”³⁴⁴ “Mistake respecting the person” was interpreted to include only mistakes as to the physical identity of the person, rather than the person’s characteristics as a potential spouse, and has since been eliminated as obsolete.³⁴⁵ If needed, error as a general vice of consent could be argued if consent is lacking based on the mistaken identity of a person.³⁴⁶ Unlike in some jurisdictions, an action to annul a marriage is not available in Louisiana because one spouse has been declared insane during the marriage.³⁴⁷

1. CHALLENGING A RELATIVELY NULL MARRIAGE

The right to challenge a relatively null marriage for lack of consent belongs to the party whose consent was not free.³⁴⁸ The right is strictly personal and does not pass to the heirs of the non-consenting spouse.³⁴⁹ Only the non-consenting spouse or his legal representative can file the action to annul for lack of consent

339. See JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 50, 66–67 (3d ed. 2005).

340. See generally LA. CIV. CODE ANN. arts. 95, 97 (2018).

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

342. LA. CIV. CODE ANN. art. 1959 (2018) (“Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party’s person, property, or reputation. Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.”); see also LA. CIV. CODE ANN. art. 1948 (2018) (“Consent may be vitiated by error, fraud, or duress.”).

343. LA. CIV. CODE ANN. art. 93 cmts. (c)–(d) (2018).

344. LA. CIV. CODE ANN. art. 91 (rev. 1987).

345. See Spaht, *supra* note 2, at 284.

346. *Id.*

347. See Ryals v. Ryals, 57 So. 904, 905 (La. 1912).

348. See LA. CIV. CODE ANN. art. 95 (2018).

349. Succession of Jene, 173 So. 2d 857, 860 (La. Ct. App. 4 Cir. 1965).

during the spouse's lifetime.³⁵⁰ Courts have rejected pleas by the spouse of a person incapable of understanding to have the marriage annulled on that basis.³⁵¹

The Louisiana First Circuit Court of Appeal, in *Succession of Ricks*, extended the power to challenge a relatively null marriage to a succession representative after the death of the alleged non-consenting spouse.³⁵² The deceased husband remarried his ex-wife within hours of his death, and his children, in a will contest, alleged that he lacked the mental capacity to consent to the remarriage.³⁵³ The wife argued that the children had no right of action to bring the suit to annul the marriage because the right of action is personal to the spouse and abates on his death.³⁵⁴ The court disagreed, concluding that the Louisiana Code of Civil Procedure provides that the proper party to sue to enforce the right of the deceased, even if a personal right, belongs to the succession representative.³⁵⁵ Therefore, the succession representative was the proper party to challenge the marriage as relatively null.³⁵⁶

The *Ricks* court, while valiant in its attempt to right a wrong that appears to have been perpetrated by an opportunistic ex-wife, misapplied the law and created a right without a remedy. The right to challenge a relatively null marriage has limitations. The relatively null marriage, similar to the voidable marriage under the common law, can only be challenged by the party whose consent was lacking and only during the life of that party.³⁵⁷ If the decedent had filed suit to challenge his marriage prior to his death, the succession representative would be the proper party to continue the action.³⁵⁸ Or, if the law provided that lack of consent

350. See *Stier v. Price*, 37 So. 2d 847, 848–50 (La. 1948) (finding that only the insane spouse or his legal representatives can bring an action to annul); *Succession of Barth*, 152 So. 543, 544 (La. 1934) (recognizing the rule from other jurisdictions that a voidable marriage is valid for all purposes until annulled, and it can only be attacked in a direct proceeding during the lifetime of the parties).

351. See *Stier*, 37 So. 2d at 849–50 (La. 1948); *Ryals v. Ryals*, 57 So. 904, 905 (La. 1912).

352. See *In re Succession of Ricks*, 2003-2580, p. 5 (La. App. 1 Cir. 11/10/04); 893 So. 2d 98, 100.

353. *Id.* at p. 2; 893 So. 2d at 98–99.

354. *Id.* at p. 3; 893 So. 2d at 99. The trial court agreed with the ex-wife and granted her exception of no right of action. *Id.* at pp. 3–4; 893 So. 2d at 99.

355. See *id.* at p. 5; 893 So. 2d at 100.

356. *Ricks*, 2003-2580, p. 5; 893 So. 2d at 100.

357. LA. CIV. CODE ANN. art. 95 (2018); *Barth*, 152 So. at 544; *Morris v. Godwin*, 148 A.3d 63, 70 (Md. Ct. Spec. App. 2016).

358. See, e.g., *Morris*, 148 A.3d at 71.

rendered a marriage absolutely null, then a challenge after death would be permitted.³⁵⁹ Neither was the case in *Ricks*.

Furthermore, even if the succession representative was successful in having the marriage declared null after the decedent's death, the marriage was still valid at the time of the decedent's death. A relatively null marriage, by definition, is a marriage until declared null.³⁶⁰ Therefore, if the succession representative received a declaration of the nullity of the decedent's marriage, it would not retroactively dissolve the decedent's marriage or change his status at death. While there is reason to question the status of a marriage without consent as relatively null (rather than absolutely null), it is nonetheless a marriage until declared null as the Civil Code currently provides.³⁶¹

In fact, during the 1987 revision of the law on marriage, the Marriage-Persons Committee of the Law Institute originally suggested that the right to challenge the relatively null marriage should belong to the party whose consent was not free "or his legal representative."³⁶² The committee wanted to be clear that a person who was incapable of discernment, and would therefore lack procedural capacity to bring the action to annul, could have a legal representative bring the action on his behalf.³⁶³ The council expressed concern that the language was too broad and could be used to permit an executor or administrator to bring the action after death, the result ultimately reached by the *Ricks* court.³⁶⁴ Because the committee believed that the curator could bring the action on the interdict's behalf without the need for the additional "or his legal representative" clause, the clause was ultimately left out.³⁶⁵

2. CONFIRMING A RELATIVELY NULL MARRIAGE

While a marriage can be relatively null at inception for lack of consent, the party who lacked consent can later confirm the marriage "after recovering his liberty or regaining his

359. LA. CIV. CODE ANN. art. 94 (2018). *See generally* Succession of Marinoni, 164 So. 797 (La. 1935).

360. LA. CIV. CODE ANN. art. 95 (2018).

361. *Id.*

362. *See* Spaht, *supra* note 10, at 1154–55.

363. *See id.* at 1154.

364. *See id.* at 1155.

365. *See id.*; *see also* LA. CODE CIV. PROC. ANN. arts. 684, 4262, 4555 (2018).

discernment.”³⁶⁶ Once facts establish that the marriage has been confirmed, the party no longer has the right to annul the marriage.³⁶⁷ While divorce would be available, the action in nullity would not.³⁶⁸

Prior law required “cohabiting together” as the only means to validate a relatively null marriage.³⁶⁹ In the 1987 revision, the broader term “confirm” replaced the narrow construction.³⁷⁰ As a result, the general obligations principles on confirming a relatively null contract are applicable to the marriage contract.³⁷¹ Parties can implicitly confirm a relatively null union by living together as spouses or holding themselves out as married, or parties can expressly confirm the marriage to cure its relative nullity.³⁷²

Jurisprudence on the issue of cohabitation or confirmation has been fact-driven, but having sexual intercourse or freely living together as spouses, even for a short time, will likely be sufficient to confirm a marriage.³⁷³ It is necessary, however, that confirmation occurs after the duress has ceased or the person has regained his understanding.³⁷⁴ In other words, if the non-consenting spouse cohabits while still under duress or while still incapable of understanding his actions, the marriage remains subject to annulment.

Just as confirmation eliminates the right to annul a relatively null marriage, so too would the passage of time (i.e., prescription). Article 2032 of the Civil Code provides that an action to annul a relatively null contract prescribes “five years from the time the ground for nullity either ceased, as in the case of incapacity or

366. LA. CIV. CODE ANN. art. 95 (2018).

367. *See id.*

368. *See* LA. CIV. CODE ANN. art. 95 (2018).

369. LA. CIV. CODE ANN. art. 95 cmt. (c) (2018). Courts have also interpreted acts of sexual intercourse to constitute “cohabitation” as that term is used in the marriage context. *Ford v. Ford*, 292 So. 2d 275, 277 (La. Ct. App. 2 Cir. 1974); *State v. Brown*, 108 So. 2d 233, 235 (La. 1959).

370. LA. CIV. CODE ANN. art. 95 cmt. (c) (2018).

371. *See id.* Confirmation under article 1842 can be express or tacit. *See* LA. CIV. CODE ANN. art. 1842 (2018).

372. *See* LA. CIV. CODE ANN. art. 1842 (2018).

373. *Thompson v. Thompson*, 87 So. 250, 250 (La. 1921) (cohabitating as husband and wife for three days); *Boutterrie v. Demarest*, 52 So. 492, 495 (La. 1910) (consummating the marriage); *Taylor v. Castille*, 318 So. 2d 106, 107, 109 (La. Ct. App. 3 Cir. 1975) (cohabitating as husband and wife for fifteen days).

374. *See* *Fowler v. Fowler*, 60 So. 694, 695 (La. 1913) (finding that husband who cohabitated with wife for twenty days was still operating under the threat of duress).

duress, or was discovered, as in the case of error or fraud.”³⁷⁵ Because consent to wed is not free when given by a person under duress or one who lacks capacity (incapable of discernment),³⁷⁶ the right to bring the annulment action, when there has been no confirmation, prescribes five years from the time the duress or incapacity ended.³⁷⁷

C. ACTIONS INCIDENTAL TO NULL MARRIAGES

When a party seeks a declaration of nullity,³⁷⁸ the court is authorized to award the party incidental relief just as it would in a petition for divorce.³⁷⁹ When the cause for nullity is lack of consent and the marriage is relatively null, the right to incidental relief is based on the existence of the marriage. When the marriage is absolutely null, however, the court must be given the power to award incidental relief, such as in the case of a good faith putative spouse who is entitled to the civil effects of marriage.

The Civil Code contains two articles dealing with incidental relief: article 151 authorizes interim relief pending the final nullity judgment, and article 152 authorizes final relief after the judgment of nullity.³⁸⁰ A party is only entitled to final incidental relief if the party is in good faith and therefore entitled to the civil effects of marriage.³⁸¹ If the party is unable to prove good faith, interim relief is available, but it will terminate on the declaration of nullity.³⁸² Even if a party is not entitled to the civil effects of marriage due to a lack of good faith, that party may be able to seek custody, visitation, and support as a natural result of parenthood, regardless of the null marriage.³⁸³

While article 151 states the general proposition that

375. See LA. CIV. CODE ANN. art. 2032 (2018).

376. See LA. CIV. CODE ANN. art. 95 (2018).

377. See LA. CIV. CODE ANN. art. 2032 (2018).

378. A party must seek a declaration of nullity when the marriage is relatively null. See LA. CIV. CODE ANN. art. 95 (2018). When a marriage is absolutely null, a party may seek an action to recognize the nullity if the party seeks civil effects or incidental relief as a result of the null marriage. See generally LA. CIV. CODE ANN. art. 94 (2018).

379. See generally LA. CIV. CODE ANN. arts. 151–152 (2018).

380. *Id.*

381. See LA. CIV. CODE ANN. art. 152 (2018).

382. See *id.* (“Incidental relief granted pending declaration of nullity to a party not entitled to the civil effects of marriage shall terminate upon the declaration of nullity.”).

383. See *id.* But see *supra* Section X.A.2.a (noting that if both parties are in bad faith, the child will be illegitimate and must establish filiation).

incidental relief permitted in a divorce petition is also available in a petition for a declaration of nullity of marriage, undesirable consequences may flow from this general rule as it relates to interim spousal support.³⁸⁴ Because interim spousal support is available to either spouse in a valid marriage regardless of fault, interim support is arguably available to either spouse in a putative setting.³⁸⁵ Permitting a bad faith spouse in a putative marriage to receive interim spousal support, however, directly conflicts with the Civil Code's mandate that spouses must be in good faith when contracting the marriage to receive *any* civil effects of marriage.³⁸⁶ A spouse in bad faith could lure an unsuspecting, wealthy spouse into an invalid marriage to later receive the civil effect of interim support. While the obligation of support owed during marriage should permit parties to a valid marriage to receive interim support regardless of fault, the right to receive interim support should not be afforded to a bad faith spouse when there is no marriage at all due to the actions of the bad faith spouse. No published opinion has considered the issue or has permitted a bad faith putative spouse to receive interim support.

XI. INCIDENTS AND EFFECTS OF MARRIAGE

Chapter 3 of Title IV in Book I sets forth the duties owed between married persons and the general authority married persons share over the family. While the litigation surrounding these provisions is scant, the law sets forth general principles of public order that inform other family laws.

A. MUTUAL DUTIES OF MARRIED PERSONS

“Married persons owe each other fidelity, support, and assistance.”³⁸⁷ Fidelity contains both a positive and a negative aspect, including the spouse's duty to refrain from adultery and the obligation to submit to the reasonable and normal sexual desires of the other spouse.³⁸⁸ Support contemplates providing the other

384. See LA. CIV. CODE ANN. art. 151 (2018).

385. The comments to article 152 take this position. See LA. CIV. CODE ANN. art. 152 cmt. (b) (2018) (“This [Article] and Article 151 govern claims for incidental relief pendente lite, which a party may be granted irrespective of the nature of the alleged nullity, and of whether he was in good or bad faith in contracting the marriage.”).

386. See LA. CIV. CODE ANN. art. 96 (2018). The “civil effect” of interim support stems from the obligation of support that spouses owe during marriage. See *Cortes v. Fleming*, 307 So. 2d 611, 616 (La. 1973).

387. LA. CIV. CODE ANN. art. 98 (2018).

388. LA. CIV. CODE ANN. art. 98 cmt. (b) (2018); see also *Currier v. Currier*, 599 So. 2d 456, 458 (La. Ct. App. 2 Cir. 1992); *Von Bechman v. Von Bechman*, 386 So. 2d 910,

spouse with the necessities of life, which include “food, clothing, and shelter,” as well as other conveniences, such as “telephones, appliances, and automobiles.”³⁸⁹ Assistance is distinct from support and focuses on the “personal care to be given to an ill or infirm spouse.”³⁹⁰ Spouses, by contract, cannot derogate from these rules.³⁹¹

For example, in *Boudreaux v. Boudreaux*, the spouses entered into a post-nuptial agreement where the husband agreed to pay spousal support to the wife regardless of her fault at the time of divorce.³⁹² The court found the agreement absolutely null as violating public policy because it undermined the duty of fidelity owed to a spouse in a marriage.³⁹³

These obligations are directive in nature and frame the general duties owed to one’s spouse. Although one spouse may not sue during marriage to enforce these rights,³⁹⁴ they provide the basis from which other rights and duties are derived. For example, negative fidelity, or adultery, is a ground to terminate the marriage,³⁹⁵ and interim spousal support cannot be waived pending divorce because it derives from the duty of support.³⁹⁶ Additionally, breach of a marital duty could amount to fault that would prevent one spouse from receiving final spousal support. To receive final spousal support, a party must be in need and must be free from fault prior to filing the proceeding to terminate the marriage.³⁹⁷ Fault that can bar final spousal support includes a breach of the duty of fidelity, support, or assistance.³⁹⁸

911–12 (La. 1980). *See generally* Dean v. Dean, 579 So. 2d 1124 (La. Ct. App. 2 Cir. 1991); Shenk v. Shenk, 563 So. 2d 1000 (La. Ct. App. 4 Cir. 1990).

389. LA. CIV. CODE ANN. art. 98 cmt. (c) (2018).

390. *Id.*

391. LA. CIV. CODE ANN. art. 98 cmt. (e) (2018); *see also* Favrot v. Barnes, 332 So. 2d 873, 875 (La. Ct. App. 4 Cir. 1976), *rev’d in part on other grounds*, 339 So. 2d 843 (La. 1976).

392. *Boudreaux v. Boudreaux*, 98-791, p. 4 (La. App. 3 Cir. 6/2/99); 745 So. 2d 61, 63.

393. *Id.*

394. LA. STAT. ANN. § 9:291 (2018). Under prior law, a breach of these obligations could lead to a judicial separation. *See* Spaht, *supra* note 2, at 293.

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

396. *See* Holliday v. Holliday, 358 So. 2d 618, 620 (La. 1978).

397. LA. CIV. CODE ANN. art. 111 (2018).

398. Fault includes “misconduct” that would have amounted to “one of the previously existing fault grounds for legal separation or divorce.” LA. CIV. CODE ANN. art. 111 cmt. (c) (2018). Because a violation of one spouse’s marital duties could have been a ground for separation under prior law, it can amount to misconduct sufficient to preclude final spousal support. *See supra* Section X.A.2.b.

B. MUTUAL AUTHORITY OVER THE FAMILY

The Civil Code contains a chapter on parental authority that sets forth the rights and duties that govern the relationship between parents and children. Prior to the revision of the chapter on parental authority in 2015, the Code provided that while a minor child remained under the authority of his mother and father, if a dispute arose among them, the father's decision would prevail.³⁹⁹ This "father-knows-best" provision was rooted in the Civil Code of 1870, but was tempered by the passage of article 99 in 1987 in the chapter entitled "Incidents and Effects of Marriage."⁴⁰⁰ Article 99 provides that "[s]pouses mutually assume the moral and material direction of the family, exercise parental authority, and assume the moral and material obligations resulting therefrom."⁴⁰¹ Although no reported case examined the effect that article 99 had on the father-knows-best provision, it appears that article 99 tacitly repealed it.⁴⁰² After the wholesale revision of the chapter on parental authority, the "father-knows-best" provision was repealed, and it is now clear that parents mutually enjoy authority over the family.⁴⁰³ The parties, rather than a court, are free to resolve any disagreement that arises between them.

C. SUITS BETWEEN SPOUSES & INTERSPOUSAL IMMUNITY

With limited exceptions, spouses are not permitted to sue one another during marriage.⁴⁰⁴ Interspousal immunity from suit exists to promote stability within a family.⁴⁰⁵ The immunity is procedural in nature, however, and does not negate a substantive claim that may be available after the marriage has terminated, as prescription is suspended between the spouses during the marriage.⁴⁰⁶

The first exception exists for causes of actions pertaining to contracts or actions arising out of the "Matrimonial Regimes" Title

399. LA. CIV. CODE ANN. art. 216 (2015).

400. LA. CIV. CODE ANN. art. 99 (2018).

401. *Id.*

402. *Id.*

403. Act No. 260, 2015 La. Acts 1794, 1806.

404. *See* LA. STAT. ANN. § 9:291 (2018).

405. *Smith v. S. Farm Bureau Cas. Ins. Co.*, 174 So. 2d 122, 124 (La. 1965).

406. LA. CIV. CODE ANN. art. 3469 (2018). *See generally, e.g., Duplechin v. Toce*, 497 So. 2d 763 (La. Ct. App. 3 Cir. 1986).

of the Civil Code.⁴⁰⁷ The second exception exists for claims for restitution of a spouse's separate property.⁴⁰⁸ The third exception exists for suits for divorce or for a declaration of nullity of the marriage, and the fourth for claims of support, either spousal or child, and custody of a child while the spouses are living separate and apart.⁴⁰⁹ Procedurally, spouses are therefore able to file a suit for support and custody without having to add a claim for divorce.⁴¹⁰ The exceptions listed in the statute are exclusive, not illustrative.⁴¹¹

Spouses must consider the implication of prescription in claims that are permitted under these exceptions. Because prescription is suspended between the spouses during marriage, once the spouses are divorced, prescription will begin to run at that time on any claims between them.⁴¹² If the spouses are separate in property, though, courts have determined that prescription does run between them for claims involving restitution of a spouse's separate property.⁴¹³

For example, in *Heathcock v. Neuenhaus*, a former wife sued to enforce payment on a note that her former husband had signed during their marriage and on which no payments due had been made.⁴¹⁴ He claimed that the five-year prescriptive period from the date payment was due had already run.⁴¹⁵ She insisted that prescription was suspended during her marriage, and she had filed within five years from her divorce.⁴¹⁶ The court sided with the former husband and concluded that, because the parties were separate in property, the former wife's claim fell under the

407. See LA. CIV. CODE ANN. bk. III, tit. VI (2018) ("Matrimonial Regimes").

408. LA. STAT. ANN. § 9:291 (2018). See, e.g., *Heathcock v. Neuenhaus*, 05-954 (La. App. 5 Cir. 4/25/06); 930 So. 2d 1013. In *Heathcock*, the former wife was seeking restitution of her separate property. *Id.* at p. 3; 930 So. 2d at 1013. The court concluded that prescription on her action against her husband to enforce payment on a note that he signed during marriage was not suspended during the marriage and was therefore barred by a five-year period. *Id.* at p. 4; 930 So. 2d at 1014.

409. LA. STAT. ANN. § 9:291 (2018).

410. See generally *Johnson v. Johnson*, 2014-0564 (La. App. 1 Cir. 12/23/14); 168 So. 3d 641.

411. *Heathcock*, 05-954, p. 4; 930 So. 2d at 1014; *Wilkinson v. Wilkinson*, 323 So. 2d 120, 125 (La. 1975).

412. *Schexnayder v. Schexnayder*, 451 So. 2d 1192, 1193 (La. Ct. App. 5 Cir. 1984).

413. *Heathcock*, 05-954, p. 2; 930 So. 2d at 1014; *Eckhardt v. Reveley*, 2004-0288, p. 2 (La. App. 4 Cir. 7/21/04); 881 So. 2d 128, 131.

414. *Heathcock*, 05-954, pp. 2-3; 930 So. 2d at 1013-14.

415. *Id.* at p. 3; 930 So. 2d at 1013-14.

416. *Id.*

exception for “restitution of separate property,” and she was required to file within five years from when payment was due.⁴¹⁷ As the five years had long passed, her claim, brought after the marriage had ended, was dismissed.⁴¹⁸ For spouses who are separate in property, having notes due on demand, when there is no intent by the spouses to pay the debt during marriage, would preserve a spouse’s right to collect in the event of divorce.

XII. COVENANT MARRIAGE

Parties seeking to be wed in Louisiana are presented with the option of entering into a covenant marriage.⁴¹⁹ Furthermore, couples who are already married have the ability to convert their traditional marriage into a covenant marriage.⁴²⁰ In 1997, Louisiana was the first state to enact covenant marriage legislation, and it did so primarily in an attempt to strengthen marriage and help curb the steep rise in divorce rates.⁴²¹ The law did not have the impact many had hoped, however, with only slightly more than 1% of couples who married in Louisiana opting for a covenant marriage in the first ten years after the law

417. *Heathcock v. Neuenhaus*, 05-954, pp. 3–4 (La. App. 5 Cir. 4/25/06); 930 So. 2d 1013, 1014.

418. *Id.* at p. 5; 930 So. 2d at 1014; *see also Eckhardt*, 2004-0288, p. 2; 881 So. 2d at 131 (prescription ran against the spouses who were separate in property).

419. LA. STAT. ANN. § 9:272 (2018). The law defines covenant marriage as “a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship.” *Id.* Post-*Obergefell*, the constitutionality of this provision is subject to challenge. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

420. *See* LA. STAT. ANN. § 9:275 (2018).

421. *See* LA. STAT. ANN. § 9:272 (2018); Cynthia Samuel, *Letter from Louisiana: An Obituary for Forced Heirship and Birth Announcement for Covenant Marriage*, 12 TUL. EUR. & CIV. L.F. 183, 189–90 (1997); Katherine Shaw Spaht, *What’s Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists*, 47 LOY. L. REV. 709, 710–11 (2001) [hereinafter Spaht *Social Scientists*]; Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 619–20 (2005) [hereinafter Spaht *Unfulfilled Promise*]. Few states have followed Louisiana’s lead and adopted covenant marriage. *See* ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West, Westlaw through 2018 Legis. Sess.); ARK. CODE ANN. §§ 9-11-801 to -808 (West, Westlaw through 2018 Fiscal Sess.). For a discussion of the genesis and early years of covenant marriage, *see* STEVEN L. NOCK ET AL., *COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA* (2008).

passed.⁴²² That number has declined since.⁴²³

Covenant marriages differ from standard marriages in certain respects, most notable are the requirements of counseling and restrictions on procuring a divorce.⁴²⁴ Furthermore, certain additional formalities, above what is required to perfect a standard marriage, must be followed to perfect a valid covenant marriage.⁴²⁵ First, the parties seeking to be wed must undergo premarital counseling which “emphasizes the nature and purposes of marriage and the responsibilities thereto.”⁴²⁶ Second, the parties must execute a declaration of intent, in which they evince their desire to enter into a covenant marriage.⁴²⁷

The declaration of intent appears as two separate documents: the recitation and the affidavit.⁴²⁸ The recitation is a document that is signed by both parties and contains a declaration that the parties are entering into a covenant marriage. The recitation provides that the couple has “chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into the marriage.”⁴²⁹ It further provides that the couple has received premarital counseling, read the Covenant Marriage Act, and agreed “to be bound by Louisiana law on Covenant Marriages.”⁴³⁰ The affidavit consists of an attestation by

422. From 1997 through 2007, the Department of Health and Hospitals reported that in the eleven-year period after the creation of covenant marriages, 390,893 total marriage licenses were issued and only 4,112 of those, or 1.05%, were for covenant marriages. Matthew Hinton, *Covenant Marriages Get an 'I don't' from Louisiana Couples*, TIMES PICAYUNE (Aug. 10, 2009), http://www.nola.com/news/index.ssf/2009/08/covenant_marriages_get_an_i_do.html. For discussions of why one author believes covenant marriage did not take off in Louisiana see Spaht *Unfulfilled Promise*, *supra* note 421, at 615–20 and Spaht *Social Scientists*, *supra* note 421.

423. According to records obtained from the Louisiana Department of Health, in 2014, with 31,408 marriage licenses issued, only 186 were covenant marriages, amounting to 0.6%.

424. See LA. STAT. ANN. §§ 9:272–:273, :307 (2018); see also Monica Hof Wallace, *A Primer on Divorce in Louisiana*, 64 LOY. L. REV. 619, 649–54 (2018).

425. LA. STAT. ANN. § 9:272 (2018). For a more detailed explanation of how to perfect a valid covenant marriage, see Spaht *Unfulfilled Promise*, *supra* note 421, at 612–15; KERRY TRICHE, HANDBOOK ON LOUISIANA FAMILY LAW 5 (2009); SPAHT & TRAHAN, *supra* note 5, at 67.

426. LA. STAT. ANN. § 9:272 (2018). The law does not prescribe the specific type of counseling or counselor required.

427. LA. STAT. ANN. § 9:273 (2018).

428. *Id.* For a detailed explanation of how to enter into a covenant marriage, see JESSICA G. BRAUN, HANDBOOK ON LOUISIANA FAMILY LAW 33 (2018).

429. LA. STAT. ANN. § 9:273 (2018).

430. *Id.*

the parties that they have received premarital counseling concerning the seriousness of covenant marriage and that they have read the Covenant Marriage Act.⁴³¹ The parties must also procure an attestation, signed by their counselor, confirming that the parties have undergone premarital counseling.⁴³² Once perfected, these documents must be filed with the official who issues the marriage license.⁴³³

Once a covenant marriage is created, it is governed by the codal provisions applicable to traditional marriages as well as those Code articles particular to covenant marriages.⁴³⁴ Parties to a covenant marriage may seek annulment under the Civil Code articles governing absolutely and relatively null marriages.⁴³⁵ However, fraud might also exist as an additional ground for the annulment of a covenant marriage based on the Declaration of Intent signed by the parties before entering into the marriage.⁴³⁶

XIII. CHANGE OF A MARRIED WOMAN'S NAME

In Louisiana, “marriage does not change the name of either spouse.”⁴³⁷ A married person, however, is permitted to use the surname of either or both spouses.⁴³⁸ While a spouse can change a name on a driver’s license and social security card, the legal name of a spouse is not changed on the spouse’s birth certificate as a result of marriage.⁴³⁹ Additionally, a woman can choose to “use her maiden name, her present spouse’s name, or a hyphenated combination.”⁴⁴⁰ If she has been widowed, divorced, or remarried, a woman may still “use her maiden name, the surname of her deceased or former spouse, the surname of her present spouse, or

431. *Id.*

432. *Id.* The counselor’s attestation may be made a part of the affidavit, or it may be attached to it. TRICHE, *supra* note 425.

433. LA. STAT. ANN. §§ 9:272–:273 (2018). The marriage license must also contain a declaration that the couple intends to contract a covenant marriage. LA. STAT. ANN. § 9:272 (2018).

434. LA. STAT. ANN. § 9:274 (2018); *see also* LA. STAT. ANN. § 9:293 (2018).

435. LA. STAT. ANN. § 9:272 (2018).

436. *See* Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 91–92 (1998) (arguing that the signed declaration transforms a suppression of the truth into a misrepresentation, which could be the basis for a finding of fraud in contracting the covenant marriage).

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

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

439. LA. CIV. CODE ANN. art. 100 cmt. (b) (2018).

440. LA. STAT. ANN. § 9:292 (2018).

any combination thereof.”⁴⁴¹

Currently, the law only permits a woman to use her former spouse’s surname. If a married couple uses a hyphenated surname made up of both of their individual surnames and the parties divorce or one party dies, no legislation specifically permits the man to continue using the hyphenated name, although no law prohibits its use either. The gender-specific statute could be ripe for an Equal Protection challenge if facts arise.

XIV. CONFLICTS OF LAWS AND VALIDITY OF MARRIAGE

Parties must meet the mandatory prerequisites of Louisiana law to validly contract marriage in the state, but marriages validly entered into in other states may be recognized in Louisiana as well.⁴⁴² If the marriage was “valid in the state where contracted or, in the state where the parties were first domiciled as husband and wife,” Louisiana recognizes the marriage as valid “unless doing so would violate a strong public policy of the state” whose law applies under general conflicts-of-law provisions governing the status of natural persons.⁴⁴³ The general conflicts rule provides that “[t]he status of a natural person . . . [is] governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue.”⁴⁴⁴

There is a general policy favoring the marriage of persons validly entered into in other states.⁴⁴⁵ As a result, a person who seeks to invalidate the marriage must prove: (1) the law that applies is from a state other than where the parties were married or first domiciled as spouses; and (2) that law would invalidate the

441. *Id.*

442. The term *states* includes other countries. *See, e.g., Ghassemi v. Ghassemi*, 2007-1927, p. 10 n.13 (La. App. 1 Cir. 10/5/08); 998 So. 2d 731, 739 n.13.

443. LA. CIV. CODE ANN. art. 3520(A) (2018); *see also* LA. CIV. CODE ANN. art. 3519 (2018). Subsection (B) of article 3520 was rendered unconstitutional by *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *rev’d*, 791 F.3d 616 (5th Cir. 2015).

444. LA. CIV. CODE ANN. art. 3519 (2018). The law further provides that consideration must be given to:

[T]he strength and pertinence of the relevant policies of [each] state in light of: (1) the relationship of each state, at any pertinent time, to the dispute, the parties, and the person whose status is at issue; (2) the policies referred to in Article 3515; and (3) the policies of sustaining the validity of obligations voluntarily undertaken, of protecting children, minors, and others in need of protection, and of preserving family values and stability.

Id.

445. *See* LA. CIV. CODE ANN. art. 3520 cmt. (b) (2018).

marriage for strong public policy reasons.⁴⁴⁶ So, if the parties were married overseas and moved to Louisiana, Louisiana would recognize the marriage as valid, unless the party challenging the marriage could prove that the marriage violated a strong public policy of the state that is most closely aligned to the parties and the policies at play, which is not the state where the parties were married or first domiciled.

Louisiana courts have repeatedly concluded that common-law marriages from a state that sanctions common-law marriage will be recognized in Louisiana, even though a common-law marriage cannot be contracted in Louisiana.⁴⁴⁷ Louisiana courts have also recognized a marriage by proxy that was valid under the laws of another country or state, even though it would be absolutely null if contracted in Louisiana.⁴⁴⁸ In 2008, a Louisiana appellate court concluded for the first time that marriages between first cousins validly entered into in Iran would be valid in Louisiana, even though the marriage would be invalid if contracted in Louisiana.⁴⁴⁹ The court concluded that validating the marriage was not a violation of a strong public policy of the state, because it found “a clear distinction between the marriage of first cousins and marriages contracted by more closely-related collaterals, *i.e.*, uncle and niece, aunt and nephew, and siblings.”⁴⁵⁰

446. *Id.*

447. *See, e.g.*, LA. CIV. CODE ANN. art. 87 cmt. (d) (2018); *Fritsche v. Vermilion Par. Hosp. Serv. Dist.*, 2004-1192, pp. 1-4 (La. App. 3 Cir. 2/2/05); 893 So. 2d 935, 937-38; *State v. Williams*, 96-652, p. 6 (La. App. 3 Cir. 2/5/97); 688 So. 2d 1277, 1281; *Brinson v. Brinson*, 96 So. 2d 653, 656 (La. 1957); *Bloom v. Willis*, 60 So. 2d 415, 417 (La. 1952).

448. *See Morris v. Morris*, 2009-2069, 2010 WL 2342659 (La. App. 1 Cir. 6/11/10) (valid marriage of an incarcerated man by proxy under Texas law); *United States ex rel. Modianos v. Tuttle*, 12 F.2d 927, 929 (E.D. La. 1929) (valid marriage of man present in Louisiana and represented by proxy in Turkey to a Turkish woman resulted in wife becoming an American citizen).

449. *See Ghassemi v. Ghassemi*, 2007-1927, p. 17 (La. App. 1 Cir. 10/5/08); 998 So. 2d 731, 743-44.

450. *Id.* The court noted that marriages between first cousins were permitted in Louisiana prior to 1902, and even after 1902, the legislature repeatedly ratified marriages between first cousins that had been contracted in violation of the prohibition. *See id.* at pp. 17-18; 998 So. 2d at 744. The court further noted that the criminal incest (crime against nature) statute does not include first cousins, but is limited to siblings, aunt/nephew, and uncle/niece relationships. *Id.* at p. 24; 998 So. 2d at 748.