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# Louisiana's New Divorce Legislation: Background and Commentary

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# Louisiana's New Divorce Legislation: Background and Commentary

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## I. BACKGROUND

### A. Introduction

On January 1, 1991, the Louisiana State Law Institute revision of the law of separation and divorce took effect. The revision was the culmination of a seven-year project undertaken by the Persons Committee of the Law Institute<sup>1</sup> as part of its charge to revise Book I of the Louisiana Civil Code, "Of Persons."<sup>2</sup> The elimination of separation from bed and board and the creation of a ground for divorce dependent upon the spouses' living separate and apart *after* the petition for divorce is filed constituted the most significant changes wrought by the 1991 legislation.

This article will recount the deliberations of the committee and the various alternative reforms of divorce law that were considered, rejected, and passed. Understanding the revision project's history, albeit abbreviated for this article, is important to understanding the project's ultimate results. Thereafter, the authors add commentary to each article of the new divorce law to assist members of the legal profession in understanding the intent of each provision. What may be particularly helpful is the legislative history of a specific provision, including decisions made by the Council of the Law Institute before submission of the revision project to the legislature and amendments by the legislature to the Law Institute bill as introduced.

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1. The Persons Committee of the Louisiana State Law Institute is composed of the following academicians, judges, and attorneys: Professor Katherine Spaht, Reporter; Mr. Kenneth Rigby; Professor Cynthia Samuel; Professor Kathryn Lorio; Professor Christopher Blakesley; Professor Jeanne Carriere; Mr. Phillip Riegel; and Judge Don Moseley. The committee is ably assisted in its research and drafting by Mr. Leonard Martin, staff attorney for the Louisiana State Law Institute. Hereafter, the Persons Committee will be referred to as the committee.

Credit for passage of the divorce law revision belongs to Mr. Allen Bradley, who in 1990 was a member of the House of Representatives from DeRidder, Louisiana.

2. The objectives of the Louisiana Law Institute are "[t]o examine and study the civil law of Louisiana and the Louisiana jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms," La. R.S. 24:204(2) (1989), and "to bring the law of the state, both civil and criminal, into harmony with modern conditions," La. R.S. 24:204(5) (1989).

### B. Goals for Divorce Revision

The divorce law revision had two primary goals: first, to make divorce, to the extent *legally* possible, a less traumatic experience both emotionally and economically by devising a system that would reduce the emotional investment and litigation costs; and second, to assure the reduction of the adverse after-effects of divorce, particularly for the innocent parties—the children and to a lesser degree the spouse whose economic well-being is significantly impaired.<sup>3</sup> The committee benefited by the experience of other jurisdictions with no-fault divorce systems,<sup>4</sup> principally, of course, California. Interestingly, the goals of California's reformers in the late 1960s appeared identical to those of the committee:

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3. One of the current criticisms of the initial no-fault reforms is that the reformers failed to carefully consider possible adverse consequences of no-fault divorce based on a partnership model of marriage. This dilemma has been described elsewhere as "the dilemma of private choices that cause public consequences." Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. Rev. 79, 119 (1991). In fact, current feminist writing focuses on alimony and the need for its continuation. See, e.g., Lenore J. Weitzman, *The Divorce Revolution* (1985) [hereinafter Weitzman, *The Divorce Revolution*]; *Economic Consequences of Divorce: The International Perspective* (Lenore J. Weitzman & Mavis Maclean eds., 1992); Martha A. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991).

See, for example, Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *Divorce Reform at the Crossroads* 191 (Stephen D. Sugarman & Herma H. Kay eds., 1990), where the authors describe the failure as follows: "The leading proponents of initial no-fault reform were lawyers, judges, and law professors. Their primary focus was on the legal grounds for divorce; their primary purposes were to reduce expense, acrimony, and fraud in resolving matters envisioned as essentially private concerns. What is, perhaps, most revealing about these original efforts are the issues that were not on the agenda." *Id.* at 195. The authors continue: "The early reform agenda did not specify clear public norms concerning financial and child-care responsibilities to guide parties' decision making or judicial review." *Id.* at 196.

4. If Glick's prediction is correct, we are presently in a better position than we have been in for many years to take stock of our situation and to try to determine what kinds of legal measures will be appropriate for the current needs and desires of American families. It follows, too, that states like Louisiana that did not jump hastily on the family law reform bandwagon now have the opportunity to attack the most pressing problems in the area in a more calm and rational way than some of their sister states.

Mary A. Glendon, *Family Law Reform in the 1980's*, 44 La. L. Rev. 1553, 1554 (1984).

The Law Institute Persons Committee was not guilty of overlooking the consequences of divorce. Fortunately, the committee had the benefit of other states' experience and empirical research and scholars' writings on the subject. Therefore, the committee carefully considered the adverse impact of divorce on children (e.g., a proposal for divorce of spouses with minor children, proposals on child custody and most importantly, child support) and the economically disadvantaged spouse (e.g., proposals on spousal support replacing fault of the claimant as an absolute bar with comparative fault as a mere factor and establishing the support at a level consistent with the standard of living of the couple during marriage, emphasizing the duration of the marriage).

See also Wardle, *supra* note 3; Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. Rev. 197 (1991); Ira M. Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 B.Y.U. L. Rev. 259 (1991).

The motivations of those who participated in the California divorce reform effort were far from uniform, but most of them shared the view that divorce based on fault no longer served the public interest. They undertook to design and implement a divorce law that would take account of the realities of married life, the economic needs of divorced dependent spouses, and the best interests of children.<sup>5</sup>

The latter two goals have been only recently recognized and widely accepted as laudable and necessary by other American scholars.<sup>6</sup> Recognition of the importance of the goals of providing for the economic needs of divorced spouses and children ordinarily came in the scholars' assessment of the alleged failure of California's reformers to accomplish their goals.

At one of the first meetings of the Persons Committee called to consider divorce law reform, the committee established six more specific objectives for accomplishing the articulated goals of divorce law reform:

(1) The law should recognize that, because marriage is a personal relationship entered into for complex personal and social reasons, the parties to a marriage are in the best position to know when it has ceased to serve its intended purposes. (2) Dissolution of marriage should be as amicable as possible, and the law should encourage civility in dissolution actions by making them non-adversarial in nature. (3) The law should promote reconciliation between spouses by imposing a reasonable waiting period in all divorce actions. (4) The law should seek to avoid the adverse effects on the judicial system occasioned by fault-based and complex no-fault schemes. (5) The law should encourage spouses to resolve the incidents of dissolution of marriage between themselves whenever possible. (6) Simple divorce procedures should be available in simple cases in order to insure that everyone has access to the courts in this area.<sup>7</sup>

During subsequent discussions about divorce law reform, the committee evaluated each proposed alternative in light of the two fundamental goals and six specific objectives. For example, the committee concluded that fault grounds for divorce should be abandoned. The committee felt that such grounds fail to reflect the fact that marriage breakdown is usually an incremental process rather than a catastrophic one traceable to specific acts<sup>8</sup> and that such grounds adversely affect the judicial

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5. Herma H. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 Cal. L. Rev. 291, 299 (1987).

6. See authorities cited in *supra* note 3.

7. Louisiana State Law Institute [hereinafter LSLI] materials prepared for Persons Committee meeting on May 4, 1984, at 9.

8. *Id.* at 7, 8.

The history of divorce law reform in the United States over the past twenty years reveals a continual increase in realism on the part of lawmakers and judges. At the beginning of

system by increasing the caseload and encouraging perjury.<sup>9</sup> Likewise, the

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that period the majority of states still permitted divorce only on traditional fault grounds. (A substantial minority, Louisiana among them, would grant a divorce after some period of living separate and apart.) That (fault) approach had had its origin in ecclesiastical law, both in Louisiana and in her sister states, and was apparently ultimately grounded in the notion that, because ecclesiastical doctrine gave marriage a religious dimension, marriage should only be dissolved for a religiously significant reason—i.e., a sin of one party against the other.

During the 1970's state legislatures apparently came to accept the assertions of legal scholars that the fault approach did not accurately reflect what occurred in most marriage breakdowns, and that it deterred reconciliation by forcing spouses to adopt adversary attitudes toward each other. Beginning with California in 1970, an increasing number of states enacted new, no-fault divorce laws that made dissolution of marriage available on such easily proven grounds as "irreconcilable differences," "incompatibility." Today (in 1984) thirty-nine of the fifty states have such laws (usually alongside statutes embodying the more traditional fault grounds). Only one state, South Dakota, still permits divorce exclusively on fault grounds.

*Id.* (citations omitted).

9. Katherine S. Spaht, *Persons, The Work of the Louisiana Appellate Courts for the 1972-1973 Term*, 34 La. L. Rev. 201, 203-04 (1974); *Broussard v. Broussard*, 275 So. 2d 410, 413 (La. App. 3d Cir. 1973) (Miller, J., dissenting). See also Weitzman, *The Divorce Revolution*, *supra* note 3, at 20; Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 Va. L. Rev. 32 (1966); and Timothy B. Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. Fam. L. 267 (1971). For a recent historical treatment of the development of American divorce law, see Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990) and Glenda Riley, *Divorce: An American Tradition* (1991).

In Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 Law & Soc'y Rev. 543, 565 (1989) (citation omitted), the author opines:

In all, the findings thus support the proposition that prevailing customs and peoples' immediate wants can totally thwart and not just partly circumvent laws enacting morality. Moreover, the legal system itself apparently subverted the laws; by all accounts, the lawyers actively participated in circumventing the fault requirements, and judges knowingly presided over sham proceedings. As one lawyer noted, the fault provisions meant that "the courts must often sanction clear violations of the law upon the thinnest of pretexts in order to avert the ruin of many lives." If this can happen in the legal system, the implication is that the complete nullification of laws legislating morals is likely elsewhere, but the difficulty of obtaining evidence may prevent any test of this hypothesis.

See also Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* 7 (1988); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 Tul. L. Rev. 953 (1991).

In Kay, *supra* note 5, at 292, the author observes: "That impasse was characterized by an uneasy and largely unspoken compromise between legal theory, which preserved the ideal of marriage as indissoluble except for specific acts of marital misconduct, and courtroom practice, which granted divorces based simply on an agreement between the spouses."

In fact, at least one author proposes a return to divorce only with mutual consent but not the "hypocritical grounds" that existed under fault systems. The author proposes mutual consent divorce because of "[t]he incapacity of no-fault divorce to force the divorcing spouse to recognize all the costs of divorce . . . ." Allen M. Parkman, *No-Fault Divorce: What Went Wrong?* at xiii (1992). See also Wardle, *supra* note 3, at 112, in which the author suggests that no-fault divorce reform merely shifted the point in the proceedings at which perjury occurs.

committee concluded that the predicate of living separate and apart as a ground for divorce should be abandoned because such a prerequisite simply imposed an unnecessary requirement on spouses who wished to dissolve their marriage, one not thought essential in most other states.<sup>10</sup> Furthermore, the requirement of living separate and apart, in many cases, defeated the main purpose of such statutory waiting periods—to promote reconciliation.<sup>11</sup> Spouses would not risk attempts at reconciliation if it had the effect of extinguishing a cause of action. The original product of the Persons Committee and the Council of the Louisiana State Law Institute was a pure no-fault divorce law. Unlike its counterparts in other jurisdictions, however, the Louisiana no-fault proposal did not require the functionally fictional proof that the marriage had broken down irretrievably or that there were irreconcilable differences between the spouses.

The original proposal of the Law Institute reflected the modern view of marriage as a voluntary association akin to partnership, at least as regards the termination of the relationship.<sup>12</sup> Under Louisiana Civil Code articles 2822 and

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10. Timothy B. Walker & Linda D. Elrod, *Family Law in the Fifty States: An Overview*, 26 Fam. L.Q. 319, 338-39 (1993). Another simple and easy resource is the summary of every state's divorce law (grounds for divorce, alimony, child custody, child support, and property distribution) in Fam. L. Rep. (BNA).

LSLI, materials prepared for Persons Committee meeting on May 4, 1984, at 8:

Louisiana has experienced its own version of this near-universal liberalizing trend. This state has not, however, kept pace with the national trend toward making divorce available without a period of separation. Since 1970, the Uniform Marriage and Divorce Act has provided for divorce on the ground of irretrievable breakdown after a 90-day waiting period without separation. UMDA §§ 302, 303, 305. Among the forty-nine of the sister states that permit divorce on other than fault grounds, only ten (including Louisiana) presently require spouses to live apart for a period of time in order to secure a divorce. The remaining thirty-nine all offer no-fault divorce without separation in some form.

*Id.* (citations omitted).

11. The committee found this potentially controversial change in the law [that spouses could freely associate with each other or even live together after filing for divorce] justifiable on the following grounds: (1) it would permit spouses to adjust to the financial impact of divorce by removing the necessity of their establishing two homes during the waiting period; (2) it would promote reconciliation; and (3) in practice, few spouses would actually choose to cohabit after filing.

LSLI, minutes of Persons Committee meeting on October 28, 1983 (dated November 14, 1983), at 6.

12. See, for example, John Eekelaar, *Regulating Divorce* (1991), where the author describes different ideologies of marriage:

Honore observed that the way in which the law apportions responsibilities after divorce reflects a view about marriage itself. He distinguished three "views" of marriage. One was of a partnership for life which, even after divorce, creates an obligation on each partner to allow the other to share in the available resources in the same way as would have occurred had the marriage continued . . . . A variant of it sees marriage as a partnership only until dissolution, at which point acquests must be divided equally. A second perception (which I will call the "individualistic" model) sees marriage as an arrangement which two persons enter for mutual benefits, but which may result in gains to one at the expense of the other. As a consequence, the goals on breakdown are to

2826, a partnership between two persons may be terminated virtually at will, the only prerequisite being that the withdrawing partner give reasonable notice "in good faith at a time that is not unfavorable to the partnership."<sup>13</sup> In an important partnership case, the Louisiana Supreme Court expressed the essence of a partnership as "founded on mutual trust and confidence and terminable when such cease . . ."<sup>14</sup> That consideration seemed doubly applicable in the context of marriage and divorce, where, because of the much greater intimacy of the relationship, the discomfort occasioned by a forced continuation of it against the will of one spouse was less likely to be outweighed by some countervailing benefit.<sup>15</sup>

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provide compensation for loss of expected advantages and restitution of investments put into the marriage, together with their increments in value in so far as these are attributable to the claimant. A third perception sees marriage as an undertaking by one spouse to secure the needs of the other spouse and any children which may survive the divorce. In this model, the spouses are mutual insurers against adversity. This will be called the "insurance" model.

*Id.* at 57-58 (citation omitted).

For a contrary view, see Bea A. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 Tex. L. Rev. 689 (1990). The author's criticism of the partnership model for marriage is directed to the economic consequences of divorce. However, in the article she contrasts an earlier notion of marriage described by Karl N. Llewellyn, *Behind the Law of Divorce*, 32 Colum. L. Rev. 1281 (1932), to today's notion of marriage:

All these functions existed only because marriage was seen as a permanent relationship—terminable only with considerable difficulty. In contrast, today spouses are fired when they lose their charm, children have no guarantee of care, and spouses often refuse to continue supporting their families.

Smith, *supra* at 694-95. See also Mary A. Glendon, *The New Family and The New Property* 66 (1981); Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 Fordham L. Rev. 539 (1990); Carbone & Brinig, *supra* note 9.

13. La. Civ. Code art. 2822: "If a partnership has been constituted without a term, a partner may withdraw from the partnership without the consent of his partners at any time, provided he gives reasonable notice in good faith at a time that is not unfavorable to the partnership."

La. Civ. Code art. 2826: "Unless continued as provided by law, a partnership is terminated by: the unanimous consent of its partners . . . or the attainment of, or the impossibility of attainment of the object of the partnership . . ."

14. *Stone v. Stone*, 292 So. 2d 686, 691 (La. 1974), quoting *Breaux v. LeBlanc*, 50 La. Ann. 228, 236, 23 So. 281, 284 (1898).

15. The permissible restraints that might be imposed upon the litigants are a mandatory period of reflection and the duty of the court to remind them that their actions will have a considerable impact upon their future lives. Realistically, and in terms of the legitimate exercise of its regulatory authority, the State should do no more than this. It cannot select a spouse for one of its citizens nor should it try to coerce him or her to remain with a person with whom satisfactory personal communication no longer is possible. If the State occupies any role in this process, it should be to assist the spouses to resolve their infelicitous union through an amicable settlement rather than to vent their frustrations through the legal process.

Thomas E. Carbonneau, *Analytical and Comparative Variations on Selected Provisions of Book One of the Louisiana Civil Code with Special Consideration of the Role of Fault in the Determination of Marital Disputes*, 27 Loy. L. Rev. 999, 1036 (1981).



When the issues concerned the *consequences* of termination of the relationship, however, the committee and council proposed that the spouses not be treated as ordinary partners. Ultimately, the partnership model proved desirable for termination of the marriage but not for the other incidents of the end of the relationship. Therefore, no consistent ideology of marriage and divorce was incorporated in the series of bills revising divorce law.

Initially, the committee and the Council of the Law Institute were concerned that a no-fault system of divorce would encourage an increase in the overall rate of divorce. However, empirical evidence existed that suggested no-fault divorce laws do not promote divorce,<sup>16</sup> although such laws may contribute to other inequities.<sup>17</sup> Even those who now argue that no-fault divorce contributes to other

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For a more recent discussion of the partnership model of marriage, see Rutheford, *supra* note 12.

16. Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *Divorce Reform at the Crossroads* 6 (Stephen D. Sugarman & Herma H. Kay eds., 1990); Eekelaar, *supra* note 12; Harvey J. Sepler, *Measuring the Effects of No-Fault Divorce Laws Across the Fifty States: Quantifying a Zeitgeist*, 15 *Fam. L.Q.* 65, 88-89 (1981) (no-fault laws were ineffective in altering divorce rates in 87% of 32 states studied); Robert E. McGraw et al., *A Case Study in Divorce Law Reform and its Aftermath*, 20 *J. Fam. L.* 443, 465 (1982) (the average duration of marriages being terminated did not decrease after enactment of the Ohio consent divorce statute); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 *N.C. L. Rev.* 1103 (1989) (response to critics of no-fault who claim that the no-fault system worsened women's and children's economic condition). *But see* Marvell, *supra* note 9 (no-fault laws in eight states did lead to more divorces and possibly did in eight more, but in 58% of states [the remaining studied] these laws did not appreciably increase divorce rates) and Wardle, *supra* note 3, at 118, where the author observes, "[I]t is apparent that the significant rise in the divorce rate in the United States did not begin until the no-fault divorce reform movement was well-underway."

Sepler, *supra*, at 89, observes that "despite different laws and attitudes concerning divorce, divorce appears to be a worldwide phenomenon whose direction and control may depend more on sociological developments than on specific governmental actions."

Even in Marvell, *supra* note 9, at 565, the author concludes that:

[t]he major issue is whether attempts to legislate morality with the old laws were completely futile, as evidenced by whether divorce rates rose when the fault provisions were removed. The answer is that the attempts were not always futile, although they apparently had become so in most states and in a sizable majority if one excludes the separate living laws. Also, there is almost no sign of an impact outside the eastern fringe.

17. Weitzman, *The Divorce Revolution*, *supra* note 3; Fineman, *supra* note 3; Eekelaar, *supra* note 12; Parkman, *supra* note 9. *But see* Jed H. Abraham, *The Divorce Revolution Revisited: A Counter-Revolutionary Critique*, 3 *Am. J. Fam. L.* 87, 108 (1989); Kay, *supra* note 16; Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *Divorce Reform at the Crossroads* 75 (Stephen D. Sugarman and Herma H. Kay eds., 1990). In her article *An Appraisal of California's No-Fault Divorce Law*, *supra* note 5, Professor Herma Hill Kay takes issue with the conclusions of Lenore Weitzman although she concedes that additional legislation is needed to solve the economic disparities upon divorce.

*See* Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law On Divorce Outcomes*, 57 *Brook. L. Rev.* 621, 724-25 (1991) [hereinafter Garrison, *Good Intentions Gone Awry*]:

New York has not adopted no-fault divorce except based on mutual consent. The ability of wives to block a divorce thus remains intact, but it failed to prevent diminished

inequities do not propose a return to a fault-based divorce system.<sup>18</sup> The focus of the divorce law revision was to reduce state interference in the private decision of whether one person should remain with another with whom a satisfactory personal relationship is no longer possible. However, reformers failed to consider the public consequences of such a private choice.<sup>19</sup> Increasingly, scholars recognize that although divorce should be obtainable, a continuing obligation remains to those former members of the family who are in need of support or to those family members whose expectations for future prosperity depend upon continuation of the family unit.

As a consequence of evaluating alternative approaches in light of the articulated goals and objectives, many proposals were rejected by the committee or the council because they failed to satisfy one or more of the objectives. The following discussion recounts some of the policy decisions made by the committee and council and the disposition of various alternatives proposed.

### C. Elimination of Legal Separation

Although agreement to eliminate fault grounds for divorce was virtually unanimous among members of the committee and Council of the Law Institute, the same cannot be said of the elimination of judicial separation.<sup>20</sup> The practitioner members of the committee finally persuaded the other members of the committee

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alimony prospects markedly similar to those that have been noted in no-fault divorce jurisdictions. The rules governing post-divorce entitlements appear to be more important determinants of divorce outcomes than do divorce grounds.

See also Smith, *supra* note 12; Rutheford, *supra* note 12; Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 Wis. L. Rev. 789 (1983); Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 375 (1989); Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 New Eng. L. Rev. 437 (1988); Nora J. Lauerman, *A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 U. Cin. L. Rev. 493 (1987); McGraw et al., *supra* note 16; James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L.Q. 351 (1987); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983).

18. Not even Lenore Weitzman in her book *The Divorce Revolution*, *supra* note 3, necessarily urges a return to a fault-based system of divorce. Other authors urge mechanisms to guarantee a fairer sharing of economic resources upon divorce. See, e.g., Rutheford, *supra* note 12; Kay, *supra* note 5; Glendon, *supra* note 4. Parkman in his book, *No-Fault Divorce: What Went Wrong?*, *supra* note 9, proposes divorce by mutual consent.

Marsha Garrison in *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, *supra* note 17, observes, "Legislatures that wish to improve the financial position of divorced wives would thus be ill-advised to eliminate unilateral no-fault divorce or impose substantial waiting periods; revision of the rules governing entitlements appears far more likely to produce the desired results."

19. Wardle, *supra* note 3, at 119-20. See also sources in *supra* note 17.

20. For a comparative treatment of judicial separation and such actions as separate maintenance, legal separation, and divorce from bed and board, see Lynn D. Wardle et al., 2 *Contemporary Family Law* § 17.01 (1988).

and the council that spouses no longer viewed a judicial separation as a means of accomplishing a permanent or indefinite status (as married but not divorced), even spouses among the large Catholic population of the state. Unfortunately, by the 1980s a judicial separation had become nothing more than a procedural step in the process of obtaining a divorce.

The only remaining question to be answered was whether the procedural step of a judicial separation served a meaningful purpose, such as a "cooling off" period during which reconciliation could occur. The members of the committee engaged in active practice argued that few reconciliations occurred after a judgment of separation. Therefore, weighed against the other competing policies, including simplifying procedure to reduce costs to litigants, the committee decided that the function of providing a "waiting period" before divorce could be served by other, less costly, mechanisms. Eliminating judicial separation was also resisted by some attorneys who well understood that doing so would reduce their fees. There were, of course, other legitimate objections that ranged from the religious,<sup>21</sup> to the psychological,<sup>22</sup> to the economic.<sup>23</sup>

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21. Some legislators urged a reconsideration of the elimination of judicial separation on the ground that many of their religious constituents simply could not file suit for divorce but could file for a judicial separation.

22. Some legislators argued that a judicial separation permitted the spouse who was resisting the termination of the marriage relationship to adjust over time to the change in status and to begin to accept psychologically the new status.

23. Some legislators argued that a judicial separation terminated the community of acquets and gains before a divorce, permitting the spouses the benefits of such a termination without having to sue for and obtain a divorce as would be required under the proposed new law.

During the 1992 Regular Session of the Legislature, the legislature enacted La. Civ. Code art. 2374 (1992 La. Acts No. 295, § 1), the article that permits a spouse to obtain a judgment of separation of property for specific reasons:

When a petition for divorce has been filed, either spouse may obtain a judgment decreeing separation of property, by a rule to show cause and upon proof that the spouses have lived separate and apart without reconciliation for thirty days from the date of the filing of the petition for divorce.

Because there is no requirement that a divorce judgment be rendered, Article 2375 was amended to provide that should the spouses reconcile, the community regime is re-established (the same effect as a reconciliation after a judgment of separation from bed and board). The amendment to Article 2375 protected against fraudulent action by one spouse who filed suit for divorce with the sole intention of ending the community regime, but not necessarily the marriage.

Again in 1993, the legislature amended La. Civ. Code art. 2374 to further liberalize grounds for separation of property to address the problem of termination of the community without the necessity of a divorce. La. Civ. Code art. 2374 now reads: "D. When the spouses have lived separate and apart continuously for a period of six months, a judgment decreeing separation of property shall be granted on the petition of either spouse." 1993 La. Acts No. 25, § 1. *See also* 1993 La. Acts No. 627, § 1.

Requiring a spouse to file suit for divorce to obtain spousal support was cured by amendment to La. R.S. 9:291 (1991) (1990 La. Acts No. 1009, § 6 (effective Jan. 1, 1991)) to permit a spouse living separate and apart from the other spouse to sue for spousal support, in addition to child custody and child support.

#### D. Consensual Divorce

At the beginning of its deliberations on divorce, the committee proposed divorce by mutual consent upon the filing of a joint petition and a waiting period of *ninety days*.<sup>24</sup> Divorce by mutual consent was to be in addition to the option of unilateral divorce obtained by filing a petition and waiting 180 days.<sup>25</sup> The committee was convinced early in the deliberations that divorce by mutual consent would satisfy virtually all of its goals and objectives.<sup>26</sup> The committee agreed to restrict the availability of this ground for divorce to couples who had been married for some minimum time to prevent hasty action during the adjustment period of a marriage.<sup>27</sup>

To fulfill the objective of encouraging spouses to resolve incidental matters before a judgment of divorce, the proposal imposed a condition upon the "mutual consent" divorce. Originally, a written implementation plan containing provisions for custody and support of children, spousal support, injunctive relief, and other incidental matters had to accompany the petition.<sup>28</sup> As a part of the original proposal, the plan was to be binding upon the parties from the date of court approval. After further deliberation and modification, the proposal required simply that the plan be presented to the court for its approval before the judgment of divorce was rendered for incorporation into the judgment.<sup>29</sup> The plan, under

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24. The shorter "cooling off" period of ninety days was a type of reward to the parties for saving court time by settling incidental matters by agreement and a recognition that, in the consensual divorce, the chances of reconciliation would be slight.

25. LSLI, materials prepared for Persons Committee meeting on Feb. 24, 1984, at 1, 9.

Article 1: "Spouses who have been married at least one hundred eighty days and who submit an implementation plan as provided in Chapter 1, Article 2 may jointly petition for divorce."

Article 3: "A divorce shall be granted upon joint motion of the spouses at least ninety days after the filing of the petition if the court approves the implementation plan. . . ."

26. See discussion in text at *supra* notes 3-7.

27. The minimum period of marriage for a couple who wished to take advantage of the "mutual consent" divorce stipulated in the proposal was 180 days. See *supra* note 25 for the text of proposed Article 1.

28. A written agreement shall determine, when applicable, custody, visitation, and the amount of support for minor children of the marriage, the amount of support for a spouse, use and occupancy of the family home, and use of personal property. In addition, the agreement may provide for injunctive relief and any other incidental matter referred to in Chapters [unpublished chapters on file with author].

[The agreement shall be filed with the petition and approved in writing by the court. When approved, the agreement shall be retroactive to the date on which the petition was filed and have the effect accorded an executory judgment. The court may refuse to approve an agreement if it is contrary to the best interests of the family or a spouse.]

LSLI, materials for Persons Committee meeting on October 28, 1983, at 1.

29. It [the Persons Committee] rejected the proposed articles on consent divorce, which would have made the spouses' agreement regarding incidental matters binding on them from the time of filing. Instead it adopted a scheme wherein spouses who wished to procure an expedited consent divorce would be required to file an agreed-to "implementation plan" with their joint divorce petition. This plan, which would have to address all

either alternative, had to be approved by the court, which retained authority to refuse approval if the plan was contrary to the best interests of the family or a spouse.<sup>30</sup>

The very title of the proposal, "mutual consent" divorce, necessarily suggested that spouses could withdraw consent if they had changed their minds or failed to agree as to incidental matters. Under the proposal, when a spouse withdrew consent, he or she automatically converted the "mutual consent" divorce into a "unilateral" divorce requiring the longer waiting period.<sup>31</sup> At this point in the deliberations, members of the committee expressed concern about whether the proposal on "mutual consent" divorce satisfied the objective of simplifying divorce procedure.

After further discussion, the committee voted to delete the "mutual consent" divorce proposal. The majority of the committee members was unwilling to require that the implementation plan be filed with the petition and be unmodifiable thereafter. The committee believed that the ninety-day difference between "mutual consent" and "unilateral" divorce provided insufficient incentive to spouses to use

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of the incidental matters listed in proposed Article 2 of Chapter 1, would not be binding on the spouses either as a contract or a judgment during the 90-day waiting period prior to the rendition of the divorce decree. At the time of the rendition of the decree, however, the implementation plan, together with such modifications as had been agreed to by the spouses during the waiting period, would be incorporated into the judgment of the court, and its dispositions would then become permanently binding upon the parties.

*Id.* at 3.

Article 1. Spouses who have been married at least one hundred eighty days and who submit an implementation plan as provided in Chapter 1, Article 2 may jointly petition for divorce.

LSLI, materials prepared for Persons Committee meeting on Feb. 24, 1984, at 1.

Article 2. The implementation plan shall be filed with the petition and shall determine, when applicable, custody, visitation, and support for minor children of the marriage; the support for a spouse; the use and occupancy of the family home; and the use of personal property. In addition, the agreement may provide for injunctive relief and any other incidental matter referred to in Chapters [unpublished chapters on file with author].

*Id.* at 7.

Article 3. A divorce shall be granted upon joint motion of the spouses at least ninety days after the filing of the petition if the court approves the implementation plan.

*Id.* at 9.

30. Article 3. The spouses may modify the implementation plan after the filing of the petition and before its approval by the court. The implementation plan when approved shall be [included in] the judgment of divorce. The court may refuse to approve an implementation plan if it is contrary to the best interests of the family or a spouse.

LSLI, materials prepared for Persons Committee meeting on Feb. 24, 1984, at 9.

31. Article 4. A spouse may withdraw consent to the divorce and implementation plan. The court shall grant the motion withdrawing consent to the divorce. Fifteen days from service of the motion withdrawing consent either spouse may obtain a divorce under Chapter 2, Article 1 (or under the provisions of Chapter 3, Article 1). The time which has elapsed from the filing of the joint petition shall be considered as having elapsed under Chapter 2, Article 1.

*Id.* at 13. See *infra* text pp. 34-35 for a description of "unilateral" divorce.

the "mutual consent" provisions. Furthermore, permitting withdrawal of consent to the divorce or plan before judgment, thus converting the action to one for "unilateral" divorce, failed to simplify divorce procedure.<sup>32</sup>

#### *E. Divorce of Couples with Minor Children*

Influenced by the work of two preeminent scholars, Professors Judith Younger and Mary Ann Glendon,<sup>33</sup> the committee proposed to the Council of the Law Institute a special provision for the divorce of spouses with minor children. The proposal was intended to satisfy one of the two primary goals of the divorce law revision—to assure that the adverse after-effects of divorce were reduced, particularly for the innocent parties, the children.<sup>34</sup> The committee decided to propose a special article for the divorce of couples with minor children after weighing two of the principal conflicting interests: the welfare and stability of the child against the state's interest in speedy resolution of disputes. Members of the committee originally expressed concern that requiring the parties to agree on dispositions relating to the child (custody and support) as a precondition to divorce

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32. LSLI, minutes of Council meeting on March 22-23, 1985, at 3, contains the following explanation of the rejection of "mutual consent" divorce:

The Reporter introduced this chapter by saying that it represented the result of many months of deliberations by the Marriage-Persons Committee . . . . The Committee had . . . decided to adopt a no-fault scheme with two tracks: one for consent divorce, under which a judgment could be gotten after a waiting period of only three months if the spouses agreed on all of the incidental issues raised by the divorce; and another track for the situation in which only one of the spouses wanted to be divorced, which would take six months. The Reporter explained that after further consideration the Committee had decided that the three months' difference in the two waiting periods would not have been sufficiently large to encourage spouses to take the consent route, and so had decided to provide only one form of divorce action—the unilateral action provided for in the document.

33. Professor Judith Younger teaches at University of Minnesota Law School and Professor Mary Ann Glendon at Harvard University Law School. Their works include Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45 (1981); Glendon, *supra* note 4. See also Mary A. Glendon, *Abortion and Divorce in Western Law* (1987).

In a more recent piece, Judith Younger, now the Joseph E. Wargo Anoka County Bar Association Professor of Family Law, reurges the idea of a "marriage for the benefit of minor children" (to encourage living arrangements which are good for raising children) governed by special rules including "grounds for divorce." See Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 Minn. L. Rev. 891 (1992).

See also Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 Tul. L. Rev. 1435 (1992). The article is a reply to Elizabeth Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990), whose work is heavily influenced by the articles of Professors Glendon and Younger.

34. Wardle, *supra* note 3, at 136: "There are compelling reasons to consider four kinds of reform to contemporary no-fault divorce laws; modern divorce laws should . . . (4) require parents to postpone (or provide mandatory, protective legal procedures for) major legal family adjustments that may be severely detrimental to the psychological and economic well-being of their children."

would frustrate the state's interest in resolution of disputes by giving a spouse who did not want the divorce a means of delaying it indefinitely. Other members countered that expressed concern by arguing that the importance of providing for the children justified such delays. The compromise crafted between the two positions permitted the divorcing parents to agree to a decision on custody and support or to request such relief from the court.

The proposal submitted to the Council of the Law Institute was modest<sup>35</sup> in comparison to either Professor Younger's special marital status for "marriages with minor children" or Professor Glendon's "children-first" principle of marital property division. Under the former, the couple could obtain a divorce only if they convinced the court that "continuing the marriage would cause either or both spouses exceptional hardship and would harm their minor children more than the divorce."<sup>36</sup> Both Professors Glendon and Younger<sup>37</sup> proposed that the division of marital property depend upon whether or not the divorcing couple had minor children. For example, in Professor Glendon's hypothetical "marriage with minor children," she urged that a category of "family property" be recognized and its distribution be dependent upon assuring the welfare of the children and their custodian.<sup>38</sup> Even though Professors Younger and Glendon wrote their articles in the early to middle 1980s, one other author since then has proposed a constitutional amendment prohibiting divorce for couples with children under the age of twenty-one.<sup>39</sup>

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35. See discussion of the specific proposal *infra* text at notes 40-43.

36. Younger, *supra* note 33, at 90: "It would enable the courts to explore the possible effects of the divorce on the children, an inquiry they do not make under current law. Children's interests would become a crucial factor not only in deciding custody, but also in deciding their parents' rights to divorce."

37. Existing judicial powers to grant alimony and child support to dependent family members would be expanded for marriages with minor children to allow the courts to order continuation of the economic partnership between ex-spouses in the children's interest. A divorcing court could thus delay ultimate property division between parents until all the children reached eighteen. The more difficult divorce standard and the immutable partnership rules would apply during the minority of all children. Thereafter, the couple could divorce as easily as couples without minor children and alter their economic relations by agreement if they chose.

*Id.* at 91 (footnote omitted).

38. This principle [children-first] rests on a notion that most people in our society probably would accept: the fact of having children impresses a lien upon all of the parents' income and property to the extent necessary to provide for the children's decent subsistence at least until those children reach the age of majority.

Glendon, *supra* note 4, at 1559.

Another author who urges adoption of Professor Glendon's approach is Arthur B. Cornell, Jr., in *When Two Become One, and Then Come Undone: An Organizational Approach to Marriage and Its Implications for Divorce Law*, 26 Fam. L.Q. 103, 138 (1992).

39. Christopher Lasch, in Gerald Mazorati et al., *Who Owes What to Whom?*, Harper's Mag., Feb. 1991, at 47-48. See also Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (1978).

The committee proposed a modest limitation on the ability of spouses to divorce if they had a minor child of the marriage. The proposed article required that a judicial determination of custody and support for the child be made before rendition of the divorce judgment.<sup>40</sup> With an abbreviated divorce process available to either spouse, the proposed article furthered the policy of requiring couples with minor children to adopt dispositions for the custody<sup>41</sup> and support of their children before obtaining a divorce. The official comments to the article explained the provision as a statement of the court's basic obligation to assure that provision is made for the children of the marriage<sup>42</sup> and, more importantly, that it is made *before* rendition of the divorce judgment.<sup>43</sup>

Although the Council of the Law Institute originally approved the proposal in principle and recommitted it to the committee for redrafting, the council ultimately rejected the proposal. By the time that the proposal was presented to the council for the second time, the council had adopted as an additional no-fault ground for divorce living separate and apart for one year. Thus, the council members reasoned that arrangements for the child or children would have to have been made by the parties or the court because the parties were required to live separate and apart. By contrast, under the committee's original proposal for divorce, the only ground for divorce was a filing of the petition for divorce and a waiting period of 180 days *without* the requirement that the spouses live separate and apart during that period. Therefore, the council concluded that the article served no purpose.<sup>44</sup>

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Both works are cited in Lacey, *supra* note 33. Elizabeth Scott's work to which the article in Harper's is a response is entitled, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990).

40. "Good cause" according to comment (d) of Article 3 "is left to be settled by the courts in light of the purpose of the article, which is to give precedence to the interests of children in the divorce process." LSLI, materials prepared for Council meeting on May 10, 1985, at 9.

41. Originally, the proposal also included provisions concerning visitation, but when the proposal was submitted to the council for the second time, the committee had deleted references to visitation.

42. Article 3:

If there is a minor child of the marriage, a court may not render a divorce . . . without a judicial determination of custody and support for the child, except for good cause shown.

LSLI, materials prepared for Council meeting on May 10, 1985, at 8.

Article 3, cmt. (b):

. . . A similar imperative was stated in Civil Code Article 157 (1982) ("in *all* cases of separation and divorce . . . custody *shall* be granted . . ."), but it apparently was never acknowledged in the holding of any case, perhaps because the use of the passive voice in that article obscured the fact that the court was the person to whom the imperative was directed. But see *Griffith v. Roy*, 263 La. 712, 269 So. 2d 217, 221 (1972) (dictum: "court is empowered, perhaps mandated, to determine the custody of the minor children . . .").

*Id.* (emphasis added).

43. *Id.* Article 3, cmt. (c).

44. Another objection raised by the council to the proposal when it was first introduced was that the requirement would create a new ground for nullifying a judgment of divorce. See La. Code Civ. P. art. 3953. However, when the proposal was resubmitted to the council, comment (f) to



### F. Unilateral Divorce

The original proposal of the committee revising divorce law contained only one no-fault ground for divorce:

A divorce shall be granted upon motion of a spouse when: That spouse has filed a petition for divorce; and One hundred eighty days have elapsed from the service of the petition.

The motion shall be a rule to show cause filed after the one hundred eighty days have elapsed.

Although the article bears some resemblance to present Louisiana Civil Code article 102, there are important differences.<sup>45</sup> First, the proposed article did not require that the spouses live separate and apart during the 180-day waiting period. The committee's view, ultimately accepted by the council but not the legislature, was that the requirement of living separate and apart served no useful purpose and in fact had the disadvantage of impeding reconciliation.

In the original proposal, because the article did not require the spouses to live separate and apart, service of the petition and the motion had to be by personal service,<sup>46</sup> rather than domiciliary service. Personal service assured that the petitioning spouse could not receive service for the defendant and thus prevent knowledge by the defendant of the action for divorce. For the same reason, the committee concluded that it was necessary to inform the spouse served that the suit was for divorce and that he or she could claim certain incidental relief, all in terms a layperson could understand.<sup>47</sup>

Secondly, under the proposed article only the petitioning spouse could seek a divorce after the 180-day waiting period. The nonpetitioning spouse could not utilize the action initiated by the petitioning spouse; he could only file his own

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proposed Article 3 provided that a divorce judgment should not be declared null for failure to comply with the article. LSLI, materials prepared for Council meeting on May 10, 1985, at 9.

45. Even earlier in the deliberations, the committee had proposed a mechanism to encourage agreement as to incidental matters in a "unilateral" divorce. The provision read as follows:

Upon filing of the petition, a spouse may request by motion the determination of custody and support of minor children of the marriage, support for a spouse, injunctive relief, use and occupancy of the family home, and any other incidental matter.

The court on its own motion or upon the motion of a spouse may direct the spouses and their attorneys to appear for a conference to consider the possibility of agreement as to any of the incidental matters. [The court may designate a person to conduct the conference.] After the conference, the court shall render an order which contains the agreements made by the parties as to any of the matters considered at the conference.

(As edited at the meeting.) LSLI, materials prepared for Persons Committee meeting on April 8, 1983, at 16B.

Ultimately, the committee rejected the express provision.

46. La. Code Civ. P. art. 1314, eliminating service by mail under La. Code Civ. P. art. 1313.

47. These notices accompanying service of the petition and the rule to show cause were copied from the notices for small claims court (La. R.S. 13:5204 (1991)) and presently appear in La. R.S. 13:3491-92 (1991).

action by means of a reconventional demand.<sup>48</sup> The committee reasoned that the action was intended to reflect the petitioning spouse's initial desire to divorce and the continuance of that desire for the entire waiting period. To permit the nonpetitioning spouse to file the motion for divorce would circumvent the policy of guaranteeing that the spouse who filed the petition desired to obtain a divorce for the entire six-month period. Furthermore, without the requirement that the spouses live separate and apart during the waiting period, the court would be relying for proof of the desire to divorce exclusively upon the spouse's assertions in the petition and the subsequent motion.

### G. Organization of Title

Even though the legislature did not pass some chapters and sections of the divorce revision package in 1990,<sup>49</sup> the Law Institute rearranged Book I, Title V (Divorce), which contains the substantive provisions regulating the termination of marriage by divorce and the incidental proceedings in such an action. The restructuring resulted in the following organization: chapter 1, "The Divorce Action"; chapter 2, "Provisional and Incidental Proceedings" (alimony, claims for contributions to a spouse's education or training, child custody, and child support); and chapter 3, "Effects of Divorce." The structure of the reorganization was identical to that of Title V, which was incorporated in the Law Institute bill as introduced with proposals for revision of the law on spousal support, child custody, and child support.<sup>50</sup>

All of the rather detailed provisions on the other incidental proceedings, such as injunctive relief, use and occupancy of the family home, and use of personal property,<sup>51</sup> were transferred to the Louisiana Revised Statutes and reorganized in a logical pattern.<sup>52</sup> The corresponding book and title in the Louisiana Revised Statutes, (Code Book I, Code Title V) contains the ancillary provisions on divorce. The remainder of the reorganization of the Louisiana Revised Statutes into discrete chapters on spousal support, child custody, and child support await the enactment of the remainder of the Law Institute's revision.<sup>53</sup>

### H. Provisions on Alimony, Child Custody, and Child Support

Part of the original Law Institute package of bills revising Title V of Book I included articles on spousal support, child custody, and child support. Principally,

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48. An action for divorce under La. Civ. Code art. 102 is an exception to the defense of *lis pendens*. See La. Code Civ. P. art. 3955.

49. See discussion *infra* text at Part I, Section H.

50. See discussion of the Law Institute proposal *infra* text at Part I, Section H.

51. See the rather exhaustive list in La. Civ. Code art. 105, which was intended to be introductory to Chapter 2, and related provisions of the Civil Code Ancillaries (La. R.S. Title 9).

52. La. R.S. 9:371-375 (1991) (Code Title V—Divorce, Part V).

53. See discussion *infra* text at Part I, Section H.

the proposed articles on spousal support and child custody addressed the documented disparate impact of no-fault divorce on women and children.<sup>54</sup> The Law Institute approach of addressing the impact of no-fault divorce on women and children through the law of support has been urged by at least one author, who observed that "[l]egislatures that wish to improve the financial position of divorced wives would thus be ill-advised to eliminate unilateral no-fault divorce or impose substantial waiting periods; revision of the rules governing entitlements appears far more likely to produce the desired results."<sup>55</sup>

In an effort to improve the position of women in need at divorce, the Law Institute proposed that fault of the recipient be eliminated as an absolute bar to receipt of support after divorce.<sup>56</sup> The proposal substituted *comparative* "marital misconduct" of the *parties* for "fault" of the recipient as a discretionary factor for the court to consider in deciding the "entitlement, amount and duration" of final periodic support.<sup>57</sup> "Marital misconduct" under the proposed legislation was

54. See *supra* notes 3-19 and accompanying text.

Although not directly concerned with the impact of no-fault divorce on the economic situation of women and children, Marsha Garrison's article, *Good Intentions Gone Awry*, *supra* note 17, considers the unintentional effect on divorced wives of the reform of New York's equitable distribution (of marital property) and rehabilitative alimony laws.

55. Garrison, *Good Intentions Gone Awry*, *supra* note 17, at 725.

56. La. Civ. Code art. 111:

The court must consider all relevant factors in determining the entitlement, amount, and duration of final support. *Those factors may include:*

- (1) The needs of the parties;
- (2) The income and means of the parties, including the liquidity of such means;
- (3) The financial obligations of the parties;
- (4) The earning capacity of the parties;
- (5) The effect of custody of children upon a party's earning capacity;
- (6) The time necessary for the claimant to acquire appropriate education, training, or employment;
- (7) The health, age, and physical and emotional condition of the parties;
- (8) The standard of living of the parties during the marriage;
- (9) The duration of the marriage;
- (10) The tax consequences to either or both parties; and
- (11) *The comparative marital misconduct*, if any, of the parties.

The term "marital misconduct" as used in this Article means any substantial act or omission that violates a spouse's marital duties or responsibilities.

H.R. 1102, Regular Sess. (1990) (emphasis added).

The same proposal was contained in La. Civ. Code art. 112 as introduced during the 1993 legislative session, H.R. 963, Regular Sess. (1993), but the bill was deferred by the House Committee on Civil Law and Procedure.

57. La. Civ. Code art. 111 cmt. (b):

This Article changes the law governing the effect of marital misconduct on a spouse's claim for support. Under the prior law misconduct that rose to the level of one of the then-existing fault grounds for divorce or legal separation operated as a bar to the guilty spouse's receiving post-divorce support. . . . Under this Article, by contrast, misconduct is only one of eleven factors that may be considered by the court in deciding the entitlement to and amount of spousal support, and the comparative misconduct of both

defined as "any substantial act or omission that violates a spouse's marital duties or responsibilities."<sup>58</sup> In addition, two new factors added for consideration in determining entitlement to and amount of support promised the possibility of greater economic parity between the parties—duration of the marriage<sup>59</sup> and standard of living enjoyed by the parties during the marriage.<sup>60</sup> The proposal prohibited the extinction of the spousal support obligation by consent unless an action for divorce was pending or the judgment of divorce rendered.<sup>61</sup> Furthermore, the consensual extinction of the obligation of spousal support had to be in a particular form with court approval.<sup>62</sup> Regulating consensual extinction<sup>63</sup> of the

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spouses is to be considered, not merely that of the spouse who seeks support. Nevertheless, the court still has the discretion to find, in an appropriate case, that marital misconduct of one spouse is sufficiently serious to operate as a complete bar to any award of spousal support to that spouse.

H.R. 1102, Regular Sess. (1990).

58. La. Civ. Code art. 111, H.R. 1102 Regular Sess. (1990). The statutory definition roughly corresponds to the definition of *fault* for purposes of alimony after divorce under La. Civ. Code art. 160 (rev. 1982 & 1986; now La. Civ. Code art. 112 (1991)) in *Felger v. Doty*, 217 La. 365, 366, 46 So. 2d 300, 301 (1950), cited in *Smith v. Smith*, 216 So. 2d 391, 394 (La. App. 3d Cir. 1968).

59. Comment (f) to proposed La. Civ. Code art. 111 explains this factor as one that permits the court to consider "the degree to which a spouse's habituation to dependency during the marriage has impaired his earning capacity." H.R. 1102, Regular Sess. (1990).

60. This factor represented a change in the law. The measure of permanent alimony under La. Civ. Code art. 112 is whether the recipient has insufficient means for her support. Support, by contrast to *maintenance* in La. Civ. Code art. 111, encompasses the necessities (food, clothing, shelter) and conveniences of life (reasonable and necessary automobile expenses, medical and drug expenses, utilities, household expenses, and the income tax liability generated by the alimony payments made to the former wife) unfettered by a consideration of the standard of living of the parties during marriage. See *Bernhardt v. Bernhardt*, 283 So. 2d 226, 229 (La. 1973), cited in *Loyacano v. Loyacano*, 358 So. 2d 304, 310 (La. 1978), judgment vacated *Loyacano v. Leblanc*, 440 U.S. 952, 99 S. Ct. 1488 (1979).

Comment (e) to proposed Article 111, explained the change in law as follows:

It changes the law by permitting the court to consider more than just the cost of "necessities" in setting the amount of spousal support. . . . This change reflects one of the purposes of spousal support awards under this revision, which is to do justice by equitably allocating the economic advantages secured by the parties during the marriage. This factor appears in the spousal support statutes of a number of other states. *E.g.*, Fla. Stat. Ann. § 61.08 (West 1992); Ohio Rev. Code Ann. § 3105.1B (Baldwin 1992).

H.R. 1102, Regular Sess. (1990).

61. La. Civ. Code art. 115: "The obligation of spousal support may not be extinguished by consent unless an action for divorce is pending or a judgment of divorce has been rendered." H.R. 1102, Regular Sess. (1990). See also La. Civ. Code art. 116 in H.R. 963, Regular Sess. (1993).

62. La. Civ. Code art. 115 continues:

That consent must be expressed in an authentic act or act under private signature duly acknowledged by the obligee, and the act must receive court approval. The court must approve the act if it finds that the obligee understands the legal consequences of extinction of the obligation.

H.R. 1102, Regular Sess. (1990). See also La. Civ. Code art. 116 in H.R. 963, Regular Sess. (1993).

See also comment (c) to Article 115 explaining judicial approval of the consensual extinction as requiring that the same proof be elicited as that required under La. Civ. Code art. 2329 for the

obligation assured that the agreement would be entered when the spouses could have information about conditions affecting future need<sup>64</sup> and would by the solemnities of form and court approval "impress upon the affected spouse the seriousness of the step about to be taken."<sup>65</sup>

The Law Institute proposal revising the Civil Code articles on child custody and child support accomplished the principal purposes of (1) creating legislative authority in the Civil Code for the award of child support in connection with a divorce proceeding,<sup>66</sup> (2) providing a "domiciliary parent" model for a joint custody implementation plan in the absence of court modification,<sup>67</sup> and (3) adding the factor of the child's "primary caretaker" to the list of factors to be considered in deciding what custody arrangement is in the best interest of the child.<sup>68</sup> In addition, the proposed revision of the law of custody and child support

approval of matrimonial agreements. H.R. 1102, Regular Sess. (1990). See also La. Civ. Code art. 116 in H.R. 963, Regular Sess. (1993).

63. Comment (f) to La. Civ. Code art. 115: "This Article does not apply to an agreement that fixes, modifies, or otherwise imposes conditions or limitations on spousal support that do not amount to a present or future extinguishment of it." H.R. 1102, Regular Sess. (1990). See also La. Civ. Code art. 116 in H.R. 963, Regular Sess. (1993).

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

65. Comment (e) to La. Civ. Code art. 115. H.R. 1102, Regular Sess. (1990). See also La. Civ. Code art. 116 in H.R. 963, Regular Sess. (1993).

66. La. Civ. Code arts. 136-137. H.R. 1105, Regular Sess. (1990).

Even though the child support guidelines presently appear in the Civil Code Ancillaries (under Code Title V—Divorce, Chapter 1. Divorce—Part 1. In General and Part 1-A. Guidelines for Determination of Child Support), there are no corresponding Civil Code articles in Title V—Of Divorce, Chapter 2 (Provisional and Incidental Proceedings). Only La. Civ. Code art. 131 mentions child support in connection with a joint custody implementation plan.

Authority in the Civil Code for the award of child support in a divorce proceeding rested on the provisions in Chapter 5 (Of Parental Authority) of Title VII (Of Father and Child) of Book I. See La. Civ. Code arts. 224, 227, and 230-34.

67. La. R.S. 9:335(B). 1993 La. Acts No. 261, § 5, contains the Law Institute proposal on child custody originally introduced in 1990 which will take effect on Jan. 1, 1994:

(1) In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown.

(2) The domiciliary parent is the parent with whom the child shall primarily reside, but the other parent shall have physical custody during time periods that assure that the child has frequent and continuing contact with both parents.

(3) The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.

See also La. R.S. 9:341(B), H.R. 1105, Regular Sess. (1990).

68. La. Civ. Code art. 134 (as amended by 1993 La. Acts No. 261, § 1, effective Jan. 1, 1994): "The court shall consider all relevant factors in determining the best interest of the child. Such factors may include: . . . (12) The responsibility for the care and rearing of the child previously exercised by each party."

See comment (j) to Article 134 (citing *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981)) and Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and The Dynamics of Greed*,

organized the Louisiana Revised Statutes (Civil Code Ancillaries) in a pattern corresponding to the organizational structure of the Civil Code's chapters and sections.

In 1990 the Law Institute package revising the law of divorce and its incidental proceedings consisted of eight separate bills introduced in the House of Representatives and referred to the House Committee on Civil Law and Procedure. Four of the bills received a hearing by the committee—the revision of actions for divorce, the revision of claims for contributions to a spouse's education, the addition of express provisions governing incidental matters in actions for nullity of marriage,<sup>69</sup> and the "housekeeping" revision of other statutory provisions necessitated by the elimination of judicial separation. All four bills were reported favorably by the House Committee on Civil Law and Procedure, and all but one, the bill on incidental proceedings in an action for nullity of marriage, passed the House of Representatives. The other four bills concerning spousal support, child custody, and child support were never heard by the House Committee on Civil Law and Procedure. Because all eight bills originally had been a coordinated revision of the law of divorce, failure to pass part of the proposed legislation, especially the revision of spousal support, created problems.

The ability to obtain a divorce judgment by rule to show cause 180 days after service of a petition created the possibility of termination of alimony pendente lite with the judgment of divorce before a hearing could be held on the rule to determine permanent periodic alimony. The judiciary faced the unpleasant choice upon divorce of terminating support to a needy and "worthy" spouse (one who would be awarded permanent alimony) or extending alimony pendente lite until a hearing on the rule to set permanent alimony, unauthorized by the legislation as interpreted by the jurisprudence. The proposed Law Institute revision of the spousal support law eliminated the dilemma by permitting the award of an "interim allowance" (virtually identical to alimony pendente lite) only when a claim for final, periodic support was pending, which could occur at any time after the petition for divorce was filed.<sup>70</sup> The interim allowance did not terminate upon divorce, but upon a judicial determination of whether to grant or to deny the request for final, periodic support.

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3 Yale L. & Pol'y Rev. 168 (1984). See also La. Civ. Code art. 133, H.R. 1105, Regular Sess. (1990).

69. H.R. 1107, Regular Sess. (1990). The substance of this House bill was enacted during the 1993 Legislative Session. See 1993 La. Acts No. 108, § 1.

70. See La. Civ. Code arts. 110-112 in H.R. 1102, Regular Sess. (1990).

La. Civ. Code art. 112: "When a demand for final support is pending, the court may award a party an interim allowance based on the needs of that party, the ability of the other party to pay, and the standard of living of the parties during the marriage." *Id.* (emphasis added). See also La. Civ. Code art. 113, H.R. 963, Regular Sess. (1993).

See, e.g., *Moody v. Moody*, 618 So. 2d 1005 (La. App. 1st Cir. 1993) and *Champion v. Champion*, 618 So. 2d 1182 (La. App. 3d Cir.), writ denied, 620 So. 2d 850 (1993).

During the 1993 legislative session, the legislature enacted the Law Institute proposals on child custody, child support, and incidental proceedings in a nullity action originally introduced in 1990.<sup>71</sup> The Law Institute proposal on revision of the law of spousal support did not fare as well;<sup>72</sup> the House Committee on Civil Law and Procedure voted to defer the measure. In summary, the entire package of bills originally proposed as a revision of Title V of Book I has been enacted, except for one bill—the revision of the law of spousal support. The proposed changes to the law of spousal support described previously in this article<sup>73</sup> are more controversial because they concern economic issues between the two spouses, including the possibility of more former spouses being obligated to pay and the enlarged class of obligors paying more.

### *I. Claims for Contributions to a Spouse's Education*

The legislature replaced one Louisiana Civil Code article on claims for contributions to a spouse's education<sup>74</sup> with four new ones. Two of the articles substituted for former Article 161 contain new provisions that are described as a clarification of the law.<sup>75</sup> Louisiana Civil Code article 122 explicitly provides that the claim for contributions is strictly personal as to both the obligor and the obligee.<sup>76</sup> Article 123 permits the court to structure the award for contributions made to the education of a spouse in the form of a sum certain payable in

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71. 1993 La. Acts Nos. 108 and 261.

72. H.R. 963, Regular Sess. (1993).

73. See discussion of proposed changes in *supra* notes 54-65 and accompanying text.

74. La. Civ. Code art. 161 (as enacted by 1986 La. Acts No. 780, § 1):

A. In a proceeding for a legal separation, declaration of nullity of a marriage, or divorce, or in a separate proceeding, the court may allow a party a sum for financial contributions made to the education, training, or increased earning power of the other party to the extent that the contributing party has not previously benefited by such education, training, or increased earning power. The sum awarded for such contributions may be in addition to a sum for support and to property received in the partition of the community property.

B. Any claim for contributions made in accordance with provisions of Paragraph A of this Article prescribes three years from the date of judgment of declaration of nullity of the marriage or judgment of divorce.

75. See La. Civ. Code arts. 122, cmt. (a) (effective Jan. 1, 1991) and 123, cmt. (a) (effective Jan. 1, 1991).

76. La. Civ. Code art. 122 (effective Jan. 1, 1991): "The claim for contributions made to the education or training of a spouse is strictly personal to each party."

Comment (a) to Article 122 explains that the article is new and comment (b) explains the consequences of the claim being personal: "Under this Article and Civil Code Articles 1765 and 1766, the obligation recognized by this Section is neither transferable nor heritable prior to being reduced to judgment. Under this Article and Code of Civil Procedure Article 428, a pending action under this Section abates when either spouse dies." La. Civ. Code art. 122, cmt. (b).

installments that does not terminate upon remarriage or death of either party.<sup>77</sup> Comment (b) explains the motive for enacting Article 123:

[t]his Section contemplates an award that will tend to be greater the earlier it is made in the defendant's career, because of the importance of the "realized benefit" factor . . . . Thus, a mechanism is needed whereby the award can be structured so as to shift some of its cost from the judgment debtor's early working years to his later, more productive ones.<sup>78</sup>

Louisiana Civil Code article 124 retains the prescriptive period for asserting the claim for contributions originally found in Article 161—three years from the date of signing the judgment of divorce.<sup>79</sup>

Although the substantive elements of the claim contained in Louisiana Civil Code article 121 appear virtually identical to those of its predecessor, the bill originally introduced on recommendation of the Louisiana State Law Institute contained a limitation on the amount of the award not found in former Article 161. As originally introduced, Article 121 limited the amount that could be awarded to a sum *not to exceed* a spouse's financial contributions made to the education or training of the other spouse.<sup>80</sup> In an article written after the enactment of Article 161 in 1986, the author speculated about the possibility that the sum awarded could be a proportion of the other spouse's increased earning power.<sup>81</sup> The Law

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77. La. Civ. Code art. 123, cmt. (c) (effective Jan. 1, 1991):

A judgment under this Article is still a money judgment for a specified sum, not an open-ended award. Thus a judgment under this Article is similar to a spousal support award in only two ways: (1) It is payable periodically; and (2) it may be enforced by an action to make past-due installments executory under Code of Civil Procedure Article 3945 (rev. 1990). It is not, like a spousal support award, modifiable in light of changed circumstances, and under the second sentence of this Article it is not terminated by the death or remarriage of either party.

78. La. Civ. Code art. 123, cmt. (b) (effective Jan. 1, 1991).

79. La. Civ. Code art. 124 (effective Jan. 1, 1991). See also the comment to Article 124.

80. For a comprehensive treatment of the meaning of the language of Article 161 (1986) (repealed, effective Jan. 1, 1991), the predecessor of La. Civ. Code art. 121 (1990 La. Acts No. 1108, § 2, effective Jan. 1, 1991), see Katherine S. Spaht, *Persons and Matrimonial Regimes, Developments in the Law, 1985-1986*, 47 La. L. Rev. 391 (1986). The article explores the background of the proposal for permitting a claim for contributions to the education of a spouse and examines the language of the statutory provision (Article 161), which is virtually identical to that of La. Civ. Code art. 121.

81. A persuasive argument may be made that article 161 permits an award in excess of the "financial" contributions of the contributing spouse. Rather than directing the court in its discretion to award the contributing party his financial contributions only, the article permits the court to "allow a party a sum for financial contributions made to the education . . . of the other party." A prerequisite to the claim is a spouse's financial contribution, but the award is a *sum* that is not expressly limited to the contributions. The quoted language suggests the possibility of prorating the increased earning power of the supported spouse according to the proportion that the financial contributions bear to the total cost of the education. The task of quantification of increased earning power is not easy, but not impossible.



Institute intended to end speculation, limiting the claim to no more than the spouse's financial contributions.

The bill as introduced, with the limitation on the sum that could be awarded, passed the House of Representatives and the Senate Committee on Judiciary A. However, on the floor of the Senate during the debate of the bill, an amendment passed that stripped the limitation from the article, thereby clearly evidencing legislative intent to permit the judge the latitude to award either a sum equal only to the financial contributions of the spouse or a sum representing a proportionate part of the supported spouse's increased earning power or some amount in between.<sup>82</sup>

### J. Transitional Provisions

The elimination of legal separation, not to mention the myriad fault grounds for its rendition,<sup>83</sup> created the necessity for rather detailed transitional provisions. The committee determined that it was unnecessary to retain the *procedure* for obtaining a judicial separation, but it was necessary to retain present law on the *effects* of legal separation in the interest of those spouses who were judicially separated.<sup>84</sup> The committee rejected the repeal of the entire law governing legal

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Spaht, *supra* note 80, at 396-97 (footnote omitted).

82. A description of the legislative history appears in Robert A. Pascal & Katherine S. Spaht, *Louisiana Family Law Course* 302 (6th ed. 1992):

In the legislative history of the amendment and reenactment of Article 161 (which became Articles 121-124) there is evidence of legislative intent that the claimant not be restricted to recovery of only his or her financial contributions. The bill as originally introduced contained a ceiling (no more than his/her contributions) but the language creating the ceiling was stripped from the bill on the Senate floor. Now it is possible under Article 121 to seek an award which represents a percentage of the increased earning power of the recipient.

83. *But see* La. Civ. Code art. 138 (1870) (repealed Jan. 1, 1991).

For an example of the type of problem created by elimination of fault grounds, see *Mathews v. Mathews*, 614 So. 2d 1287 (La. App. 2d Cir. 1993); *Currier v. Currier*, 599 So. 2d 456 (La. App. 2d Cir. 1992); *Wicker v. Wicker*, 597 So. 2d 1273 (La. App. 3d Cir. 1992). *See also* discussion of the issue in Christopher L. Blakesley, *Louisiana Family Law* § 15.27 at 15-43 (1993).

84. La. R.S. 9:382 (effective Jan. 1, 1991):

A judgment of separation from bed and board or divorce rendered before January 1, 1991, or a judgment rendered in an action governed by R.S. 9:381, shall have the same effect that it had prior to January 1, 1991. These effects include, but are not limited to:

- (1) Spouses who are judicially separated shall retain that status until either reconciliation or divorce.

La. R. S. 9:384 (effective Jan. 1, 1991):

A. If spouses who were judicially separated by a judgment signed before January 1, 1991, or by a judgment rendered in an action governed by R.S. 9:381, reconcile, their community of acquets and gains shall be reestablished between the spouses, as of the date of filing of the original petition in the action in which the separation judgment was rendered, unless the spouses execute prior to the reconciliation a matrimonial agreement that the community will not be reestablished upon reconciliation. This matrimonial

separation and the substitution of a single provision continuing the effect of prior law on the consequences of legal separation.<sup>85</sup> Instead, the committee adopted the approach of multiple provisions specifically addressing individual effects of a legal separation. Because of the importance of the subject matter and the need for clarity, and for the convenience of the bench and bar,<sup>86</sup> the committee decided that the transitional provisions should be incorporated in the Louisiana Revised Statutes rather than in separate sections of the act itself.

When the transitional provisions were drafted, revisions to the law of spousal support eliminated fault as an absolute bar to its award.<sup>87</sup> The committee members were particularly sensitive to the reasonable expectations of parties who had filed suit for separation or divorce before the new law became effective. The parties' expectations could include the effect on permanent alimony of a legal separation on the grounds of fault,<sup>88</sup> the elimination of fault as an absolute bar to a claim for alimony, and the effect of judicial findings of freedom from fault under pre-1991 law.<sup>89</sup> Therefore, the transitional provisions addressed actions for

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agreement shall not require court approval.

B. Reestablishment of a community property regime under the provisions of this Section shall be effective toward third persons only upon filing notice of the reestablishment for registry in accordance with the provisions of Civil Code Article 2332. The reestablishment of the community shall not prejudice the rights of third persons validly acquired prior to filing notice of the reestablishment nor shall it affect a prior community property partition between the spouses.

85. The result of this decision was not to eliminate all references in the law to legal separation, but rather to retain each reference to legal separation that concerned its effect, rather than the procedure for obtaining a separation.

The list of the statutory provisions that remained untouched by the legislation in 1990 because they pertained to the effect of a separation includes: La. Civ. Code arts. 221, 250, 258, 355, 880, 894, 895, 896, 902, 2367.1; La. Code Civ. P. arts. 683, 732, 3992, 4031, 4501; Code Juv. P. arts. 13(11), 51; La. R.S. 4:150 (1987), 6:763(b) (1986), 8:655 (1986), 8:659 (1986), 9:422.4 (1965), 9:571 (1965), 9:572 (1965), 13:1140(b) (1983), 13:1401 (1983), 14:41(c) (1986), 26:80(a)(9) (1989), 33:2141(7) (1988), 33:2176(1) (1988), 33:2385.8(G) (1988), 40:1299.58.5(A)(2)(b) (1985). Some of those statutory provisions have been altered since 1990 but not by the new divorce revision. (1990 La. Acts No. 1009, effective Jan. 1, 1991).

One effect of a judgment of separation from bed and board—re-establishment of the community regime after reconciliation of the spouses—was explicitly incorporated into the transitional provisions in the Revised Statutes (La. R.S. 9:384 (effective Jan. 1, 1991)).

86. The committee expressed concern about the difficulty of a piecemeal application of the new law to certain actions.

87. See discussion of La. Civ. Code art. 111 in H.R. 1102, Regular Sess. (1990) in *supra* notes 54-65 and accompanying text.

88. See, e.g., *Lagars v. Lagars*, 491 So. 2d 5 (La. 1986); *Fulmer v. Fulmer*, 301 So. 2d 622 (La. 1974). See discussion *infra* text at notes 96-106.

89. The committee intended to give preclusive effect, for alimony purposes, to a separation judgment rendered before the effective date of the divorce law, on the grounds of the claimant's fault. Likewise, the committee intended to provide that a separation judgment silent as to the claimant's fault should have no preclusive effect on a claim for alimony and should not prevent the payor from proving fault of the claimant as a means of precluding alimony after January 1, 1991.

separation pending on January 1, 1991,<sup>90</sup> reconventional demands thereto whenever filed (even after January 1, 1991), pending incidental actions,<sup>91</sup> and the effect of a judgment of separation from bed and board.<sup>92</sup> Another bill, part of the Law Institute package containing the revision of the law of spousal support, addressed in its transitional provision the effect of new prescriptive periods for claiming spousal support.<sup>93</sup>

In an effort to make the divorce revision more palatable, the transitional provisions extended to legally separated spouses the possibility of obtaining a divorce six months after the date of the judicial separation.<sup>94</sup> To deny legally

La. R.S. 9:381 (effective Jan. 1, 1991): "This Act does not apply to . . . actions for incidental relief commenced before January 1, 1991. . . . Such actions are to be governed by the law in effect prior to January 1, 1991." La. R.S. 9:382 (effective Jan. 1, 1991):

A judgment of separation from bed and board or divorce rendered before January 1, 1991, or a judgment rendered in an action governed by R.S. 9:381, shall have the same effect that it had prior to January 1, 1991. These effects include, but are not limited to:

(2) A judicial determination of fault or freedom from fault made prior to January 1, 1991, shall have the same effect on the right to claim spousal support as it had prior to January 1, 1991.

(3) A judgment of separation or divorce rendered prior to January 1, 1991, without a determination of fault shall not preclude a subsequent adjudication of fault as a bar to spousal support.

See discussion *infra* notes 96-106 and accompanying text.

90. La. R.S. 9:381 (effective Jan. 1, 1991): "This Act does not apply to actions for separation from bed and board or divorce or actions for incidental relief commenced before January 1, 1991, or to reconventional demands thereto, whenever filed. Such actions are to be governed by the law in effect prior to January 1, 1991."

Despite the rather obvious intention of this transitional provision, some judges and attorneys interpreted the statute to deny to the parties the possibility of amending a petition or reconventional demand in a pending separation suit to seek a divorce under new La. Civ. Code art. 102. Therefore, the Legislature, by Concurrent Resolution in 1991, declared that

the sole purpose of enacting R.S. 9:381 was to permit parties to an action for separation from bed and board filed before January 1, 1991, to *continue to proceed* in those suits under the law effective before that date, and was not to preclude such parties from amending their pleadings or filing new pleadings to take advantage of the new ground for divorce under Louisiana Civil Code Article 102.

(emphasis added).

91. Such incidental actions included requests for alimony pendente lite, alimony after divorce, child custody, child support, injunctive relief, use and occupancy of the family home or community movables or immovables, and use of personal property.

92. La. R.S. 9:382 (effective Jan. 1, 1991).

93. La. R.S. 9:383: "A person who is entitled to assert a claim for spousal support, and who is adversely affected by the provisions of this Act, has one year from January 1, 1989, within which to assert a claim under the law in effect prior to that date." H.R. 1102, Regular Sess. (1990). See also La. R.S. 9:386 in H.R. 963, Regular Sess. (1993).

94. La. R.S. 9:383 (effective Jan. 1, 1991): "A. Any person who is judicially separated before January 1, 1991, may obtain a judgment of divorce if there has been no reconciliation between the spouses for a period of six months or more from the date the judgment of separation from bed and board was signed."

separated spouses this opportunity to obtain a divorce which was afforded by prior law<sup>95</sup> would mean a significantly longer wait for a divorce under either Louisiana Civil Code article 102 (180 days after filing a petition) or Article 103 (one year living separate and apart). The provision extending this possibility for divorce to judicially separated spouses had a sunset clause of one year<sup>96</sup> to avoid the undesirable situation of continuing parallel divorce law in the Civil Code Ancillaries.

The serious effect of a fault-based judicial separation *or divorce* on permanent alimony<sup>97</sup> necessitated careful consideration of language to protect the spouse or spouses who had relied or intended to rely<sup>98</sup> on the determination of fault. Under pre-1991 jurisprudence the rendition of a judgment of separation on fault grounds<sup>99</sup> or on mutual fault<sup>100</sup> was determinative of whose fault caused the separation<sup>101</sup> for purposes of awarding or denying permanent alimony.<sup>102</sup> In the case of divorce on the basis of a spouse's fault, the other spouse was relieved of proving his or her lack of fault<sup>103</sup> as a prerequisite to a claim for permanent alimony.

By way of example, for couples who were judicially separated before January 1, 1991, on the grounds of fault of one spouse or mutual fault, the issue of fault for purposes of permanent alimony was resolved. If the new divorce law eliminating judicial separation applied, the issue of fault would have to be relitigated, since fault remained an absolute bar to permanent periodic alimony. The committee knew that in some cases a judicial separation on the grounds of fault was the result of overall negotiations between the two spouses, yet in other cases separations represented results of hotly contested trials. In either situation the two parties had

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95. La. R.S. 9:302 (1898) (repealed Jan. 1, 1991).

96. La. R.S. 9:383 (1991): "B. This Section shall be effective until January 1, 1992, and thereafter spouses who are judicially separated shall be governed by the provisions of this Act in obtaining a judgment of divorce."

97. La. Civ. Code art. 112.

98. La. R.S. 9:381 (effective Jan. 1, 1991) directed that pre-1991 law apply to actions for separation from bed and board and reconventional demands thereto, whenever filed. In addition La. R.S. 9:382 (effective Jan. 1, 1991), which detailed the effect of a judgment of separation rendered prior to the effective date of the act, extended pre-1991 law to a judgment rendered in an action governed by La. R.S. 9:381 (separation or divorce actions filed before Jan. 1, 1991).

99. La. Civ. Code art. 138 (1870) (repealed Jan. 1, 1991) (adultery, conviction of a felony and sentence, habitual intemperance or cruel treatment rendering the common life together insupportable, public defamation, attempt against the life of the other, charged with a felony and fled from justice, intentional non-support of the other who is in destitute or necessitous circumstances).

100. La. Civ. Code art. 141 (1976) (repealed Jan. 1, 1991): "A separation from bed and board shall be granted although both spouses are mutually at fault in causing the separation. In such instances, alimony pendente lite may be allowed but permanent alimony shall not be allowed thereafter following divorce."

101. *Fulmer v. Fulmer*, 301 So. 2d 622 (La. 1974).

102. La. Civ. Code art. 112 (emphasis added): "When a spouse *has not been at fault* . . . , the court may allow that spouse . . . permanent periodic alimony . . . ."

103. The burden of proof shifts to the spouse found "guilty" of fault to prove the claimant's fault. *Lagars v. Lagars*, 491 So. 2d 5 (La. 1986).

expectations that the judgment of separation eliminated the necessity of trying the fault issue for permanent alimony. Therefore, a provision of the transitional legislation stated that "[a] judicial determination of fault or freedom from fault made prior to January 1, 1991, shall have the same effect on the right to claim spousal support as it had prior to January 1, 1991."<sup>104</sup> At the time, this provision also reflected sensitivity to change in the law of spousal support; the Law Institute had proposed eliminating fault as an absolute bar to permanent alimony. The spousal support proposal retained "comparative" fault as a factor in the award of permanent alimony.<sup>105</sup> As a result, parties who had assumed that the fault issue was decided by virtue of a judicial separation rendered before January 1, 1991, would have been required to litigate the general issue of entitlement to alimony because, under the proposal, fault was only one of eleven factors to consider, not a bar.

Likewise, a couple who had decided to pretermite the issue of fault during the separation proceedings by obtaining a no-fault separation,<sup>106</sup> had expectations that the issue of fault could be tried at a later date, if and when one of the spouses claimed permanent alimony (with the hope that none would be claimed). The transitional legislation provided for those couples as well, assuring that a judgment of separation rendered before January 1, 1991, "without a determination of fault shall not preclude a subsequent adjudication of fault as a bar to spousal support."<sup>107</sup>

Two of the transitional provisions concerned the status of couples who were judicially separated on the effective date of the legislation. One provision incorporated by general reference the pre-1991 law of status of judicially separated spouses.<sup>108</sup> As a result, judicially separated couples after January 1, 1991, are considered married,<sup>109</sup> but liberated from the obligation to live together<sup>110</sup> and

104. La. R.S. 9:382(2) (effective Jan. 1, 1991).

105. La. Civ. Code art. 111:

The court must consider all relevant factors in determining the entitlement, amount, and duration of final support. Those factors may include: . . . (11) The comparative marital misconduct, if any, of the parties.

The term "marital misconduct" as used in this Article means any substantial act or omission that violates a spouse's marital duties or responsibilities.

H.R. 1102, Regular Sess. (1990).

See also La. Civ. Code art. 112 in H.R. 963, Regular Sess. (1993). See discussion, *supra* notes 54-65 and accompanying text.

106. La. Civ. Code art. 138(9) (living separate and apart for six months with no reconciliation) (repealed Jan. 1, 1991) or La. Civ. Code art. 138(10) (living six months separate and apart without reconciliation and a joint affidavit that irreconcilable differences exist) (repealed Jan. 1, 1991).

107. La. R.S. 9:382(3) (effective Jan. 1, 1991).

108. La. R.S. 9:382 (effective Jan. 1, 1991): "A judgment of separation from bed and board or divorce rendered before January 1, 1991, or a judgment rendered in an action governed by R.S. 9:381, shall have the same effect that it had prior to January 1, 1991 . . . ."

109. La. Civ. Code art. 136 (repealed Jan. 1, 1991) provided that "[s]eparation from bed and board does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; but it puts an end to their conjugal cohabitation, and to the common concerns.

from the property-sharing arrangement of the community of acquets and gains.<sup>111</sup> Furthermore, if a legally separated husband engages in sexual intercourse with a person other than his wife, he is guilty of adultery and subject to a suit by his wife for divorce.<sup>112</sup> A spouse who is judicially separated, however, is not considered a surviving spouse for intestate succession purposes.<sup>113</sup>

The second provision addressed the effect of a reconciliation of judicially separated spouses on the community of acquets and gains.<sup>114</sup> What the transitional provisions failed to consider explicitly is the effect of reconciliation upon the status of judicially separated spouses and upon the other incidental judgments—such as custody and alimony pendente lite. Implicitly, the provision that addresses the effect of reconciliation upon the community regime suggests that the effects of the judgment of separation are terminated and the spouses' status as married persons is restored with all the consequent legal obligations.<sup>115</sup> Pre-1991 jurisprudence is consistent.<sup>116</sup> Furthermore, the use of analogy to the provision

which existed between them.”

110. La. Civ. Code art. 98, *see cmt. (f)*.

111. La. Civ. Code arts. 101, 155 (repealed Jan. 1, 1991).

112. La. Civ. Code art. 103: “A divorce shall be granted on the petition of a spouse upon proof that: . . . (2) The other spouse has committed adultery; . . . .”

113. La. Civ. Code art. 880 (emphasis added):

In the absence of valid testamentary disposition, the undisposed property of the deceased devolves by operation of law in favor of his descendants, ascendants, and collaterals, by blood or by adoption, and in favor of his *spouse not judicially separated from him*, in the order provided in and according to the following articles.

*See also* La. Civ. Code arts. 894, 895, 896. *But see* La. Civ. Code art. 2433 (marital portion) and *cmt. (b)* to that article.

For a discussion of the effects of a separation from bed and board under the law effective before January 1, 1991, *see* Robert A. Pascal & Katherine S. Spaht, *Louisiana Family Law Course* 261-77 (4th ed. 1986).

114. La. R.S. 9:384 (effective Jan. 1, 1991):

A. If spouses who were judicially separated . . . reconcile, their community of acquets and gains shall be reestablished between the spouses, as of the date of filing of the original petition in the action in which the separation judgment was rendered, unless the spouses execute prior to the reconciliation a matrimonial agreement that the community will not be reestablished upon reconciliation. This matrimonial agreement shall not require court approval.

B. Reestablishment of a community property regime under the provisions of this Section shall be effective toward third persons only upon filing notice of the reestablishment for registry in accordance with the provisions of Civil Code Article 2332. The reestablishment of the community shall not prejudice the rights of third persons validly acquired prior to filing notice of the reestablishment nor shall it affect a prior community property partition between the spouses.

115. La. Civ. Code arts. 98-100.

116. *See, e.g.,* *Moody v. Moody*, 78 So. 2d 536 (1955); *Reichert v. Lloveras*, 188 La. 447, 177 So. 569 (1938); *Dooley v. Dooley*, 443 So. 2d 630 (La. App. 3d Cir. 1983), *cert. denied*, 444 So. 2d 1215 (1984).

that incorporates by general reference pre-1991 law as to the effect of the separation judgment<sup>117</sup> would produce the same result.

## II. COMMENTARY ON NEW DIVORCE ARTICLES: SUBSTANCE AND PROCEDURE

This portion of the article will review the Civil Code and Code of Civil Procedure articles and Revised Statutes sections enacted or amended by Acts 1990, No. 1009, and explain the interrelationship of these provisions with each other and with other statutory provisions. There are similarities and differences between civil actions generally and the different types of divorce actions. For example, some of the procedural requirements for a Civil Code article 102 divorce action are the same or similar to those in other types of civil actions. Other procedures are unique to this type of action. One procedure is unique to a Civil Code article 103(1) divorce action. An understanding of the similarities and differences is critical to avoid procedural error in divorce actions under Civil Code articles 102 and 103 and actions incidental or related to these divorce actions.

For clarity of discussion, in some instances statutory provisions relating to the same issue are grouped and reviewed together. The statutory provisions are presented in a sequence which will be familiar and useful to the practitioner.

### A. Goals

The implementation of the goals of the Marriage/Persons Committee is reflected in the substantive and procedural provisions of the new divorce law.

People marry for very personal and individual reasons; the same is true of divorce. The state cannot select a spouse for one of its citizens, nor should it try to force a person to remain in a marriage in which a satisfactory personal relationship is no longer possible. The state may encourage thoughtful reflection and decision making through the procedures provided for the divorce process. Or state coercion may be exercised by limiting the grounds or causes for which a divorce may be obtained and requiring cumbersome and burdensome procedures in divorce actions. In both, the underlying policy is to discourage hasty divorce. However, empirical evidence suggests that such a public policy has not deterred divorces. Cognizant of this, the committee included in its goals reducing adversarial proceedings, encouraging reconciliation, and instituting simple divorce procedures in simple cases to ensure that everyone has access to the courts in divorce cases.

The substantive and procedural rules adopted reflect these goals. They attempt to do no more than afford the spouse who wishes to end a marriage a period for reflection and reconsideration, and ensure that the incidental issues raised by the impending divorce are decided by a disinterested third party.

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117. La. R.S. 9:382 (effective Jan. 1, 1991). See discussion, *supra* notes 83-85 and accompanying text.

### *B. Organization*

Acts 1990, No. 1009, contains provisions that are incorporated into Louisiana's Civil Code, Code of Civil Procedure, and Revised Statutes, Titles 9 and 13. The act follows the traditional organization of statutory provisions in Louisiana.

The Louisiana Civil Code contains substantive provisions with respect to persons, things, and conflicts of laws. It contains four Books: "Of Persons," "Of Things and the Different Modifications of Ownership," "Of the Different Modes of Acquiring the Ownership of Things," and "Of Conflict of Laws." Each book is divided into titles, each title into chapters, some chapters into sections, and each chapter into articles.

Title IV of Book I, entitled "Husband and Wife," contains the substantive rules of marriage. Title V of Book I, "Divorce," contains the substantive provisions regulating the termination of marriage by divorce and the provisional and incidental proceedings in a divorce action. Title 9 of the Revised Statutes contains the Civil Code Ancillaries and has the same organization as the Civil Code. Title 9 is divided into code titles, chapters, parts, and sections. The only difference is that each chapter in Title 9 is divided into sections not articles as in the Civil Code. Therefore, the corresponding book and title in the Revised Statutes, Code Book I, Code Title V, contain the ancillary provisions concerning divorce.

The Code of Civil Procedure contains general procedural rules. It is also organized into books, titles, chapters, sections, and articles. The procedural provisions of Acts 1990, No. 1009, and subsequent amendatory acts are contained in the appropriate chapters of the Code of Civil Procedure. Some apply only to divorce and incidental actions. Just as the Civil Code has its ancillary Title 9, the Code of Civil Procedure has its corresponding Title 13 in the Revised Statutes. In Title 13, chapters 11 through 32 contain the general rules of civil procedure. The provisions of Acts 1990, No. 1009, regulating service of the original petition and notice of the rule to show cause and notice in a Louisiana Civil Code article 102 divorce action, sections 3491 and 3492, are contained in chapter 14, entitled "Process," and the provisions of Acts 1991, No. 367, excepting divorce actions and their incidental or related actions from the general *res judicata* rule, section 4232(B), are contained in chapter 23, "Judgments." As in the Code of Civil Procedure, many of the general provisions of Title 13 are also applicable to divorce and incidental actions, and some provisions, like those above, apply only to divorce and incidental actions.

Many familiar provisions of the Civil Code now appear under new article numbers. For example, Article 148, "Alimony Pendente Lite," is now Article 111, and Article 160, "Permanent Periodic Alimony," is now Article 112. The Louisiana Law Institute is given statutory authority by Louisiana Revised Statutes 24:253 to redesignate article numbers. Since the prior articles regulating separation and divorce were repealed, and the new articles regulating divorce are now Articles 102-105, the articles regulating provisional and incidental proceedings were redesignated to be sequential with the new divorce articles.



Since passage of the divorce law revision, several acts have passed amending the legislation and various related provisions. Two 1991 acts amended the new divorce law.<sup>118</sup> Act 918 reduced the one-year voluntary separation period to six months for a divorce under Louisiana Civil Code article 103(1). This act was not a Law Institute bill, but Act 367 was, and it made several changes in the divorce law, one in claims for contributions and a significant one regarding *res judicata*.

### C. Article 102 Divorce—The Petition

Louisiana Civil Code art. 102:

A divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that one hundred eighty days have elapsed from the service of the petition, or from the execution of written waiver of the service, and that the spouses have lived separate and apart continuously since the filing of the petition.

Louisiana Code of Civil Procedure art. 3951:

A petition for divorce under Civil Code Article 102 shall contain allegations of jurisdiction and venue and shall be verified by the affidavit of the petitioner.

A petition filed pursuant to this article must comply with the general requirements for pleadings<sup>119</sup> and the particular requirements for petitions.<sup>120</sup>

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118. 1991 La. Acts Nos. 367, 918.

119. La. Code Civ. P. art. 853:

Every pleading shall contain a caption setting forth the name of the court, the title and number of the action, and a designation of the pleading. The title of the action shall state the name of the first party on each side with an appropriate indication of other parties.

A statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading in the same court. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

La. Code Civ. P. art. 854:

No technical forms of pleading are required.

All allegations of fact of the petition, exceptions, or answer shall be simple, concise, and direct, and shall be set forth in numbered paragraphs. As far as practicable, the contents of each paragraph shall be limited to a single set of circumstances.

All pleadings are required to be in writing. La. Code Civ. P. art. 852. The pleading of specified matters is regulated by La. Code Civ. P. arts. 855-862. La. Code Civ. P. art. 863 requires that every pleading of a party represented by an attorney be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney must sign his pleading and state his address.

The practitioner of family law should be especially cognizant of the effect of his signature on a pleading and the possibility of the imposition of sanctions on him and his client as a result of a certification by signature made in violation of Article 863. The sanctions may include the payment of reasonable attorney's fees and expenses incurred because of the filing of the pleading, as well as appropriate disciplinary action for a willful violation of any provision of Article 863 or for the

In addition, it must allege the jurisdictional facts called for by Louisiana Code of Civil Procedure article 10(A)(7),<sup>121</sup> and one or more of the bases for divorce venue specified in Louisiana Code of Civil Procedure article 3941.<sup>122</sup> Louisiana Code of Civil Procedure article 10(A)(7) provides that a court that is otherwise competent under the laws of Louisiana has jurisdiction of a divorce action only if at the time of filing one or both of the spouses are domiciled in Louisiana. Louisiana Code of Civil Procedure article 3941, regulating venue, provides that an action for an annulment of marriage or for a divorce shall be brought in a parish where either party is domiciled, or in the parish of the last matrimonial domicile. The article further provides that this venue may not be waived,<sup>123</sup> and that a

insertion of scandalous or indecent matter in a pleading. La. Code Civ. P. art. 864. See *Diesel Driving Academy, Inc. v. Ferrier*, 563 So. 2d 898 (La. App. 2d Cir. 1990), *recalled in part, reinstated in part on reh'g*, 1990 Lexis 1902, for the obligation imposed upon an attorney who signs a pleading to make an "objectively reasonable inquiry" into the facts and the law. Subjective good faith will not satisfy the duty of reasonable inquiry. *Id.* at 902. The court also enumerates the factors to be considered in determining whether "reasonable factual inquiry" has been made and whether "reasonable legal inquiry" has been made. *Id.* at 902. For other applications of these provisions, see *Barry W. Miller v. Poirier*, 580 So. 2d 558 (La. App. 1st Cir. 1991); *Bankston v. Alexandria Neurosurgical Clinic*, 583 So. 2d 1148 (La. App. 3d Cir.), *cert. denied*, 586 So. 2d 1066 (1991); *Fairchild v. Fairchild*, 580 So. 2d 513 (La. App. 4th Cir. 1991); *Loyola v. A Touch of Class Transp. Service, Inc.*, 580 So. 2d 506 (La. App. 4th Cir. 1991).

120. La. Code Civ. P. art. 891:

The petition shall comply with Articles 853, 854, and 863, and, whenever applicable, with Articles 855 through 861. It shall set forth the name, surname, and domicile of the parties; shall contain a short, clear, and concise statement of all causes of action arising out of, and of the material facts of, the transaction or occurrence that is the subject matter of the litigation; shall designate an address, not a post office box, for receipt of service of all items involving the litigation; and shall conclude with a prayer for judgment for the relief sought. Relief may be prayed for in the alternative.

La. Code Civ. P. art. 892:

Except as otherwise provided in Article 3657, a petition may set forth two or more causes of action in the alternative, even though the legal or factual bases thereof may be inconsistent or mutually exclusive. In such cases all allegations shall be made subject to the obligations set forth in Article 863.

121. La. Code Civ. P. art. 10(A)(7):

A. A court which is otherwise competent under the laws of this state has jurisdiction of the following actions or proceedings only under the following conditions:

.....

(7) An action for divorce, if, at the time of filing, one or both of the parties are domiciled in this state.

122. La. Code Civ. P. art. 3941:

A. An action for an annulment of marriage or for a divorce shall be brought in a parish where either party is domiciled, or in the parish of the last matrimonial domicile.

B. The venue provided in this Article may not be waived, and a judgment rendered in either of these actions by a court of improper venue is an absolute nullity.

123. La. Code Civ. P. art. 44 provides, in part: "The venue provided in Articles . . . 3941 . . . may not be waived." See also La. Code Civ. P. art. 3941(B).

judgment rendered in either of these actions by a court of improper venue is an absolute nullity.<sup>124</sup>

Improper venue in a divorce action has the same effect as a court's lack of subject matter jurisdiction. A judgment rendered in either case is an absolute nullity.<sup>125</sup> In neither case may the parties confer proper venue or subject matter jurisdiction either expressly or by waiver.<sup>126</sup> However, jurisdiction and venue are distinct legal concepts.<sup>127</sup> Jurisdiction is the legal power and authority of a court to hear and determine an action or proceeding involving the legal relations of the parties and to grant the relief to which they are entitled.<sup>128</sup> Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted.<sup>129</sup> Jurisdiction over status is a species of subject matter jurisdiction and is not subject to waiver.<sup>130</sup>

Venue, on the other hand, refers to the parish where an action or proceeding may properly be brought and tried.<sup>131</sup> Generally, an objection to improper venue may be waived.<sup>132</sup> In an action for a divorce, however, the venue provided in Louisiana Code of Civil Procedure article 3941 may not be waived, either expressly or by failure to plead the declinatory exception timely as provided in Article 928 of the Code of Civil Procedure. Therefore, venue is the functional equivalent of subject matter jurisdiction in a divorce action. Although this nonwaivable venue has been referred to as "jurisdictional"<sup>133</sup> or "jurisdictional venue,"<sup>134</sup> it is conceptually incorrect to equate the legal concepts of jurisdiction and venue. To prevent forum shopping in divorce cases, the legislature has decided that venue in divorce actions is not subject to waiver and that a judgment of divorce by a court of improper venue is an absolute nullity. Thus, Article 3941 simply provides special venue rules for divorce actions; the jurisdiction of the court is not implicated.

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124. La. Code Civ. P. art. 3941(B) provides: "The venue provided in this Article may not be waived, and a judgment rendered in either of these actions by a court of improper venue is an absolute nullity."

125. La. Code Civ. P. arts. 3, 3941(B).

126. La. Code Civ. P. arts. 3, 3941(B); *State Dep't Social Servs. v. Parker*, 595 So. 2d 815 (La. App. 2d Cir. 1992); *Douglas v. Douglas*, 146 So. 2d 227 (La. App. 3d Cir. 1962).

127. *Clark v. Clark*, 600 So. 2d 880, 882 (La. App. 1st Cir.), *cert. denied*, 604 So. 2d 1305 (1992); *Sims v. Sims*, 388 So. 2d 428, 430 (La. App. 2d Cir. 1980).

128. La. Code Civ. P. art. 1.

129. La. Code Civ. P. art. 2.

130. *Dailey v. Hough*, 368 So. 2d 1182 (La. App. 3d Cir.), *cert. denied*, 369 So. 2d 1378 (1979); *Douglas v. Douglas*, 146 So. 2d 227, 230 (La. App. 3d Cir. 1962); *Jones v. Shadwick*, 601 So. 2d 371, 374 (La. App. 5th Cir. 1992). *See also* *Lucas v. Lucas*, 195 So. 2d 771, 776 (La. App. 3d Cir.) (Culpepper, J., dissenting), *cert. denied*, 250 La. 539, 197 So. 2d 81 (1967).

131. La. Code Civ. P. art. 41.

132. La. Code Civ. P. art. 44.

133. Notes to La. Code Civ. P. art. 3941.

134. *Paschall v. Paschall*, 357 So. 2d 1266, 1267 (La. App. 2d Cir. 1978).

The petition states that the plaintiff desires to be divorced from the defendant. It must be verified by the affidavit of the petitioner.<sup>135</sup> Verification by petitioner's attorney is not sufficient.<sup>136</sup>

*D. Incidental Relief—Use of Summary Proceedings*

Louisiana Civil Code article 105:

In a proceeding for divorce or thereafter, either spouse may request a determination of custody, visitation or support of a minor child; support for a spouse; injunctive relief; use and occupancy of the family home or use of community movables or immovables; or use of personal property.

Louisiana Code of Civil Procedure article 425:

A. A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.

B. Paragraph A of this Article shall not apply to an action for divorce under Civil Code Article 102 or 103, an action for determination of incidental matters under Civil Code Article 105, an action for contributions to a spouse's education or training under Civil Code Article 121, and an action for partition of community property and settlement of claims between spouses under R.S. 9:2801.

Louisiana Revised Statutes 13:4232(B):

B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contributions to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R. S. 9:2801, the judgment has the effect of res judicata only as to causes of action actually adjudicated.

The petition for divorce may request a determination of the above-listed incidental matters and those matters may be disposed of, at trial or otherwise, by summary proceedings.<sup>137</sup> If not asserted in the petition for a divorce, a determi-

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135. La. Code Civ. P. art. 3951. For suggested forms for this petition and other pleadings in divorce actions, see La. Code Civ. P. Forms 370(1)-370(23) (Supp. 1993).

136. La. Civ. Code art. 102. This is one of the exceptions provided by law to the La. Code Civ. P. art. 863 provision that pleadings need not be verified or accompanied by affidavit or certificate.

137. La. Code Civ. P. art. 2592 provides, in part:

Summary proceedings may be used for trial or disposition of the following matters only:

(1) An incidental question arising in the course of judicial proceedings, including the award of and the determination of reasonableness of attorney's fees.

....

nation of these incidental matters may be sought in subsequent pleadings, by ordinary or summary proceedings, as is appropriate to a particular action.<sup>138</sup>

### *1. Use of Summary Proceedings*

Louisiana Code Civil Procedure article 2592:

Summary proceedings may be used for trial or disposition of the following matters only:

(1) An incidental question arising in the course of judicial proceedings, including the determination of reasonableness of attorney's fees.

....

(3) An issue which may be raised properly by an exception, contradictory motion, or rule to show cause.

....

(8) The original granting of, subsequent change in, or termination of custody, visitation and support for a minor child; support for a spouse; injunctive relief; support between ascendants and descendants; use and occupancy of the family home or use of community movables or immovables; or use of personal property.

....

(11) All other matters in which the law permits summary proceedings to be used.

(8) The original granting of, subsequent change in, or termination of custody, visitation, and support for a minor child; support for a spouse; injunctive relief; support between ascendants and descendants; use and occupancy of the family home or use of community movables or immovables; or use of personal property.

....

(11) All other matters in which the law permits summary proceedings to be used.

138. La. Code Civ. P. art. 2592, cmt.:

Paragraph (8) relief may be sought as an incident to a termination of marriage action or after a judgment has been granted in such an action. The phrase "injunctive relief" applies to family-related injunctions under Code Title V of Title 9 of the Revised Statutes.

*See also* La. Code Civ. P. art. 425, cmt.:

Paragraph B is added to this Article in order to make it clear that a party to a divorce action is not required to raise the actions commonly associated with divorce actions, such as claims for spousal and child support, in the divorce action itself. Such claims historically have been assertable after the divorce action has been concluded by judgment, and the added phrase makes it clear that this Article does not change the law in that respect.

*See also* La. R. S. 13:4232 (Supp. 1993), cmt.:

Subsection B is added to this Section to make it clear that failure to raise related causes of action in any of the specified actions will not result in the actions that were not urged being barred by the subsequent judgment, if that judgment is silent as to the actions in question.

Summary proceedings are those conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in evidentiary proceedings.<sup>139</sup> A summary proceeding may be commenced by the filing of a contradictory motion or by a rule to show cause, except as otherwise provided by law.<sup>140</sup> If the order applied for by written motion is one to which the mover is clearly entitled without supporting proof, the court may grant the order *ex parte* and without hearing the adverse party.<sup>141</sup> Examples are a temporary restraining order prohibiting a spouse from disposing of or encumbering community property<sup>142</sup> or harming, harassing, or physically or sexually abusing the other spouse or a child of either of the parties.<sup>143</sup> Some orders may not be issued *ex parte* but require a contradictory hearing.<sup>144</sup> An example is the awarding of the use and occupancy of the family residence and use of community movables and immovables pending partition of the community property.<sup>145</sup> The rule to show cause is a contradictory motion.<sup>146</sup>

An obligation for attorney's fees and costs in an action for divorce incurred before the date of the judgment of divorce that terminates the community regime is now a community obligation of that regime, subject to the same rules as to enforcement, allocation, and reimbursement as other community obligations.<sup>147</sup>

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139. La. Code Civ. P. art. 2591.

140. La. Code Civ. P. art. 2593.

141. La. Code Civ. P. arts. 963, 3603. Article 963 provides:

If the order applied for by written notice is one to which mover is clearly entitled without supporting proof, the court may grant the order *ex parte* and without hearing the adverse party.

If the order applied for by written notice is one to which the mover is not clearly entitled, or which requires supporting proof, the motion shall be served on and tried contradictorily with the adverse party.

The rule to show cause is a contradictory motion.

142. La. R.S. 9:371 (1991).

143. La. R.S. 9:372 (1991).

144. La. Code Civ. P. art. 963.

145. La. R.S. 9:374 (1991).

146. La. Code Civ. P. art. 963.

147. 1990 La. Acts No. 1009, § 3 (effective Jan. 1, 1991), adding La. Civ. Code art. 2362.1 and amending La. Civ. Code art. 2363. *See* Comment—1990 to La. Civ. Code art. 2363. Art. 2362.1 provides: "An obligation for attorney's fees and costs in an action for divorce incurred before the date of the judgment of divorce that terminates the community property regime is a community obligation of that regime."

Article 2363, in part, classifies as a separate obligation "an obligation incurred after termination of a community property regime, except an obligation incurred for attorney's fees and costs under Article 2362.1."

Read literally, Article 2362.1 classifies as a community obligation only those attorney's fees and costs "incurred *before* the date of the judgment of divorce that terminates the community property regime," (emphasis added) and Article 2363 classifies as a separate obligation those attorney's fees and costs incurred *on* or after the date of the judgment of divorce. This result was not intended. Attorney's fees incurred through the obtaining of the divorce should be classified as a community obligation. *See infra* note 177 and accompanying text.

Previously, the action to obtain a judgment for attorney's fees was an ordinary proceeding.<sup>148</sup> Louisiana Code of Civil Procedure article 2592 has been amended to include it as an incidental question arising in the course of judicial proceedings, for which summary proceedings may be used.<sup>149</sup> Louisiana Code of Civil Procedure article 2592 was also amended to expressly permit the use of summary proceedings for the granting of the use and occupancy of the family home, use of community movables and immovables, and use of personal property.<sup>150</sup> Courts may grant ex parte orders for spouses to obtain designated personal property.<sup>151</sup>

Louisiana Civil Code article 102 provides that a divorce shall be granted upon *motion* of a spouse when the requirements of that article are met. Louisiana Code of Civil Procedure article 3952 sets forth the required allegations in the *rule to show cause* provided under Louisiana Civil Code article 102. Subsequent articles also refer to the rule to show cause why a divorce should not be granted. Originally, the second paragraph of Louisiana Civil Code article 102 provided that the motion for divorce shall be a "rule to show cause."<sup>152</sup> The second paragraph was inadver-

Because of the Louisiana Supreme Court's exclusive jurisdiction to regulate the practice of law in Louisiana, the reasonableness of attorney's fees is subject to judicial scrutiny. *Baton Rouge v. Stauffer Chemical Co.*, 500 So. 2d 397 (La. 1987); *Leenerts Farms, Inc. v. Rogers*, 421 So. 2d 216 (La. 1982); *Scott v. Kemper Ins. Co.*, 377 So. 2d 66 (La. 1979); *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1978). Although now classified as a community obligation, attorney's fees asserted as a community obligation will still be subject to the pre-amendment jurisprudential reasonableness test. *See Gallagher v. Gallagher*, 190 So. 2d 916 (La. App. 2d Cir. 1966). Attorney's fees are the only community obligation in which the reasonableness of the amount of the obligation is subject to judicial scrutiny.

148. Prior to its amendment, La. Code Civ. P. art. 2592 did not list an action for attorney's fees as one of the matters for which summary proceedings may be used. The statutory listing in Article 2592 of actions that may be instituted by summary process has been generally held to be exclusive. *See Clay v. Clay*, 389 So. 2d 31 (La. 1979); *State, Dep't of Highways v. Lamar Advertising Co.*, 279 So. 2d 671 (La. 1973); *Burdine & Assocs., Inc. v. Noel*, 550 So. 2d 677 (La. App. 2d Cir. 1989); *Irvin v. Irvin*, 425 So. 2d 936 (La. App. 4th Cir. 1983).

149. 1989 La. Acts No. 118, § 1.

150. 1990 La. Acts Nos. 1008, 1009, § 4, both effective Jan 1, 1991, made identical changes in subparagraph (8) to provide for these incidental actions to be instituted by summary proceedings.

151. La. R.S. 9:373 (1991) provides:

A. In a proceeding for divorce, a court may grant an ex parte order requiring the sheriff or appropriate law enforcement officer to accompany a spouse to the family residence or another location designated by the court so that personal property specified in the order may be obtained by that spouse.

B. Personal property which may be obtained by a court order issued under this Section includes, but is not limited to, the following:

(1) Items of personal wearing apparel belonging to the petitioning spouse or belonging to any children in the custody of the spouse.

(2) Food and eating utensils necessary for the spouse or any children in the custody of the spouse.

(3) Any other item or items deemed necessary by the court for the safety or well-being of the spouse or any children in the custody of the spouse.

152. 1990 La. Acts No. 1009, § 2 (effective Jan 1, 1991). The second paragraph provided that "[t]he motion shall be a rule to show cause filed after the one hundred eighty days have elapsed."

tently omitted from Article 102 when it was amended and re-enacted by Acts 1991, No. 367, to add the provision for written waiver of service.<sup>153</sup> This omission was cured by legislation restoring the second paragraph to Article 102 in 1993.<sup>154</sup> However, the use of the word "motion" in Louisiana Civil Code article 102 was consistent with the use of the phrase "rule to show cause" in Louisiana Code of Civil Procedure article 3952 since both refer to contradictory motions. The articles of the Code of Civil Procedure simply specify which type of motion must be used in obtaining the divorce.

#### *E. Service of Petition and Notice of Suit*

##### Louisiana Revised Statutes 13:3491:

A. A notice in a divorce action under Civil Code Article 102 must be signed by the clerk of the court or his deputy issuing it with an expression of his official capacity and under the seal of his office; must be accompanied by a certified copy of the petition, exclusive of exhibits, even if made a part thereof; and must contain the following:

- (1) The date of issuance;
- (2) The title of the cause;
- (3) The name of the person to whom it is addressed;
- (4) The title and location of the court issuing it; and
- (5) Statements to the following effect:

(a) The person served is being sued for divorce by his spouse under Civil Code Article 102, and that one hundred and eighty days after the service occurs the suing spouse is entitled to file a motion for final divorce;

(b) The suing spouse will no longer be able to move for a final divorce after one year has elapsed from the date of the service;

(c) The person served is entitled to file his or her own motion for a final divorce against the suing spouse; and

(d) The person served is entitled to file motions for incidental relief in the divorce proceeding, including motions for spousal support, child custody, and child support.

B. The statements required to appear in the notice shall provide substantially as follows:

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153. See Editor's Note to La. Civ. Code art. 102 (A. N. Yiannopolos ed., West 1992).

154. 1993 La. Acts No. 107.



## ATTENTION

YOU ARE BEING SUED FOR DIVORCE BY YOUR SPOUSE. ONE HUNDRED AND EIGHTY DAYS AFTER YOU RECEIVE THIS NOTICE YOUR SPOUSE MAY FILE FOR AND OBTAIN A FINAL DIVORCE.

YOU MAY FILE FOR A FINAL DIVORCE YOURSELF, AND YOU MAY SEEK CUSTODY OF CHILDREN, AND MONEY FOR THEIR SUPPORT AND YOUR SUPPORT, AS WELL AS OTHER RELIEF TO PROTECT YOU.

IF YOUR SPOUSE FAILS TO FILE FOR A FINAL DIVORCE IN ONE YEAR, HE MAY NOT DO SO WITHOUT FILING NEW PAPERS AND WAITING ANOTHER ONE HUNDRED AND EIGHTY DAYS.

IF YOU ARE UNSURE OF WHAT TO DO AS A RESULT OF THIS NOTICE, YOU SHOULD TALK IMMEDIATELY WITH AN ATTORNEY ABOUT IT.

A certified copy of the petition must be served on the defendant<sup>155</sup> unless the defendant executes and files a written waiver of service of the petition.<sup>156</sup> The written waiver must be executed after the filing of the petition and be made a part of the record.<sup>157</sup>

No citation is required in the action for the divorce.<sup>158</sup> In all cases procedural due process requires that a defendant be notified in some reasonable manner that an action has been instituted against him and of the nature of that action in order that he may have a fair opportunity to defend himself.<sup>159</sup> Procedural due process does not require any particular form of notice.<sup>160</sup> The required notice may take

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155. La. Code Civ. P. art. 1202, governing ordinary actions generally, provides that the citation "must be accompanied by a certified copy of the petition, exclusive of exhibits, even if made a part thereof . . . ." Although citation is not required and would be inappropriate in an action for a divorce pursuant to La. Civ. Code art. 102, the general requirement of service of a certified copy of the petition is retained. La. R.S. 13:3491(A) (1991) provides that the required notice in a divorce action under La. Civ. Code art. 102 "must be accompanied by a certified copy of the petition, exclusive of exhibits, even if made a part thereof."

156. A discussion of the requirements for a valid waiver of service in an action for a La. Civ. Code art. 102 divorce is contained at *infra* notes 203-207.

157. La. Civ. Code art. 102; La. Code Civ. P. art. 3957(C).

158. In an action for divorce under La. Civ. Code art. 102, La. R.S. 13:3491 (1991) requires service upon the defendant of the statutory notice in the required form, together with a certified copy of the petition for divorce.

159. U.S. Const. amend. XIV; La. Const. art. 1, § 2; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950); *Wilson v. City of New Orleans*, 479 So. 2d 891 (La. 1985); *State v. Woodard*, 387 So. 2d 1066, 1068 (La. 1980); *Grimmer v. Beaud*, 537 So. 2d 299 (La. App. 1st Cir. 1988), *cert. denied*, 538 So. 2d 613 (1989); *Klein v. Klein*, 487 So. 2d 775, 776 (La. App. 3d Cir. 1986); *McLaughlin v. Jefferson Parish School Board*, 560 So. 2d 585, 588-89 (La. App. 5th Cir. 1990).

160. *Wilson*, 479 So. 2d 891; *White v. Board of Supervisors*, 365 So. 2d 583, 585 (La. App. 1st Cir. 1978).

several forms in a suit that cumulates actions for a divorce, for determination of incidental matters, for a partition of community property and settlement of the claims of the parties, and a claim for contributions to education or training.<sup>161</sup> An action is an instituted cause of action, *i.e.*, a demand for the enforcement of a legal right.<sup>162</sup> An action is instituted to enforce a cause of action and a remedy.<sup>163</sup> In a typical divorce suit, there may be cumulated actions<sup>164</sup> for divorce,<sup>165</sup> custody,<sup>166</sup> visitation,<sup>167</sup> child support,<sup>168</sup> alimony pendente lite,<sup>169</sup> permanent periodic or lump sum alimony,<sup>170</sup> use and occupancy of the family residence and community movables or immovables,<sup>171</sup> injunctive relief,<sup>172</sup> partition of

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161. Cumulation of actions is the joinder of separate actions in the same judicial demand, whether by a single plaintiff against a single defendant, or by one or more plaintiffs against one or more defendants. La. Code Civ. P. art. 461.

La. Code Civ. P. art. 462 permits the cumulation of two or more actions by a plaintiff against the same defendant, subject to the following limitations:

- (1) Each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and
- (2) All of the actions cumulated are mutually consistent and employ the same form of procedure.

Except as otherwise provided in La. Code Civ. P. art. 3657, inconsistent or mutually exclusive actions may be cumulated in the same judicial demand if pleaded in the alternative.

Washington v. Washington, 493 So. 2d 1227 (La. App. 2d Cir. 1986) permitted the cumulation of an action for partition of community property and settlement of the claims of the parties under La. R.S. 9:2801 (Supp. 1993), an ordinary proceeding, and a motion for possession of the family home and household goods under La. R.S. 9:374 (1991), a summary proceeding. The court held that the two proceedings were not inconsistent because summary proceedings may be used to try traverses in La. R.S. 9:2801 (Supp. 1993) and that to this extent, both procedures can be used in both actions.

La. Civ. Code art. 105 and La. Code Civ. P. art. 2592(8) expressly authorize the cumulation of the ordinary action for divorce and the use of summary proceedings for the determination of the listed incidental matters.

162. La. Code Civ. P. art. 421:

A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. Amicable demand is not a condition precedent to a civil action, unless specifically required by law.

See also Official Revision Comments to Article 421.

163. For discussions of actions and the distinction between actions and suits, see Harris v. Bardwell, 373 So. 2d 777, 781-82 (La. App. 2d Cir. 1979); Sims v. Sims, 247 So. 2d 602, 604-05 (La. App. 3d Cir. 1971); Texas Gas Transmission Corp. v. Gagnard, 223 So. 2d 233, 237 (La. App. 3d Cir. 1969); Martin Exploration Co. v. Joli Services, Inc., 360 So. 2d 902 (La. App. 4th Cir. 1978).

164. La. Civ. Code art. 105; La. Code Civ. P. arts. 461, 462.

165. La. Civ. Code arts. 102, 103.

166. La. Civ. Code arts. 131, 134.

167. La. Civ. Code arts. 132, 133.

168. La. Civ. Code arts. 131(A)(1)(c), 227; La. R.S. 9:315-315.15 (1991 and Supp. 1993).

169. La. Civ. Code art. 111.

170. La. Civ. Code art. 112.

171. La. R.S. 9:374 (1991).

172. La. Code Civ. P. arts. 3601, 3944; La. R.S. 9:371, 372 (1991).

community property and settlement of the claims of the spouse,<sup>173</sup> contributions to the education and training of a spouse,<sup>174</sup> attorney's fees,<sup>175</sup> and removal of personal property.<sup>176</sup>

Some of these actions must be instituted by ordinary proceedings, and some may be instituted by either ordinary or summary proceedings.<sup>177</sup> In ordinary proceedings citation and service of citation constitute the requisite procedural due process notice.<sup>178</sup> A citation requires the person upon whom it is served to comply with the demand contained in the petition or make an appearance, either by

173. La. R.S. 9:2801, 2802 (1991 and Supp. 1993).

174. La. Civ. Code arts. 121-124.

175. La. Civ. Code art. 2362.1.

176. La. R.S. 9:373 (1991).

177. Summary proceedings are authorized by La. Code Civ. P. art. 2592(8) for the determination of custody, visitation, and support of a minor child; support for a spouse; injunctive relief; support between ascendants and descendants; use and occupancy of the family home and use of community movables or immovables; and use of personal property. Actions for divorce under La. Civ. Code art. 103 must be instituted by ordinary proceedings. La. Code Civ. P. art. 851. An action for a divorce under La. Civ. Code art. 102 must also be instituted by ordinary proceedings; however, the application for the divorce filed after the 180-day delay must be by summary proceedings. La. Civ. Code art. 102; La. Code Civ. P. arts. 3952, 3956. A claim for contributions to the education and training of a spouse and an action for partition of community property and for the settlement of the claims of the parties must be by ordinary proceedings. La. Code Civ. P. art. 851. However, summary proceedings may be used in an action for partition of community property and the settlement of the claims of the parties for the setting of time limits for the filing of detailed descriptive lists and traverses or for concurrence in detailed descriptive lists and for the trial of the traverses. La. R.S. 9:2801(1) and (2) (Supp. 1993).

There is no specific authorization for use of summary proceedings for awarding, at the time of the divorce, attorney's fees and costs incurred before the date of the judgment of divorce that terminates the community property regime. However, La. Code Civ. P. art. 2592(1) authorizes the use of summary proceedings for the trial and disposition of an incidental question arising in the course of judicial proceedings, including the determination of reasonableness of attorney's fees. This provision should include the awarding of attorney's fees in divorce actions pursuant to La. Civ. Code arts. 2357 and 2362.1.

La. Civ. Code arts. 2357 and 2362.1 appear to exclude as community obligations the attorney's fees and costs incurred on the day the divorce judgment is rendered, including attorney's fees and costs for the court appearance to obtain the divorce judgment. Formerly, La. Civ. Code art. 159 classified as a liability of the community "attorney fees and costs incurred by a spouse in the action in which the judgment (of divorce) is rendered," which included the attorney's fees and costs incurred at the hearing at which the divorce decree was rendered. There was no intention to eliminate those attorney's fees and costs in La. Civ. Code art. 2362.1. See Revision Comments—1990 to La. Civ. Code art. 159. See *supra* note 147 and accompanying text for a more complete discussion of attorney's fees.

178. La. Code Civ. P. arts. 6, 1201, 1231. See *Duehring v. Vasquez*, 490 So. 2d 667 (La. App. 2d Cir. 1986).

La. Code Civ. P. art. 1201 provides:

A. Citation and service thereof are essential in all civil actions except summary and executory proceedings and divorce actions under Article 102 of the Civil Code. Without them all proceedings are absolutely null.

B. The defendant may expressly waive citation and service thereof by any written waiver made part of the record.

filing a pleading or otherwise, within a stipulated delay under penalty of default.<sup>179</sup> In summary proceedings service of the contradictory motion or the rule to show cause and order assigning date and hour of trial is the requisite notice to the defendant.<sup>180</sup> Citation and service of citation are not necessary.<sup>181</sup> In executory proceedings citation and service of citation are also not necessary;<sup>182</sup> service of the demand for payment<sup>183</sup> and of the notice of seizure<sup>184</sup> fulfill the notice function.<sup>185</sup> Citation is not required in a Louisiana Civil Code article 102 action because the defendant is not required to respond in any way to the petition. In a Louisiana Civil Code article 102 divorce action, service of the certified copy of the petition for divorce and the notice of suit functions as notice.<sup>186</sup> When actions for

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179. La. Code Civ. P. art. 1202:

The citation must be signed by the clerk of the court issuing it with an expression of his official capacity and under the seal of his office; must be accompanied by a certified copy of the petition, exclusive of exhibits, even if made a part thereof; and must contain the following:

- (1) The date of issuance;
- (2) The title of the cause;
- (3) The name of the person to whom it is addressed;
- (4) The title and location of the court issuing it; and
- (5) A statement that the person cited must either comply with the demand contained in the petition or make an appearance, either by filing a pleading or otherwise, in the court issuing the citation within the delay provided in Article 1001 under penalty of default.

180. *Klein v. Klein*, 487 So. 2d 775, 776 (La. App. 3d Cir. 1986), La. Code Civ. P. art. 2594, cmts.

181. La. Code Civ. P. art. 2594.

182. La. Code Civ. P. art. 2640.

183. La. Code Civ. P. art. 2639. Service of the demand for payment may be waived by the debtor in the act of mortgage or privilege or in the debtor's security agreement. In this event the demand for payment need not be served on the defendant. *Reed v. Meaux*, 292 So. 2d 557, 574 (La. 1974). La. Code Civ. P. arts. 2638 and 2639 have been held to be constitutional. *Buckner v. Carmack*, 272 So. 2d 326 (La. 1973), *appeal dismissed*, 417 U.S. 901, 94 S. Ct. 2594 (1974).

However, unless service of the demand for payment is waived, a defendant in an executory proceeding has an absolute and unqualified right to be served with the notice of demand for payment prior to the sale of the property, and the failure to serve a notice of demand to pay, in the absence of a waiver of it, is a defect which strikes the judicial sale with nullity. *Bourgeois v. De Soto*, 280 So. 2d 271 (La. App. 1st Cir. 1972), *writ denied*, 282 So. 2d 141 (La. 1973); *Consolidation Loans, Inc. v. Guercio*, 200 So. 2d 717, 721 (La. App. 1st Cir. 1966).

184. La. Code Civ. P. art. 2721. Unlike a demand for payment, service of a written notice of seizure may not be validly waived in the act of mortgage or privilege or in the debtor's security agreement. *Security Homestead Ass'n v. Fuselier*, 591 So. 2d 335, 340 (La. 1991). If the debtor could validly waive both the demand for payment and the notice of seizure, he would receive no notice at all of the institution of the executory proceedings or seizure of his property. For these and other reasons, paragraph B of Article 2721 prohibits a waiver of the sheriff's notice of seizure. See Official Revision Comment (b) to Article 2721.

185. See *Neff v. Ford Motor Credit Co.*, 347 So. 2d 1228 (La. App. 1st Cir. 1977); *Brown v. Everding*, 357 So. 2d 1243, 1248 (La. App. 2d Cir. 1978).

186. La. Civ. Code art. 102; La. Code Civ. P. art. 1201; La. R.S. 13:3491 (1991).

incidental relief are cumulated with the action for divorce,<sup>187</sup> summary process may be used in the actions for incidental relief,<sup>188</sup> and service of the contradictory motion or rule to show cause and order assigning date and hour of trial serves as the requisite notice in these incidental actions.<sup>189</sup> If an action for the partition of community property and settlement of the claims of the parties<sup>190</sup> and a claim for contributions to education or training of the other spouse,<sup>191</sup> both ordinary actions, are cumulated with the divorce action,<sup>192</sup> citation and service of citation are required for those cumulated ordinary actions.<sup>193</sup>

Louisiana Code of Civil Procedure article 1201, which provides that citation and service thereof are required in all civil actions except summary and executory proceedings, was amended by Acts 1991, No. 367, to additionally exclude from this citation requirement divorce actions under Louisiana Civil Code article 102 of the Civil Code. Although Louisiana Revised Statutes 13:3491 sets forth the notice requirements for a Louisiana Civil Code article 102 action, Louisiana Code of Civil Procedure article 1201 was amended to address some concerns as to whether citation and service thereof were also required.

Additionally, a notice signed by the clerk of court or his deputy issuing it, with an expression of his official capacity and under his seal of office, containing the statements required by Louisiana Revised Statutes 13:3491,<sup>194</sup> must be served on

187. La. Civ. Code art. 105.

188. La. Code Civ. P. art. 2592(8).

189. La. Code Civ. P. arts. 2593, 2594.

190. La. R.S. 9:2801 (Supp. 1993).

191. La. Civ. Code arts. 121-124.

192. La. Code Civ. P. art. 462.

193. La. Code Civ. P. art. 1201.

194. See *supra* text at Part II, Section E. An error appears in La. R.S. 13:3491(A)(5)(b) (1991). As originally recommended by the Louisiana State Law Institute, La. Code of Civ. P. art. 3954 provided that a divorce action instituted under La. Civ. Code art. 102 is abandoned if the rule to show cause provided by that article is not filed within one year of the service of the original petition. See Comment—1990. In 1991, the Law Institute recommended the addition of the words "or execution of written waiver of service of the original petition" to coordinate this provision with new Article 3957 of the Code of Civil Procedure, which expressly authorizes the waiver of service of the original petition and the rule to show cause and accompanying notices. The legislature, in 1991 La. Acts No. 367, § 2, also amended the article to substitute "two years" for "one year" following the words "is not filed within." However, the notice of suit provision, La. R.S. 13:3491(A)(5)(b) (1991), was not similarly amended by the legislature. Also, Comment—1991 to La. Code Civ. P. art. 3954 and Comment—1991 to La. Civ. Code art. 102 do not note this change, as the legislative change was not upon the recommendation of the Law Institute. For a discussion of this amendment, see *infra* note 265 and accompanying text.

Additionally, the La. R.S. 13:3491 (1991) and 3492 (1991) texts and notice forms do not reflect the provisions of La. Code Civ. P. art. 3957 permitting an express waiver of the service of the initial petition for divorce, the rule to show cause why a divorce should not be granted, and the accompanying notices. The articles refer to *service* of the initial petition for divorce and the rule to show cause, La. R.S. 13:3491(A)(5)(a) (1991) and 3492(A)(6)(b) (1991), respectively. The notices, however, refer to a party having *received* the notice of the divorce action. Presumably, when a waiver of service of the initial petition and notice is executed, that party will contemporaneously

the defendant<sup>195</sup> unless a written waiver of service of the notice is executed by the defendant after the filing of the petition and it is made a part of the record.<sup>196</sup>

The notice of suit requirements of Louisiana Revised Statutes 13:3491, excluding the requirement that a certified copy of the petition be served with the notice, are only directory.<sup>197</sup> Although both a certified copy of the initial petition for divorce and the Louisiana Revised Statutes 13:3491 notice are required to be served on the defendant spouse in a Louisiana Civil Code article 102 divorce action,<sup>198</sup> proof of service of the Louisiana Revised Statutes 9:3491 notice is not required to obtain a divorce.<sup>199</sup> The mandatory 180-day waiting period commences with the service of the initial petition (or waiver thereof), not with service of the notice (or waiver thereof).<sup>200</sup>

Louisiana Code of Civil Procedure article 3953 governing the nullity of a divorce judgment and Article 3954 governing abandonment of a divorce action refer only to the service or waiver of service of the initial petition, not the notice.

The notice for purposes of divorce, patterned after the notice given defendants in actions instituted in small claims courts,<sup>201</sup> is informational and ensures that the defendant spouse in an Article 102 divorce action is notified, in simple terms, that he or she is being sued for a divorce, advises the spouse of his or her right to seek certain relief, and contains certain procedural time limits and other information.

Failure to issue or serve the notice does not affect the validity of a divorce obtained in the action.<sup>202</sup> On the other hand, failure to serve a certified copy of the divorce petition, unless service is waived, renders the divorce judgment an absolute nullity, since such service represents the required procedural due process notice to the defendant.<sup>203</sup>

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receive a copy of the initial petition and notice, minimizing the possibility of misunderstanding on the part of the defendant in the action for divorce.

195. La. R.S. 13:3491 (1991).

196. La. Code Civ. P. art. 3957.

197. See Revision Comments—1987 to La. Civ. Code art. 91 and the cases cited for the effect of failure to comply with a directory requirement.

198. La. R.S. 9:3491 (1991).

199. See La. Code Civ. P. art. 3956.

200. La. Civ. Code art. 102; La. Code Civ. P. arts. 3952, 3953; La. R.S. 9:3491, 3492 (1991).

201. La. R.S. 13:5204 (1991). However, there is a substantial difference in the effect of the failure to serve the statutory notice in the small claims division of city courts and in actions for La. Civ. Code art. 102 divorces. Under La. R.S. 13:5204 (1991), the notice must be contained in a citation or other process. If a citation containing the mandatory notice is not validly served on a defendant in an action in the small claims division of a city court, a resulting judgment is an absolute nullity. *Guillory v. Guillory*, 396 So. 2d 540 (La. App. 3d Cir. 1981). Failure to serve the notice in a divorce action does not result in the nullity of the divorce judgment. See La. Code Civ. P. art. 3953.

202. La. Code Civ. P. art. 3953. This result is implicit in the article's inclusion of service of the petition and omission of service of the notice.

203. La. Code Civ. P. arts. 3952-3953, 3956(2).

### *F. Waiver of Service*

Louisiana Code of Civil Procedure article 1201:

A. Citation and service thereof are essential in all civil actions except summary and executory proceedings and divorce actions under Article 102 of the Civil Code. Without them all proceedings are absolutely null.

B. The defendant may expressly waive citation and service thereof by any written waiver made part of the record.

Louisiana Code of Civil Procedure article 3957:

A. A party in a divorce action under Civil Code Article 102 may expressly waive service of the petition and accompanying notice by any written waiver executed after the filing of the petition and made part of the record.

B. If there is such a waiver, the periods specified by Civil Code Article 102 and Code of Civil Procedure Articles 3953 and 3954 shall run from the date of execution of the waiver.

C. A party in a divorce action under Civil Code Article 102 may expressly waive service of the rule to show cause why a divorce should not be granted and accompanying notice by any written waiver executed after the filing of the rule to show cause and made part of the record.

Article 3957 was added by Acts 1991, No. 367, because of concerns about whether service of the original petition for divorce and its accompanying notice and the rule to show cause and its accompanying notice in an Article 102 divorce action could be waived. None of the original Civil Code or Code of Civil Procedure articles regulating this action for divorce prohibited such a waiver of service. Louisiana Code of Civil Procedure article 3957 now expressly provides for such waivers. Additionally, Louisiana Code of Civil Procedure article 1201 was amended in the same act to except Article 102 divorce actions from its citation and service requirements.

The waiver of service of the initial petition for an Article 102 divorce and its accompanying notice must be in writing and must be executed after the filing of the petition. The written waiver must be made a part of the record. Also, the waiver of service of the rule to show cause why a divorce should not be granted and accompanying notice must be executed after the filing of the rule to show cause. This written waiver must also be made a part of the record. The requirements that the waiver of service be written and be made a part of the record are consistent with and parallel to the requirements of Louisiana Code of Civil Procedure article 1201, permitting the waiver of citation and service.

If service of the initial petition and accompanying notice is waived, the 180-day waiting period commences<sup>204</sup> from the date of execution of the waiver, not from the date of the filing of the written waiver in the record. The committee deliberately chose this event to avoid the type of problem resulting from the long arm statute's provision that the thirty-day delay for the rendition of a default judgment commences when the required proof of service of process in affidavit form is filed in the record, not when the affidavit of service of process is executed.<sup>205</sup> Therefore, the inadvertent failure to file the written waiver in the record will not preclude the commencement of the mandatory 180-day waiting period.

Normally, compliance with the requirement that the waiver be executed after the filing of the petition for divorce and motion for divorce, respectively, is determined by the date inserted in the waiver. What is the effect of a failure to date the waiver? Louisiana Revised Statutes 13:3471(4) requires that an acceptance of service shall be dated and provides that if no date is shown thereon, the acceptance takes effect from the date of its filing in court.<sup>206</sup> The 180 days is a mandatory waiting period that may not be waived in any manner, and non-compliance with it results in the absolute nullity of the judgment of divorce.<sup>207</sup> If a waiver of the initial petition for divorce is undated, it should be considered as having been dated upon its being made a part of the record, and the mandatory 180-day waiting period commences on that date. The 180-day waiting period is not simply a procedural requirement; it and the other requirements of Louisiana Code of Civil Procedure article 3953 represent matters of public policy.<sup>208</sup> Nor should a general appearance be permitted to substitute for the service and waiver requirements of Louisiana Civil Code article 102 and Louisiana Code of Civil Procedure article 3952 because of their public policy underpinnings.

### *G. Motion for Divorce (Rule to Show Cause)*

Louisiana Civil Code article 102:

A divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that one hundred eighty days have elapsed from the service of the petition, or from the

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204. La. Civ. Code art. 102; La. Code Civ. P. arts. 3952-3953.

205. La. R.S. 13:3205 (1991); *Glessner v. Hyatt*, 380 So. 2d 222 (La. App. 3d Cir. 1980).

206. La. R.S. 13:3471(4) (1991): "An acceptance of service shall be dated, and if no date is shown thereon, the acceptance takes effect from the date of its filing in court. No acceptance of service shall affect the delays allowed by law or by the local rules of court."

207. La. Code Civ. P. art. 3953.

208. La. Civ. Code art. 11, prior to its repeal and replacement by La. Civ. Code art. 7, 1987 La. Acts No. 124 (effective Jan. 1, 1988), referred to "public order." The jurisprudence frequently referred to "public policy." Present La. Civ. Code art. 7 refers to "the public interest." The terms generally mean the same thing. The 180-day waiting period reflects Louisiana's historical prohibition of "quickie" divorces as a matter of public policy, except for limited serious reasons now reflected in La. Civ. Code art. 103(2) and (3), the commission of adultery and the commission of a felony and resulting sentence of death or imprisonment at hard labor.



execution of written waiver of the service, and that the spouses have lived separate and apart continuously since the filing of the petition.

Louisiana Code of Civil Procedure article 3952:

The rule to show cause provided under Civil Code Article 102 shall allege proper service of the initial petition for divorce, that one hundred eighty days or more have elapsed since that service, and that the spouses have lived separate and apart continuously since the filing of the original petition. The rule to show cause shall be verified by the affidavit of the mover.

When 180 days have elapsed since the service of the initial petition for a divorce, or since the execution of the written waiver of service, either spouse may file a motion for a divorce.<sup>209</sup> The motion is a rule to show cause why a divorce decree should not be rendered.<sup>210</sup> Motions may be granted *ex parte* or may require service on and a contradictory trial with the adverse party.<sup>211</sup> In addition to the other requirements regulating the form and contents of motions,<sup>212</sup> the rule

209. La. Civ. Code art. 102; La. Code Civ. P. arts. 3952, 3957.

210. La. Civ. Code art. 102; La. Code Civ. P. arts. 3952, 3956(3).

When originally enacted by 1990 La. Acts No. 1009, Louisiana Civil Code article 102 contained a second paragraph providing that "[t]he motion shall be a rule to show cause filed after one hundred eighty days have elapsed."

When Article 102 was amended by 1991 Acts No. 367 to add the provision for written waiver of service of the initial petition for divorce, the second paragraph was inadvertently omitted. The omission did not change the Article 102 divorce procedure, however, as the "rule to show cause" language is still retained in La. Code Civ. P. arts. 3952, 3953, 3954, 3956, and 3957(C). The omitted language simply stated the type of contradictory motion to be used. The language inadvertently omitted was restored by 1993 La. Acts No. 107.

211. La. Code Civ. P. art. 963.

212. La. Code Civ. P. art. 962 provides:

A written motion shall comply with Articles 853 and 863, and shall state the grounds therefor, and the relief or order sought. It must also comply with Article 854 if the motion is lengthy, and whenever applicable, with Articles 855 through 861.

La. Code Civ. P. art. 853 provides:

Every pleading shall contain a caption setting forth the name of the court, the title and number of the action, and a designation of the pleading. The title of the action shall state the name of the first party on each side with an appropriate indication of other parties.

A statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading in the same court. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

La. Code Civ. P. art. 854 provides:

No technical forms of pleading are required.

All allegations of fact of the petition, exceptions, or answer shall be simple, concise, and direct, and shall be set forth in numbered paragraphs. As far as practicable, the contents of each paragraph shall be limited to a single set of circumstances.

La. Code Civ. P. art. 863 provides, in part:

to show cause provided for in Louisiana Code of Civil Procedure article 3952 must allege proper service or waiver of service of the initial petition for divorce, that 180 days have elapsed since the service or the execution of a waiver of service of the initial petition for divorce, and that the spouses have lived separate and apart continuously since the filing of the original petition.<sup>213</sup> It must be verified by the affidavit of the mover.<sup>214</sup> Verification by mover's attorney is not sufficient.<sup>215</sup>

This motion is the sole means by which an Article 102 divorce may be obtained.<sup>216</sup> Ordinary proceedings, involving delays for answering, a judgment by default, and confirmation of a default judgment, may not be employed to obtain the divorce.<sup>217</sup> Neither a motion for summary judgment nor a judgment on the pleadings may be employed for this purpose.<sup>218</sup>

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A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

C. If a pleading is not signed, it shall be stricken unless promptly signed after the omission is called to the attention of the pleader.

Paragraphs D, E, and F of Article 863 provide for sanctions imposed upon a party or his attorney, or both, for a violation of the provisions of the article.

Articles 855-861 provide rules for pleading special matters, most of which are inapplicable to the Article 3952 motion for divorce.

213. La. Code Civ. P. art. 3952.

214. *Id.* This verification requirement is similar to those imposed with respect to a temporary restraining order in an action for injunctive relief, La. Code Civ. P. art. 3603, and an action for conservatory relief, La. Code Civ. P. art. 3501, except that, as noted, the verification must be by the petitioner, not his attorney or agent, as is permitted in these two types of actions.

215. La. Code Civ. P. art. 3952.

216. La. Civ. Code art. 102; La. Code Civ. P. arts. 3952-3953, 3956, 3957(C). See La. Civ. Code art. 102 cmt. (g). See *Morrow v. Morrow*, 595 So. 2d 367 (La. App. 2d Cir. 1992).

217. Requiring summary proceedings was deliberate. Summary proceedings are those conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all of the formalities required in ordinary proceedings. La. Code Civ. P. art. 2591. Divorce proceedings should be handled expeditiously in the courts. Although exceptions and answers are permitted in summary proceedings, La. Code Civ. P. art. 2593, experience shows that they are less likely to be filed in summary proceedings than in ordinary proceedings. They are disposed of on the trial of the rule or motion. La. Code Civ. P. art. 2593. Additionally, summary and ordinary proceedings are generally scheduled on separate trial dockets, and the delays incident to the latter are usually far greater than in summary trial dockets. Many trial courts require formal pre-trial orders and conferences in ordinary proceedings prior to the case being assigned a trial date. The opportunities for a defendant to delay the rendition of judgment are generally greater in ordinary proceedings than in summary proceedings for these and other reasons. See *Clay v. Clay*, 389 So. 2d 31, 35 (La. 1979).

218. La. Code Civ. P. art. 969. The prohibition against the use of judgments on the pleadings and summary judgments in divorce and related actions was to prevent collusive judgments. Armona

The requirements of Louisiana Code of Civil Procedure article 3952 are special pleading requirements in addition to those specified elsewhere in the Code of Civil Procedure for pleadings generally or pleadings used in summary proceedings.

*H. Service of Motion (Rule to Show Cause) and Notice of Rule to Show Cause*

Louisiana Revised Statutes 13:3492:

A. A notice of a rule to show cause under Civil Code Article 102 must be signed by the clerk of the court or his deputy issuing it with an expression of his official capacity and under the seal of his office; must be accompanied by a certified copy of the motion, order and rule to show cause; and must contain the following:

- (1) The date of issuance;
- (2) The title of the cause;
- (3) The name of the person to whom it is addressed;
- (4) The title and location of the court issuing it;
- (5) The return date, time, and place; and
- (6) Statements to the following effect:
  - (a) The person served is being directed to appear and show cause why a divorce should not be granted to his spouse;
  - (b) The necessity for the lapse of one hundred and eighty days from service of the petition of divorce upon the person; and
  - (c) The person served is entitled to appear and oppose the divorce action and to file motions for incidental relief in the divorce proceeding, including motions for spousal support, child custody, and child support.

B. The statements required to appear in the notice shall provide substantially as follows:

**ATTENTION**

**YOU ARE BEING SUED FOR FINAL DIVORCE. A JUDGMENT OF DIVORCE MAY BE RENDERED AGAINST YOU ON THE DATE SPECIFIED IN THE ATTACHED RULE TO SHOW CAUSE UNLESS YOU APPEAR AND OPPOSE THE RULE.**

**ONE HUNDRED EIGHTY DAYS MUST HAVE PASSED SINCE YOU OR YOUR SPOUSE RECEIVED THE FIRST NOTICE OF THE DIVORCE ACTION.**

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v. Algiers Homestead Ass'n, 431 So. 2d 18 (La. App. 4th Cir. 1983); *Loeb v. Loeb*, 252 So. 2d 516 (La. App. 4th Cir. 1971); La. Code Civ. P. art. 969 cmt. (a). As noted in the text *infra*, at notes 236-239, these procedural devices may be utilized in a divorce action pursuant to La. Civ. Code art. 103(1) when all the conditions specified in La. Code Civ. P. art. 969(B) are complied with.

YOU MAY SEEK CUSTODY OF CHILDREN, AND MONEY FOR THEIR SUPPORT AND YOUR SUPPORT, AS WELL AS OTHER RELIEF TO PROTECT YOU.

IF YOU ARE UNSURE WHAT TO DO, YOU SHOULD IMMEDIATELY TALK WITH AN ATTORNEY ABOUT IT.

Unless service is waived by written waiver filed in the record,<sup>219</sup> the defendant in the rule must be served with a certified copy of the motion, order, and rule to show cause, and a notice of the rule to show cause issued and signed by the clerk of court or his deputy, with an expression of his official capacity under the seal of his office, containing the statements required by Louisiana Revised Statutes 13:3492.<sup>220</sup> This notice requirement is parallel to that of Louisiana Revised Statutes 13:3491 and is designed to advise the defendant in the motion unequivocally of the necessity of protecting his interests and advising him of the consequences of inaction.

### *I. Evidence in Article 102 Divorce Proceedings*

Louisiana Code of Civil Procedure article 3956:

The facts entitling a moving party to a divorce under Civil Code Article 102 may be established by:

- (1) The petition for divorce;
- (2) The sheriff's return of service of the petition, or by a waiver of that service;
- (3) The rule to show cause and the affidavit required by Code of Civil Procedure Article 3952;
- (4) The sheriff's return of service of the rule, or by a waiver of that service; and
- (5) The affidavit of the mover, executed after the filing of the rule, that the parties have lived separate and apart continuously since the filing of the original petition and that the mover desires to be divorced.

Louisiana Revised Statutes 9:302:

A. In addition to any hearing otherwise authorized by law to be held in chambers, the court by local rule, and only in those instances where good cause is shown, may provide that only with mutual consent, civil hearings before the trial court in divorce proceedings may be held in chambers. Such hearings shall include contested and uncontested proceedings and rules for spousal support, child support, visitation,

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219. La. Code Civ. P. arts. 3956(4), 3957(C).

220. La. R.S. 13:3492 (1991). Additionally, the notice of a rule to show cause must comply with the requirements of La. Code Civ. P. art. 2594.

injunctions, or other matters provisional and incidental to divorce proceedings.

B. A motion for hearing in chambers pursuant to this Section may be made by either party or upon the court's own motion.

C. Except for being closed to the public, the hearings held in chambers pursuant to this Section shall be conducted in the same manner as if taking place in open court. The minute clerk and court reporter shall be present if necessary to perform the duties provided by law.

D. The provisions of this Section shall not be construed to repeal or restrict the authority otherwise provided by law for any hearing to be held in chambers.

The act provides three alternative methods of proceeding upon the return date of the rule to show cause for a divorce. The first method of proceeding is to have an evidentiary hearing in open court. In such a hearing, evidence of compliance with the procedural requirements must be adduced: that a certified copy of the initial verified petition for divorce was properly served on the defendant in the suit, unless properly waived,<sup>221</sup> that 180 days or more elapsed between that service or waiver and the filing of the rule to show why a divorce should not be rendered, and that proper service was made of the rule to show cause and annexed affidavit of the mover and notice, or service was properly waived.<sup>222</sup> Additionally, the substantive facts must be established. The mover must testify concerning the marriage of the parties, the facts establishing jurisdiction and venue, the separation of the parties, that the parties have lived separate and apart continuously since the filing of the initial petition for divorce, and that the mover desires to be divorced.<sup>223</sup>

A second method of proceeding upon the return date is to establish these facts by filing into evidence at a hearing in open court the verified initial petition for divorce, the sheriff's return showing proper service of the petition, or its proper waiver, the rule to show cause and annexed affidavit of the mover, the sheriff's return showing proper service of the rule to show cause, or its proper waiver, and the additional affidavit of the mover, executed after the filing of the rule, that the parties have lived separate and apart continuously since the filing of the original petition and that the mover desires to be divorced.<sup>224</sup>

For this second procedure, three affidavits are required. One is the affidavit of the original petitioner for divorce verifying the allegations of that initial petition.<sup>225</sup> The second is the affidavit of the mover in the rule to show cause for

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221. La. Code Civ. P. art. 3956(1), (2).

222. La. Code Civ. P. arts. 3952, 3956 (1)-(4); La. Civ. Code art. 102.

223. La. Civ. Code art. 102; La. Code Civ. P. arts. 3952, 3956(5). Implicit in the provisions of Article 3956 is the requirement that the facts required by La. Civ. Code art. 102 and La. Code Civ. P. arts. 3951-3953 and 3956 be proved, either by the convenient method provided in Article 3956 or by testimonial and documentary proof. See La. Code Civ. P. art. 3956 cmt.

224. La. Code Civ. P. art. 3956.

225. La. Code Civ. P. art. 3951.

divorce verifying the allegations of the rule to show cause.<sup>226</sup> The third is the affidavit of the mover in the rule to show cause that the parties have lived separate and apart continuously since the filing of the original petition and that the mover desires to be divorced.<sup>227</sup> This third affidavit is required to invoke the provisions of Louisiana Code of Civil Procedure article 3956 permitting proof by affidavit. It must be executed by the mover after the filing of the rule to show cause required by Louisiana Code of Civil Procedure article 3952.<sup>228</sup> All of these affidavits must be personally executed by the spouse filing the original petition or the motion for divorce, respectively; the affidavit of the spouse's attorney is insufficient.<sup>229</sup>

These requirements are deliberate. The three sequential affidavits ensure that a spouse proceeds deliberately with each step in the divorcing process. They give a spouse an opportunity to pause and reflect and make a conscious decision for each step. The spouse who files the motion for divorce may not be the spouse who filed the initial petition for divorce.<sup>230</sup> It is therefore important that the motion for divorce also be verified, and that the spouse who is actually obtaining the divorce attests to non-reconciliation and the desire to be divorced. The spouse who files the motion for divorce is not required to have desired a divorce when the initial petition was filed nor is the party who filed the initial petition required to have continued in his desire to be divorced.

The committee considered but ultimately rejected a proposal that would have required a spouse to desire to be divorced for at least 180 days. Under that proposal, only the spouse who filed the initial petition for divorce pursuant to Louisiana Civil Code article 102 could file the motion for divorce required by Louisiana Code of Civil Procedure article 3952. If the other spouse desired assurance that the divorce would ultimately be rendered at the end of the 180-day waiting period, he or she was required to file his or her own initial petition for a divorce. That spouse could file a motion for divorce at the end of the 180-day waiting period after service or waiver of service of his or her own initial petition for divorce. This requirement would ensure that at least one of the spouses would have the requisite desire for a divorce for a minimum of six months. The requirement was abandoned as too burdensome and as permitting too much of an opportunity for abuse.

A spouse could file a petition for divorce, obtain favorable incidental relief, and forestall filing the motion for divorce for two years, continuing the incidental relief during that period. For protection, the other spouse would be required to file his or her own petition for divorce even if he or she did not desire a divorce at the time of filing. In other words, one spouse may desire a divorce and file an initial petition. The other spouse may not then desire a divorce. Both spouses may

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226. La. Code Civ. P. art. 3952.

227. La. Code Civ. P. art. 3956(5).

228. *Id.*

229. *See supra* notes 136, 214-215.

230. La. Civ. Code art. 102 permits either spouse to file the rule to show cause why a divorce should not be granted after the requisite waiting period.

change their views by the time the 180-day waiting period has elapsed. The final decision was that either spouse could use the filing and service, or waiver of service, of the initial petition for the purpose of filing the motion for divorce. This change negates the requirement that a spouse desire a divorce for six months. The requirement of the two affidavits in connection with the motion for divorce ensures that the party obtaining the divorce is indeed the one who currently desires it.

Another practical reason for the sequential personal affidavit requirements was to guard against the inadvertent granting of a divorce to a spouse who no longer wants to be divorced, or the use of the proof-by-affidavit procedure to grant a divorce to a spouse who has reconciled. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law.<sup>231</sup> Therefore, without an express verification requirement, an attorney could file a motion for divorce on behalf of a person who in fact does not desire to be divorced. This could also occur if an attorney secures the execution of all three affidavits at the time of the filing of the initial petition. He might "mark up" the file for the motion for divorce and either assume his client still wants to be divorced, or through miscommunication, mistakenly believe that he is authorized to file the motion for divorce.<sup>232</sup> Thus, the third affidavit must be executed *after* the filing of the rule to show cause.

The third method of proceeding upon the return date is to conduct either procedure, the evidentiary hearing or the use of an affidavit, in chambers when permitted by local rule and where good cause is shown.<sup>233</sup> This method is permitted for contested or uncontested divorce proceedings and rules for incidental relief.<sup>234</sup> Except for being closed to the public, these hearings in chambers must be conducted in the same manner as they would be in open court.<sup>235</sup>

Allowing three alternate methods of proceeding upon the return date of the rule to show cause for a divorce was a deliberate decision of the committee. Using the provisions of Louisiana Code of Civil Procedure article 3956 in uncontested cases conserves judicial resources and time—a legitimate goal of courts and attorneys. A court appearance by the divorcing spouse may be a traumatic experience. This procedure eliminates the necessity of the court appearance. The divorce becomes a matter of "paperwork." This should not be the sole method of proceeding, however. For some spouses, a public hearing and a formal judicial pronouncement of the termination of the marriage is therapeutic. Ceremony, or ritual, marks the

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231. La. Code Civ. P. art. 863(B).

232. Under Louisiana law, the relationship between attorney and client is one of principal and agent. *Sondes v. Sears, Roebuck & Co.*, 501 So. 2d 829 (La. App. 4th Cir. 1986); *St. Paul Ins. of Bellaire v. AFIA Worldwide Ins.*, 937 F.2d 274 (5th Cir. 1991). Although the authority of an attorney to represent a litigant whom he claims a right to represent is presumed, this presumption of authority is subject to rebuttal. *Wadsworth v. Alexius*, 234 La. 187, 99 So. 2d 77 (1958); *Price v. Taylor*, 139 So. 2d 230 (La. App. 1st Cir. 1962).

233. La. R.S. 9:302(A) (1993). This method requires the mutual consent of the parties.

234. *Id.*

235. La. R.S. 9:302(C) (1993).

beginning and ending of most of our human relationships. Baptism accompanies birth, and the wedding ceremony accompanies marriage. Bar mitzvah and bat mitzvah mark new life stages and changes in the parent/child relationship. Funeral and interment help the grieved ones to accept the finality of the end of a family relationship. Divorce symbolizes the death of the marriage and the ending of a spousal relationship. For some spouses, a ritual or ceremony marking the end of his or her marital relationship by divorce is as important as the wedding ceremony marking the beginning of the marital relationship. Therefore, for the spouse who needs the ritual of a court hearing to accept the finality it represents, such an opportunity should be and is presented.

Usually, that hearing is public. However, where good cause is shown, local court rules may provide for a closed hearing in chambers. This procedure accommodates the spouses' mutual agreement that the hearing be closed to the public, although the ceremonial character of the hearing is preserved.<sup>236</sup>

#### *J. Evidence and Procedure in Article 103(1) Divorce Proceedings*

Louisiana Code of Civil Procedure article 969:

A. Judgments on the pleadings and summary judgments shall not be granted in any action for divorce or annulment of marriage, nor in any case where the community, paraphernal, or dotal rights may be involved in an action between husband and wife.

B. (1) Notwithstanding the provisions of Paragraph A, judgments on the pleadings and summary judgments may be granted without hearing in any action for divorce under Civil Code Article 103(1) under the following conditions:

- (a) All parties are represented by counsel;
- (b) Counsel for each party, after answer is filed, file a written joint stipulation of facts, request for judgment, and sworn verification by each party; and
- (c) Counsel for each party file a proposed judgment containing a certification that counsel and each party agree to the terms thereof.

(2) The court may render and sign such judgments in chambers without a hearing and without the taking of testimony.

Louisiana Code of Civil Procedure article 1701(B):

When a defendant in an action for divorce under Civil Code Article 103(1), by sworn affidavit, acknowledges receipt of a certified copy of the petition and waives formal citation, service of process, all legal delays, notice of trial, and appearance at trial, a judgment of default may be

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236. *Id.*



entered against the defendant the day on which the affidavit is filed. The affidavit of the defendant may be prepared or notarized by any notary public. The judgment may be obtained by oral motion in open court or by written motion mailed to the court, either of which shall be entered in the minutes of the court, but the judgment shall consist merely of an entry in the minutes.

Louisiana Code of Civil Procedure article 1702(E):

Notwithstanding any other provisions of law to the contrary, when the demand is for divorce under Civil Code Article 103(1), whether or not the demand contains a claim for relief incidental or ancillary thereto, a hearing in open court shall not be required unless the judge, in his discretion, directs that a hearing be held. The plaintiff shall submit to the court an affidavit specifically attesting to and testifying as to the truth of all of the factual allegations contained in the petition, and shall submit the original and not less than one copy of the proposed final judgment. If no answer or other pleading has been filed by the defendant, the judge shall, after two days, exclusive of holidays, of entry of a preliminary default, render and sign the judgment or direct that a hearing be held. The minutes shall reflect rendition and signing of the judgment.

Louisiana substantive and procedural law has always reflected the public policy that the termination of a marriage cannot be the subject of a private agreement between the spouses, and that the termination must be judicially obtained.<sup>237</sup> Stringent substantive and procedural limitations discouraging collusion between the parties enforced this public policy.<sup>238</sup> With the adoption

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237. La. Civ. Code art. 140 (1870) provided: "Separation is to be claimed, sued for and pronounced in the competent courts of justice; it can not be made the subject of arbitration."

The marriage status of the parties is a matter of public interest, and the parties can neither dissolve the marriage by consent nor make it indissoluble by consent. *Barringer v. Dauernheim*, 127 La. 679, 53 So. 923 (1911). See also *Halls v. Cartwright*, 18 La. Ann. 414 (1866).

238. The admission by a defendant spouse of facts alleged by the plaintiff spouse is insufficient to authorize the granting of a divorce. *Arbour v. Murray*, 222 La. 684, 63 So. 2d 425 (1953). Corroboration by a co-respondent was insufficient to establish adultery. *Hayes v. Hayes*, 225 La. 374, 73 So. 2d 179 (1954); *Olivier v. Abunza*, 226 La. 456, 76 So. 2d 528 (1954). In adultery cases the circumstances and facts established had to be such as to lead thoroughly and necessarily to the conclusion that adultery had been committed as alleged in the petition, *Pilgrim v. Pilgrim*, 235 La. 112, 102 So. 2d 864 (1958), and the proof of adultery had to be precise as to time, place, and the person involved, *Arbour*, 222 La. 684, 63 So. 2d 425. If a spouse knew the name of the co-respondent, he was required to allege the name. *Shipp v. Shipp*, 183 La. 1025, 165 So. 189 (1935). Additionally, the courts developed a rule that the uncorroborated testimony of private investigators was insufficient to support a divorce judgment based upon adultery. See *Larocca v. Larocca*, 597 So. 2d 1000, 1002 n.5 (La. 1992) for a discussion of the jurisprudential relaxing of this rule of evidence.

of true no-fault divorce, many of the procedural strictures have properly been abandoned and new procedures instituted to facilitate the obtaining of a divorce.

An exception has been provided to the Louisiana Code of Civil Procedure article 969 prohibition<sup>239</sup> against judgments on the pleadings and summary

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239. La. Code Civ. P. art. 969(A) provides: "Judgments on the pleadings and summary judgments shall not be granted in any action for divorce or annulment of marriage, nor in any case where the community, paraphernal, or dotal rights may be involved in an action between husband and wife."

This provision contains a hiatus. Prior to the enactment of the Matrimonial Regimes Act, 1979 La. Acts No. 709 (effective Jan. 1, 1980), the property of married persons was divided into separate and common property. La. Civ. Code art. 2334 (1870). The separate property of the wife was divided into *dotal* and *extra-dotal* property. La. Civ. Code art. 2335 (1870). Dotal property, or dowry, was that which the wife brought to the husband to support the expenses of the marriage. La. Civ. Code arts. 2335, 2337 (1870). *Extra-dotal* property, otherwise called *paraphernal* property, was that portion of the wife's separate property that did not form a part of her dowry. La. Civ. Code arts. 2335, 2383 (1870). Dotal property and paraphernal property were exclusive sub-classifications of the wife's separate property. There was no provision for the dowry of the husband. All of his separate property was simply that—his separate property. Not having a dowry, or dotal property, he owned no extra-dotal, or paraphernal property. See Kenneth Rigby, *Some Views, Old and New, on Recent Developments in Family Law*, 29 La. B.J. 232 (1982).

The prohibition in La. Code Civ. P. art. 969(A) against the use of judgments on the pleadings and summary judgments in actions between spouses involving property rights is restricted to those in which community, paraphernal, or dotal rights of the spouses are involved. Prior to January 1, 1980, these procedural proscriptions did not apply when the husband's separate property rights were involved, as they could be neither paraphernal nor dotal rights. La. Code Civ. P. art. 969 cmt. (a) (1984) confirms that the rule was to prevent collusive judgments in divorce actions "and other suits involving the rights of married women." It was a rule designed to protect a married woman in her community and separate (dotal and paraphernal) property rights against her husband, who occupied a vastly superior position as head and master of the partnership or community of gains. La. Civ. Code art. 2404 (1870). The husband alone had the administration of his wife's dowry; she could not deprive him of it. La. Civ. Code art. 2350 (1870). Unless she withheld from her husband the administration of her paraphernal property, it also was under the management of her husband. La. Civ. Code art. 2385 (1870). The husband also enjoyed the administration of community effects, could dispose of the revenues they produced, and could alienate them by onerous title, without the consent and permission of his wife, with limited exceptions. La. Civ. Code art. 2404 (1870). The husband did not need any procedural protection from his wife with respect to his interest in the community property and his separate property.

If acquired prior to January 1, 1980, the separate property of a wife is either paraphernal or dotal. To this extent, the language of the article is still applicable. However, any property of a wife acquired after that date that is not community property is neither dotal nor paraphernal property but simply her separate property. The same is true of property acquired by the husband either prior to or after January 1, 1980. Property of married persons is either community or separate. La. Civ. Code art. 2335. Therefore, with respect to property of married persons acquired on or after January 1, 1980, these procedural restrictions apply only when community property rights are involved in an action between them.

Unfortunately, some courts have not understood these pre-1980 classifications of marital property. In *Arnona v. Algiers Homestead Ass'n*, 431 So. 2d 18 (La. App. 4th Cir. 1983), the court, invoking La. Code Civ. P. art. 969, reversed a trial court summary judgment recognizing a husband "as the owner in his separate and paraphernal estate" of certain immovable property. Not only is Article 969 inapplicable to the husband's separate property rights, he owns no "separate and paraphernal estate."

judgments in actions for divorce or annulment of marriage or in any case where the community, paraphernal, or dotal rights may be involved in an action between husband and wife. These procedural devices, permitting the rendition of judgment without a full trial, are available in any action for divorce under Louisiana Civil Code article 103(1) if all of the listed conditions are present. The presence of these conditions assures that no imposition on one spouse by the other exists. Additionally, the submission of sworn verification by both parties of the factual basis for the action reflects the view that this type of evidence is as reliable as testimonial proof in open court, a view reflected in the provisions of Louisiana Code of Civil Procedure article 3956 regulating evidence in Louisiana Civil Code article 102 divorce proceedings. However, the public policy considerations barring judgments on the pleadings and summary judgments in Louisiana Civil Code article 103(2) and (3) actions for divorce and annulment of marriage actions still exist.

Another simplified and expedited procedure for obtaining a Louisiana Civil Code article 103(1) divorce is provided in Louisiana Code of Civil Procedure articles 1701(B) and 1702(E). If the defendant, by sworn affidavit, acknowledges receipt of a certified copy of the petition, waives formal citation, service of process, all legal delays, notice of trial, and appearance at trial, a judgment of default<sup>240</sup>

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*Kennedy v. Kennedy*, 391 So. 2d 1193, 1197 (La. App. 4th Cir. 1980), *writ denied*, 396 So. 2d 883 (1981), held that a husband's firefighter pension benefits were "his separate and paraphernal property."

Neither could the husband nor the wife ever acquire "separate and paraphernal property." This is a contradiction in terms. Before 1980, the wife could acquire separate property that was dotal or could acquire separate property that was extra-dotal, or paraphernal. After 1980, she could acquire separate property. At all times, the husband could acquire only separate property.

Therefore, Article 969 can apply only to community property acquired by the wife at any time and separate (dotal or paraphernal) property acquired by the wife before 1980, and to community property acquired by the husband either before or on or after January 1, 1980. By its terms, it is inapplicable to separate property acquired by the husband at any time and separate property acquired by the wife on or after January 1, 1980, unless the words "paraphernal, or dotal rights" are interpreted to mean the wife's separate rights or property.

This procedural prohibition is different from that in La. R.S. 9:291 (1993), which provides that spouses may not sue each other except for causes of action arising out of the provisions of the Matrimonial Regimes Act, La. Civ. Code art. 2325 et seq., and for restitution of separate property, as well as other enumerated exceptions. There is no prohibition, for example, to an action by a wife against her husband seeking to have property decreed to be community property rather than the husband's separate property. However, a judgment on the pleadings or a summary judgment may not be used in that action as the procedural vehicle to resolve the issue. *See Arnona*, 431 So. 2d at 20.

There is no longer any presumption of the possibility of imposition upon the wife by the husband regarding marital property. The article should be amended to substitute the words "where the community or separate property rights of either spouse may be involved" for the language discussed above.

240. The judgment of default referred to in La. Code. Civ. P. art. 1701(B) describes what is commonly called a "preliminary default." It is the "judgment by default" referred to in La. Code Civ. P. arts. 928(A) and 1843. *See* Notes to La. Code Civ. P. art. 1701. A confirmation of the default judgment may be obtained after two days, exclusive of holidays, from entry of the judgment of default if no answer is timely filed. La. Code Civ. P. art. 1702(A). A final judgment rendered

(preliminary default) may be entered against him on the day the affidavit is filed. Additionally, the plaintiff may submit to the court an affidavit specifically testifying to the truth of all of the factual allegations in the petition, along with the original and at least one copy of the proposed judgment.<sup>241</sup> The article contemplates a separate affidavit of the plaintiff; the verification by the plaintiff of the petition is insufficient.

Unless the court, in its discretion, directs that a hearing be held, a hearing in open court is not required. Two days (exclusive of holidays) after the entry of the preliminary default, if no answer or other pleading has been filed by the defendant, the court shall render and sign the judgment or direct that a hearing be held.<sup>242</sup>

These simplified procedures do not preclude use of a testimonial hearing to obtain a Louisiana Civil Code article 103(1) divorce. A testimonial hearing is available for those spouses who desire the ritual or ceremony signifying the end of their marriages. In both types of divorces, the committee attempted to simplify the proceedings without overlooking the needs of those spouses who value the formal court hearing.

#### K. Reconciliation

Louisiana Civil Code article 104:

The cause of action for divorce is extinguished by the reconciliation of the parties.

Reconciliation of the parties extinguishes the cause of action for divorce and is therefore a defense to the motion for divorce pursuant to Louisiana Civil Code article 102 as well a defense to an action for divorce based upon any of the Louisiana Civil Code article 103 grounds or causes of action.<sup>243</sup> What constitutes reconciliation is a factual question.

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against a defendant against whom a valid judgment by default has not been taken is an absolute nullity. La. Code Civ. P. art. 2002(2); *Livingston Parish Police v. Patterson*, 589 So. 2d 9 (La. App. 1st Cir. 1991); *Richard v. Tri-J Indus. Constr., Inc.*, 478 So. 2d 215, 216 (La. App. 3d Cir. 1985). See also *Clark v. Neel*, 583 So. 2d 90, 92 (La. App. 3d Cir. 1991). La. Code Civ. P. art. 1701(B) does not authorize the waiver by the defendant of a judgment of default.

Additionally it appears doubtful, in view of La. Code Civ. P. art. 1702(E), that the delay (two days, exclusive of holidays) for confirming the default after the entry of the preliminary default, La. Code Civ. P. art. 1702(A), may be waived by the defendant. The term "all legal delays" in La. Code Civ. P. art. 1701(B) probably refers to the delays for answering. La. Code Civ. P. art. 1001.

A judgment rendered prematurely because two days have not elapsed between the entering of the preliminary default and the judgment confirming the default is null. *Evans v. Hamner*, 209 La. 442, 24 So. 2d 814 (1946); *Cottonport Bank v. Thomas*, 12 So. 2d 618 (La. App. 1st Cir. 1943).

241. La. Code Civ. P. art. 1702(E). This procedure is available whether or not the provisions of Louisiana Code of Civil Procedure article 1701(B) are utilized.

242. *Id.*

243. *Millon v. Millon*, 352 So. 2d 325 (La. App. 4th Cir. 1977); La. Civ. Code art. 104 cmts.

The controlling test in establishing the requisite forgiveness, acceptance by the offender, and restoration and renewal of the marital relation that legally constitutes reconciliation is the motives and intentions of the parties.<sup>244</sup>

*L. Nullity of Divorce Judgment*

Louisiana Code of Civil Procedure article 3951:

A petition for divorce under Civil Code Article 102 shall contain allegations of jurisdiction and venue and shall be verified by the affidavit of the petitioner.

Louisiana Code of Civil Procedure article 3952:

The rule to show cause provided under Civil Code Article 102 shall allege proper service of the initial petition for divorce, that one hundred eighty days or more have elapsed since that service, and that the spouses have lived separate and apart continuously since the filing of the original petition. The rule to show cause shall be verified by the affidavit of the mover.

Louisiana Code of Civil Procedure article 3953:

A judgment rendered under Civil Code Article 102 shall be an absolute nullity when less than one hundred eighty days have elapsed between service of the petition, or between execution of written waiver of service of the petition, and filing of the rule to show cause, or when the requirements of this Title with respect to jurisdiction and venue have not been met.

Louisiana Code of Civil Procedure article 10:

A. A court which is otherwise competent under the laws of this state has jurisdiction of the following actions or proceedings only under the following conditions:

....

(7) An action of divorce, if, at the time of filing, one or both of the spouses are domiciled in this state.

....

B. For purposes of Subparagraphs (6) and (7) of Paragraph A of this Article, if a spouse has established and maintained a residence in a parish of this state for a period of six months, there shall be a rebuttable presumption that he has a domicile in this state in the parish of such residence.

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244. *Garrett v. Garrett*, 324 So. 2d 494, 496 (La. App. 2d Cir. 1975), writ denied, 326 So. 2d 372 (1976).

Louisiana Code of Civil Procedure article 3941:

A. An action for an annulment of marriage or for a divorce shall be brought in a parish where either party is domiciled, or in the parish of the last matrimonial domicile.

B. The venue provided in this Article may not be waived, and a judgment rendered in either of these actions by a court of improper venue is an absolute nullity.

Four vices of form render a judgment of divorce pursuant to Louisiana Civil Code article 102 an absolute nullity. The first occurs when a party fails to observe the 180-day waiting period between service or written waiver of service of the initial petition for divorce and the filing of the motion for divorce.<sup>245</sup> The second occurs when a Louisiana court does not possess jurisdiction over the status of the parties.<sup>246</sup> The third occurs when the divorce action is filed in a court of improper venue.<sup>247</sup> The fourth occurs when the initial petition for divorce does not contain the required allegations of jurisdiction and venue.<sup>248</sup>

Ordinarily, the failure to observe required procedural waiting periods or delays is not an error or irregularity that renders a judgment an absolute nullity.<sup>249</sup> However, failure to comply with the 180-day waiting period renders the resulting divorce judgment an absolute nullity.<sup>250</sup> An absolutely null judgment may be attacked by any party in interest<sup>251</sup> and may be attacked collaterally.<sup>252</sup> The party asserting that the judgment is an absolute nullity is not required to do so in a direct action of nullity, as is the case with a relatively null judgment.<sup>253</sup> If a direct nullity action is instituted, it may be by summary proceedings.<sup>254</sup>

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245. La. Code Civ. P. art. 3953.

246. La. Code Civ. P. art. 10(A)(7).

247. La. Code Civ. P. art. 3941(B).

248. La. Code Civ. P. arts. 3951, 3953.

249. Anheuser-Busch Brewing Ass'n v. McGowan, 49 La. Ann. 630, 21 So. 766 (1897); Milner v. Milner, 244 So. 2d 716, 720 (La. App. 2d Cir.), writ refused, 258 La. 351, 246 So. 2d 198 (1971). The premature entry of a preliminary judgment of default pursuant to La. Code Civ. P. art. 1701(A) may, however, subject the resulting judgment to reversal on appeal. See Kelly v. Kelleher, 186 La. 51, 171 So. 569 (1936) and Cardone v. G & R Serv. Ctr., Inc., 360 So. 2d 244 (La. App. 1st Cir. 1978).

250. La. Code Civ. P. art. 3953.

251. Wilson v. King, 227 La. 546, 79 So. 2d 877 (1955); In re Webster's Tutorship, 188 La. 623, 177 So. 688 (1937); Logwood v. Logwood, 185 La. 1, 168 So. 310 (1936); Bryant v. Pierson, 583 So. 2d 97, 99 (La. App. 3d Cir. 1991).

252. Brana v. Brana, 139 La. 305, 71 So. 519 (1916); Jacobs v. Kansas City, S. & G. Ry., 134 La. 389, 64 So. 150 (1914); American Bank & Tr. Co. v. Marbane Inv., Inc., 337 So. 2d 1209, 1212 (La. App. 3d Cir. 1976); Franz v. Franz, 315 So. 2d 79 (La. App. 4th Cir. 1975); Charia v. Mungoven, 550 So. 2d 939 (La. App. 5th Cir. 1989).

253. Nethken v. Nethken, 307 So. 2d 563 (La. 1975).

254. American Bank & Tr. Co., 337 So. 2d at 1212.

For a Louisiana court to render a valid divorce decree, it must possess jurisdiction over the status of the parties,<sup>255</sup> that is, their legal relationship of marriage. The relationship of marriage is not a legal entity, separate and distinct from husband and wife. Jurisdiction over that status confers authority to terminate the status and adjudicate the incidental issues involved in terminating the relationship, i.e., spousal and child support, custody, and the other incidental actions. A Louisiana court has such jurisdiction if one or both spouses are domiciled in Louisiana when the divorce action is filed.<sup>256</sup> The spouses need not have cohabitated in Louisiana or established a common matrimonial domicile in Louisiana. The prior reference in Louisiana Code of Civil Procedure article 10A(7) to the place of occurrence of the grounds for a divorce was deleted.<sup>257</sup>

The requirement that one spouse be domiciled in Louisiana when the divorce action is filed ensures the minimum contacts required by the United States Constitution's Due Process Clause for a state's jurisdiction to terminate a marriage by divorce.<sup>258</sup> If a spouse has established and maintained a residence in a parish of Louisiana for six months, a rebuttable presumption exists, for a divorce or annulment action only, that he or she has a domicile in Louisiana in that parish of residence.<sup>259</sup> Additionally, the divorce action must be filed in a court of proper venue. A divorce action must be brought in a parish where either spouse is domiciled or in the parish of the last matrimonial domicile.<sup>260</sup> Usually, the domicile of a person is in the parish where that person has his principal residence.<sup>261</sup> This venue may not be waived, and a judgment rendered in a divorce action by a court of improper venue is an absolute nullity.<sup>262</sup>

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255. La. Code Civ. P. art. 10.

256. La. Code Civ. P. art. 10(7).

257. La. Code Civ. P. art. 10 previously read, in part:

A court which is otherwise competent under the laws of this state has jurisdiction of the following actions or proceedings only under the following conditions:

(7) An action of divorce, or of separation from bed and board, if one or both of the spouses are domiciled in this state and, except as otherwise provided by law, the grounds therefor were committed or occurred in this state, or while the matrimonial domicile was in this state.

258. *Williams v. North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, *reh'g denied*, 325 U.S. 895, 65 S. Ct. 1560 (1945). See also *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942).

259. La. Code Civ. P. art. 10(B). This provision does not establish a six-month waiting period to file a divorce action; it merely creates a presumption of domicile in Louisiana. A person may in fact establish a Louisiana domicile in less than six months by his acts and intention to do so. See La. Code Civ. P. art. 10 cmts. (Supp. 1993).

260. La. Code Civ. P. art. 3941(A). Although the term "matrimonial domicile" has received scholarly attention, see Robert A. Pascal, *Work of the Supreme Court*, 11 La. L. Rev. 168 (1951), it has not received judicial interpretation in Louisiana cases. It is generally used to designate the last place where the spouses maintained a common home.

261. La. Civ. Code art. 38. A person may have a number of residences but only one domicile. *Wilson v. Butler*, 513 So. 2d 304 (La. App. 1st Cir. 1987).

262. La. Code Civ. P. art. 3941(B).

What is the effect in a petition for divorce and rule to show cause of failing to meet the allegation requirements of Louisiana Code of Civil Procedure articles 3951 and 3952? Louisiana Civil Code article 3951 requires that the initial petition for divorce filed pursuant to Louisiana Civil Code article 102 contain allegations of jurisdiction and venue.<sup>263</sup> Louisiana Code of Civil Procedure article 3952 requires that the motion for divorce allege proper service of the initial petition for divorce, that 180 days or more have elapsed since that service, and that the spouses have lived separate and apart continuously since the filing of the original petition. Does the absence of one or more of the required allegations render the divorce an absolute nullity?

The pleading requirements of Article 3952 do not appear to be jurisdictional; hence the absence of one of the required allegations should not render a divorce an absolute nullity. Their absence may result in the motion's not stating a cause of action for the relief sought. For example, the absence in the motion of an allegation that 180 days or more have elapsed since the service or waiver of service of the initial petition for divorce should not invalidate the divorce obtained pursuant to that motion. However, if the substantive requirement is not met, i.e., less than 180 days have elapsed, the resulting judgment of divorce is an absolute nullity.

The pleading requirements of Article 3951 appear to be jurisdictional. Louisiana Code of Civil Procedure article 3953 provides in part that a divorce judgment rendered under Louisiana Civil Code article 102 "shall be an absolute nullity when . . . the requirements of this Title with respect to jurisdiction and venue have not been met." This article is contained in Title IV, Divorce and Annulment of Marriage. Title IV contains Article 3941, which provides the proper venue for the divorce action, and Article 3951, which requires the initial petition for divorce to contain allegations of jurisdiction and venue. It appears that if the initial petition for a Louisiana Civil Code article 102 divorce fails to allege proper jurisdiction or venue, or the action for an Article 102 divorce is in fact instituted in a court lacking jurisdiction, or in a court of improper venue, the divorce judgment rendered may be an absolute nullity under Louisiana Code of Civil Procedure article 3953. Requiring allegations of jurisdiction and venue in the initial petition reflects sound policy. Neither is subject to waiver. The validity or invalidity of a divorce affects persons other than the parties to the divorce. In many cases, the testimony in uncontested divorces is not taken or transcribed if there is an evidentiary hearing. The pleadings and affidavit may not otherwise reveal the factual basis for jurisdiction or venue. Not allowing jurisdiction and venue to be waived in divorce cases represents strong public policy; requiring a judicial declaration in the initial petition reflects that policy.

It thus appears that the court in which the Article 102 divorce action is instituted must in fact have jurisdiction over the status of the parties and be a court of proper venue. Additionally, the factual basis for that jurisdiction and venue must

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263. La. Code Civ. P. art. 3951 cmt. provides, in part, that "[t]wo new requirements are contained herein: first, the petition must contain allegations of jurisdiction and venue . . . ."



be alleged in the initial petition for divorce to prevent the divorce from being an absolute nullity.

*M. Abandonment of Action*

Louisiana Code of Civil Procedure article 3954:

A. A divorce action instituted under Civil Code Article 102 is abandoned if the rule to show cause provided by that Article is not filed within two years of the service of the original petition or execution of written waiver of service of the original petition.

B. This provision shall be operative without formal order, but on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of abandonment.

When the required 180-day delay after service of the original petition or waiver of service expires, either spouse may file a motion for a divorce. The committee concluded that there should be a reasonable maximum period of time after the mandatory waiting period in which to file the motion for divorce; it should not be prolonged indefinitely. Louisiana Civil Code article 159 provides that a judgment of divorce terminates a community property regime retroactively to the date of filing of the petition in the action in which the judgment of divorce is rendered. When there is a long delay in the rendition of a divorce judgment, a partition of community property and settlement of claims between the spouses arising from the matrimonial regime is more difficult and complicated and is more likely to lead to unfair results. Reimbursement claims are increased. Accurate reconstruction of community assets and liabilities may become more difficult or impossible. In the partition proceedings, assets are valued as of the time of the trial on the merits of the partition action.<sup>264</sup> Assets in the possession of one spouse may have increased in value during the interim, while assets in the possession of the other spouse may have decreased in value or become worthless, through either market forces or the actions of the spouses. Additionally, spouses and children need to have the marital status of the spouses resolved within a reasonable period of time.

The failure of either spouse to file the motion within the permitted time is considered an abandonment of the divorce action and results in its dismissal. This provision is self-operative. As originally enacted,<sup>265</sup> the article provided a one-year time limit, requiring that the motion for divorce be filed within approximately six months after the 180-day waiting period had expired. Some attorneys felt that the original time limit for the filing of the motion was too short. In 1991, the time limit was extended by one year to provide a limit of two years from the service of

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264. La. R.S. 9:2801(2) (1993).

265. 1990 La. Acts No. 1009 (effective Jan. 1, 1991).

the original petition or execution of written waiver of service of the original petition for the filing of the motion for divorce.<sup>266</sup>

This abandonment provision is applicable only to actions for a divorce pursuant to Louisiana Civil Code article 102. It is inapplicable to any of the actions for divorce instituted pursuant to Louisiana Civil Code article 103. Those actions are subject to the considerably longer five-year abandonment rule of Louisiana Code of Civil Procedure article 561.<sup>267</sup> That article provides that an action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for five years. The phrase "steps in its prosecution or defense" means a formal move or action before the court intended to hasten the suit to judgment.<sup>268</sup> Two exceptions to the five-year rule of abandonment have been recognized: when failure to prosecute was caused by circumstances beyond plaintiff's control, and when defendant has waived his right to plead abandonment by taking any action in the case inconsistent with an intent to treat the case as abandoned.<sup>269</sup> Thus, an action may continue for many years, as long as a formal step or action is taken at least once every five years. Unlike Louisiana Code of Civil Procedure article 561, the abandonment period in a Louisiana Civil Code article 102 divorce action commences with service or waiver of service of the initial divorce petition. Any step taken in the divorce proceeding other than the filing of the motion for divorce does not extend the two-year abandonment period.

Although divorce actions pursuant to Louisiana Civil Code article 103 are not subject to the two-year abandonment provisions of Louisiana Code of Civil Procedure article 3954, but to the five-year abandonment provisions of Louisiana Code of Civil Procedure article 561, the same considerations favoring a reasonably prompt resolution of the marital status of the parties apply to Article 103 divorces.

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266. 1991 La. Acts No. 367.

267. La. Code Civ. P. art. 561 provides:

A. An action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of five years, unless it is a succession proceeding:

- (1) Which has been opened;
- (2) In which an administrator or executor has been appointed; or
- (3) In which a testament has been probated.

This provision shall be operative without formal order, but, on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of its abandonment. However, the trial court may direct that a contradictory hearing be held prior to dismissal.

B. An appeal is abandoned when the parties fail to take any step in its prosecution or disposition for the period provided in the rules of the appellate court.

268. *Evergreen Plantation, Inc. v. Zunamon*, 272 So. 2d 414, 416 (La. App. 2d Cir.), *writ denied*, 274 So. 2d 708 (1973), and the cases cited therein.

269. *Succession of Knox*, 579 So. 2d 1164, 1166 (La. App. 2d Cir. 1991); La. Code Civ. P. art. 561 cmt. (c) (1960) and the authorities cited therein.

## *N. Lis Pendens and Res Judicata*

### *1. Lis Pendens*

Louisiana Code of Civil Procedure article 531:

When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.

Louisiana Code of Civil Procedure article 3955:

The defendant spouse in an action filed under Civil Code Article 102 may file a petition for divorce in the same or another court of competent jurisdiction and venue.

The declinatory exception of lis pendens is not applicable to an action for divorce brought under Civil Code Article 102. The declinatory exception of lis pendens is applicable to matters incidental to divorce.

Louisiana Code of Civil Procedure article 925:

The objections which may be raised through the declinatory exception include, but are not limited to, the following:

- ....  
(3) Lis pendens;

### *2. Res Judicata*

Louisiana Revised Statutes 13:4231:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

- (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
- (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Louisiana Revised Statutes 13:4232:

A. A judgment does not bar another action by the plaintiff:

(1) When exceptional circumstances justify relief from the res judicata effect of the judgment;

(2) When the judgment dismissed the first action without prejudice; or,

(3) When the judgment reserved the right of the plaintiff to bring another action.

B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contributions to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R. S. 9:2801, the judgment has the effect of res judicata only as to causes of action actually adjudicated.

Louisiana Code of Civil Procedure article 927:

The objections which may be raised through the peremptory exception include, but are not limited to, the following:

.....

(2) Res judicata;

Because the exceptions of lis pendens and res judicata are analagous, and a fair test of lis pendens is to inquire whether a final judgment in a former suit will be res judicata in a later suit,<sup>270</sup> these two exceptions are discussed together.

The declinatory action of lis pendens is not applicable to an action for divorce brought under Louisiana Civil Code article 102. The defendant in an Article 102 divorce action may file his or her own petition for an Article 102 divorce in the same court or in another court of competent jurisdiction and venue. This exception to the rule of lis pendens was adopted to prevent the plaintiff spouse from filing an Article 102 action, securing the dismissal of an Article 102 action filed by the defendant spouse on principles of lis pendens, and then dismissing his own suit before the expiration of the 180-day delay so that the defendant spouse could not

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270. State ex rel. Marston v. Marston, 223 La. 1046, 1054, 67 So. 2d 587, 589 (1953); Scott v. Ware, 160 So. 2d 237, 239 (La. App. 2d Cir. 1964); Miguez v. Miguez, 128 So. 2d 804, 805 (La. App. 3d Cir. 1961).

file a motion for a judgment of divorce based upon the plaintiff's petition for divorce.<sup>271</sup>

Because of the amendments to Louisiana Code of Civil Procedure articles 531 and 532 by Acts 1990, No. 521, however, if Louisiana Code of Civil Procedure article 3955 is restricted in its application as stated in the Comment (1990) the exception of *lis pendens* may still be applicable in the following situations:

1. Plaintiff files a suit for a divorce pursuant to Civil Code Art. 102 and thereafter the defendant files a suit for a divorce pursuant to Civil Code Art. 103(1), (2), or (3).
2. Plaintiff files a suit for divorce pursuant to Civil Code Art. 103(1), (2), or (3) and thereafter the defendant files a suit for a divorce pursuant to Civil Code Art. 102.
3. Plaintiff files a suit for a divorce based upon one of the Civil Code Art. 103 grounds and the defendant thereafter files a suit for a divorce based upon the same or another Civil Code Art. 103 ground.

Prior to their amendment,<sup>272</sup> Louisiana Code of Civil Procedure articles 531 and 532 required an identity of "cause of action" in two suits in order for *lis pendens* to be applicable to the second suit.<sup>273</sup> For example, a husband's suit for

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271. La Code Civ. P. art. 3955 cmt. The plaintiff spouse can still prevent the defendant spouse from filing a motion for a divorce based upon the initial petition of the plaintiff spouse by dismissing it prior to the expiration of the 180-day delay. However, the defendant spouse can file his or her own petition or a separate suit for an Article 102 divorce upon being served with the other spouse's petition for divorce and proceed on that initial petition at the expiration of the 180-day delay, irrespective of whether the plaintiff spouse has dismissed his or her initial petition for divorce.

1993 La. Acts No. 628 addressed the problem of the dismissal by the plaintiff spouse of his petition prior to the expiration of the 180-day waiting period and its effect on the other spouse. It enacted La. Code Civ. P. art. 3958 providing that a judgment dismissing a petition for divorce under Article 102 shall be rendered (1) upon joint application of the parties and upon payment of all costs, or (2) upon contradictory motion of the plaintiff. The contradictory motion is designed to afford the defendant an opportunity to state why the petition should not be dismissed, i.e., the effect on pending incidental actions or judgments, the delay in obtaining a divorce if the defendant desires a divorce, and other considerations. Unfortunately, the statute is couched in mandatory terms in both instances. Obviously, the petition should be dismissed if both parties desire its dismissal and comply with the cost requirements. If dismissal is mandated upon application of the plaintiff alone, the contradictory motion serves little purpose. Although the word "shall" is mandatory and the word "may" is permissive, La. Code Civ. P. art. 5053 and La. R.S. 1:3 (1987), the article should be interpreted to mandate dismissal upon joint application of the parties and to grant discretion to the court to dismiss or not dismiss the petition upon application of the plaintiff alone. Statutory words and phrases are to be read in their context. La. Code Civ. P. art. 5053 and La. R.S. 1:3 (1987). Words in a statute should be interpreted so as to carry out the policy and intent of the legislature. *Rathborne Lumber & Supply Co. v. Falgout*, 218 La. 629, 50 So. 2d 295 (1951).

272. Amended by 1990 La. Acts No. 521, § 2 (effective Jan. 1, 1991).

273. La. Code Civ. P. art. 531 (1960) provided:

When two or more suits are pending in a Louisiana court or courts on the same cause of action, between the same parties in the same capacities, and having the same object, the defendant may have all but the first suit dismissed by excepting thereto as provided

a separation based on abandonment and the wife's suit for a separation based upon cruel treatment were suits on separate causes of action, and therefore *lis pendens* was inapplicable to the second suit.<sup>274</sup>

Under the amended Articles 531 and 532 regulating *lis pendens*, the test is whether the suits are "on the same transaction or occurrence" instead of an identity of "cause of action." These articles were amended to conform to the changes made in the defense of *res judicata* by the amendment of Louisiana Revised Statutes 13:4231 and enactment of Louisiana Revised Statutes 13:4232 by Acts 1990, No. 521, § 1, effective January 1, 1991.<sup>275</sup> Prior to its amendment by this act, Louisiana Revised Statutes 13:4231 provided that an essential element of *res judicata* was an identity of "cause of action." Therefore, for example, if a wife filed a suit for a separation from bed and board on the grounds of cruel treatment and lost, she was not precluded from thereafter filing a suit for a separation from bed

in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.

La. Code Civ. P. art. 532 (1960) provided:

When a suit is brought in a Louisiana court while another is pending in a court of another state or of the United States on the same cause of action, between the same parties in the same capacities, and having the same object, on motion of the defendant or on its own motion, the court may stay all proceedings in the second suit until the first has been discontinued or final judgment has been rendered.

274. *Haynie v. Haynie*, 452 So. 2d 426 (La. App. 3d Cir. 1984). Also, a wife's suit for divorce based on adultery and the husband's suit for a divorce based on living separate and apart for one year are not suits on the same cause of action; therefore, the *lis pendens* rule of La. Code Civ. P. art. 531 is inapplicable. *Lamb v. Lamb*, 411 So. 2d 1 (La. 1982).

275. La. Code Civ. P. arts. 531 cmt. and 532 cmt.

La. R.S. 13:4231 (1991) provides:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

As amended by 1990 La. Acts 521, § 1 (effective Jan. 1, 1991), La. R.S. 13:4232 (1991) before amended provided:

A judgment does not bar another action by the plaintiff:

(1) When exceptional circumstances justify relief from the *res judicata* effect of the judgment;

(2) When the judgment dismissed the first action without prejudice; or

(3) When the judgment reserved the right of the plaintiff to bring another action.

For a scholarly explanation of the broad application of the principle of issue preclusion as the test for *res judicata*, see La. R.S. 13:4231 cmts. and 4232 cmts. (1991).

and board based on other grounds, such as habitual intemperance, public defamation, or some other Civil Code article 138 cause. Section 4231 was amended by Acts 1990, No. 521, § 1, effective January 1, 1991, so as to change the previous test for preclusion by judgment from an identity of causes of action to the rule that a judgment extinguishes all causes of action "arising out of the transaction or occurrence that is the subject matter of the litigation," a considerably expanded preclusion test.<sup>276</sup> Because of concern about the application of this broad *res judicata* test in divorce cases, Louisiana Revised Statutes 13:4232 was amended,<sup>277</sup> to add Subsection B, providing that in an action for divorce under Louisiana Civil Code articles 102 and 103, in an action for determination of incidental matters, and in the other listed actions, the judgment has the effect of *res judicata* only as to causes of action actually adjudicated.<sup>278</sup> Louisiana Code of Civil Procedure articles 425 and 1061 were also amended<sup>279</sup> to except these actions from the mandatory requirement that a party assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.<sup>280</sup>

276. See La. R.S. 13:4231, cmts., 4232, cmts. (1991).

277. Amended by 1991 La. Acts 367, § 3.

278. La. R.S. 13:4232(B) (Supp. 1993) now provides:

B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contributions to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R. S. 9:2801, the judgment has the effect of *res judicata* only as to causes of action actually adjudicated.

279. 1991 La. Acts No. 367, § 2 amended both articles.

280. La. Code Civ. P. art. 425, as amended, provides:

A. A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.

B. Paragraph A of this Article shall not apply to an action for divorce under Civil Code Article 102 or 103, an action for determination of incidental matters under Civil Code Article 105, an action for contributions to a spouse's education or training under Civil Code Article 121, and an action for partition of community property and settlement of claims between spouses under R. S. 9:2801.

La. Code Civ. P. art. 1061, as amended, provides:

A. The defendant in the principal action may assert in a reconventional demand any causes of action which he may have against the plaintiff in the principal action, even if these two parties are domiciled in the same parish and regardless of connexity between the principal and reconventional demands.

B. The defendant in the principal action, except in an action for divorce under Civil Code Article 102 or 103, shall assert in a reconventional demand all causes of action that he may have against the plaintiff that arise out of the transaction or occurrence that is the subject matter of the principal action.

The comments to La. Code Civ. P. arts. 425 and 1061 and La. R.S. 13:4232 (Supp. 1993) state that the amendments were enacted to clarify that a party to a divorce action is not required to raise the actions commonly associated with divorce actions, such as claims for spousal support and child support, in the divorce action itself. Such claims historically have been assertable after the divorce action has been concluded by judgment. The added language makes it clear that the law has not been changed in that respect. Failure to raise these related causes of action will not result in their being

Articles 531 and 532 were not similarly amended. For *lis pendens*, the test remains whether the actions instituted are based "on the same transaction or occurrence."

In a divorce action, whether under Louisiana Civil Code article 102 or any of the Article 103 provisions, what is the "transaction or occurrence" that is the subject matter of the litigation? It is the marriage of the parties, or at least the events leading to the termination of the marital relationship. If a husband files an action for divorce pursuant to Article 102 and the wife thereafter files an action for divorce based on the adultery of the husband pursuant to Article 103(2), is the second suit based "on the same transaction or occurrence" as the first? If so, the second suit is barred by *lis pendens* and may be dismissed. The same issue arises in the other instances enumerated.

In spite of the restrictive language of the comment as to its purpose, Louisiana Code of Civil Procedure article 3955 may be interpreted to make *lis pendens* applicable only to Louisiana Civil Code article 103 actions for divorce. The first sentence does not limit the defendant spouse to filing an Article 102 action; the defendant may also file an Article 103 action for divorce (situation 1 above).<sup>281</sup> The second sentence may be interpreted as permitting the defendant spouse to file an Article 102 action after the plaintiff spouse has filed either an Article 102 or an Article 103 action (situation 2 above).<sup>282</sup> Only in situation 3 above is the second suit precluded by *lis pendens* under this interpretation.

Louisiana Code of Civil Procedure article 531 proscribes the filing of two or more "suits" on the same transaction or occurrence in the same or different Louisiana courts, not the assertion of an action based upon the same transaction or occurrence in the same "suit" in the same court.<sup>283</sup> Thus, it does not appear that

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barred by a subsequent judgment in the divorce action. This rejection of the broad common law "issue preclusion" test for *res judicata* in divorce actions prevents the unfortunate results illustrated in *Brown v. Brown*, 377 So. 2d 438 (La. App. 2d Cir. 1979), *aff'd*, 387 So. 2d 565 (1980), *cert. denied*, 450 U.S. 966, 101 S. Ct. 1482 (1981).

281. The first sentence of La. Code Civ. P. art. 3955 provides that the defendant in a La. Civ. Code art. 102 action "may file a petition for divorce in the same or another court of competent jurisdiction and venue." The quoted language includes a petition for divorce pursuant to La. Civ. Code art. 103.

282. The declinatory exception of *lis pendens* is always applicable to the second suit filed since this will be the suit dismissed if *lis pendens* is applicable. La. Code Civ. P. art. 531.

283. The word *action* has a well-defined meaning and is carefully used in the Code of Civil Procedure. It is defined in La. Code Civ. P. art. 421 as follows: "A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. . . ."

In the Code of Civil Procedure, "action" means "instituted action," La. Code Civ. P. art. 421 cmt. (a), or a cause of action that has been "instituted" by being asserted in a pleading seeking judicial relief, *id.* This use of the word and this definition of "action" is used throughout Title II, "Actions," La. Code Civ. P. arts. 421-611. For example, Article 422 defines a personal action, a real action, and a mixed action. The second paragraph of Article 423 pertains to a premature action. Article 425 requires that a party assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation. Articles 426-428 regulate the effect of death of a party upon an action. Articles 461-465 regulate cumulation of actions. Article 461 provides that "[c]umulation of actions is the joinder of separate actions in the same judicial demand, whether by a single plaintiff



Louisiana Code of Civil Procedure article 531 precludes the institution of any of the divorce actions as a reconventional demand or a separate petition filed in the same suit, but applies only to actions instituted in a separate suit filed in the same court or in another Louisiana court.

The declinatory exception of *lis pendens* is applicable to all matters incidental to divorce, such as custody, visitation, support of a minor child or spouse, injunctive relief, use and occupancy of the family home, and use of other property.<sup>284</sup> It is also applicable to other related actions not incidental to a divorce action, including partition proceedings and a claim for contributions to education and training.<sup>285</sup>

As previously noted, Louisiana Revised Statutes 13:4232 was amended to add Subsection B, providing that in the enumerated actions *res judicata* is applicable "only as to causes of action actually adjudicated." This limitation in these actions precludes the defense of *res judicata* as to causes of action that could have been, but were not, pleaded and causes of action pleaded but upon which no judgment was rendered. A judgment is the solemn adjudication of a court of law made in a suit upon the relative claims of the parties thereto, as disclosed by the record.<sup>286</sup> The words "actually adjudicated" confirm the narrow application of the *res judicata* principle in these type actions.

#### *O. Injunctive Relief and Restraining Orders*

Louisiana Code of Civil Procedure article 3604:

A. A temporary restraining order shall be endorsed with the date and hour of issuance; shall be filed in the clerk's office and entered of record; shall state why the order was granted without notice and hearing; and shall expire by its terms within such time after entry, not to exceed ten days, as

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against a single defendant, or by one or more plaintiffs against one or more defendants."

Articles 462 and 463 permit the cumulation of two or more actions "even though based on different grounds" if the requirements of those articles are met. Article 465 permits a court to order a separate trial of cumulated actions, even if the cumulation is proper. Article 561 regulates the abandonment of an action either in the trial or appellate court. Chapter 5, Articles 591-611, regulates class and secondary actions. Chapter 6, Articles 1031-1116, regulates the incidental actions of reconvention, cross-claims, intervention, and the demand against third parties.

For further discussions of the distinctions between suits and actions, see *Jahncke Service, Inc. v. Coleman*, 356 So. 2d 468 (La. App. 1st Cir. 1977); *Harris v. Bardwell*, 373 So. 2d 777, 781-82 (La. App. 2d Cir. 1979); *Scott v. Ware*, 160 So. 2d 237 (La. App. 2d Cir. 1964); *Sims v. Sims*, 247 So. 2d 602, 604-05 (La. App. 3d Cir. 1971); *Texas Gas Transmission Corp. v. Gagnard*, 223 So. 2d 233, 237 (La. App. 3d Cir. 1969); *Miguez v. Miguez*, 128 So. 2d 804 (La. App. 3d Cir. 1961); *Martin Exploration Co. v. Joli Servs., Inc.*, 360 So. 2d 902 (La. App. 4th Cir. 1978); *Fertel, Inc. v. Jahncke Serv., Inc.*, 210 So. 2d 143 (La. App. 4th Cir. 1968).

284. La. Code Civ. P. art. 3955.

285. These actions are subject to *lis pendens* because they are not exempted by La. Code Civ. P. art. 3955 from the *lis pendens* provisions of La. Code Civ. P. art. 531.

286. *Allen v. Commercial Nat. Bank*, 243 La. 840, 847, 147 So. 2d 865, 867 (1962).

the court prescribes. A restraining order for good cause shown, and at any time before its expiration, may be extended by the court for one or more periods not exceeding ten days each. The party against whom the order is directed may consent that it be extended for a longer period. The reasons for each extension shall be entered of record.

B. Nevertheless, a temporary restraining order issued in conjunction with a rule to show cause for a preliminary injunction prohibiting a spouse from:

- (1) Disposing of or encumbering community property;
- (2) Harming the other spouse or a child; or
- (3) Removing a child from the jurisdiction of the court, in a suit for divorce shall remain in force until a hearing is held on the rule for the preliminary injunction.

C. A temporary restraining order issued in conjunction with a rule to show cause for a protective order filed in an action pursuant to the Protection from Family Violence Act, R. S. 46:2121, et seq., shall remain in force until a hearing is held on the rule for the protective order or for thirty days, whichever occurs first; however, at any time before its expiration, it may be extended by the court for a period not exceeding thirty days.

Although normally a temporary restraining order may not be initially issued for a period exceeding ten days,<sup>287</sup> such an order issued to prevent a spouse from disposing of or encumbering community property,<sup>288</sup> harming the other spouse or a child,<sup>289</sup> or removing a child from the jurisdiction of the court remains in full force and effect until a hearing is held on the rule for the preliminary writ of injunction,<sup>290</sup> although that period exceeds ten days. A temporary restraining order issued in connection with a rule to show cause for a protective order filed in an action pursuant to the Protection from Family Violence Act may not be initially issued for a period exceeding thirty days.<sup>291</sup>

Once the preliminary injunction is issued, it is effective against the parties restrained from the time they receive actual knowledge of the order by personal service or otherwise. It remains in effect from the time of actual knowledge until it is dissolved or modified by further orders of the court.<sup>292</sup>

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287. La. Code Civ. P. art. 3604(A).

288. La. Code Civ. P. art. 3604(B)(1) implements La. R.S. 9:371 (1993), which provides: "In a proceeding for divorce, a spouse may obtain an injunction restraining or prohibiting the disposition or encumbrance of community property until further order of the court."

289. La. Code Civ. P. art. 3604(B)(2) implements La. R.S. 9:372 (1993), which provides: "In a proceeding for divorce, a court may grant an injunction prohibiting a spouse from harassing or physically or sexually abusing the other spouse or a child of either of the parties."

290. La. Code Civ. P. art. 3604(B)(3).

291. La. Code Civ. P. art. 3604(C).

292. La. Code Civ. P. art. 3605; *Hoffpauir v. Hoffpauir*, 254 So. 2d 671 (La. App. 3d Cir. 1971), *writ refused*, 260 La. 452, 454, 256 So. 2d 440, 441 (1972).

*P. Attorney's Fees*

Louisiana Revised Statutes 9:375:

A. When the court renders judgment in an action to make executory past-due payments under a spousal or child support award, or to make executory past-due installments under an award for contributions made by a spouse to the other spouse's education or training, it shall, except for good cause shown, award attorney's fees and costs to the prevailing party.

B. When the court renders judgment in an action to enforce child visitation rights it shall, except for good cause shown, award attorney's fees and costs to the prevailing party.

The new substantive and procedural rules with respect to attorney's fees and costs incurred in an action for divorce have been treated earlier. Previously, attorney's fees could be awarded in an action to make past-due alimony or child support executory or to enforce visitation rights.<sup>293</sup> The 1990 amendment added an action to make executory past-due installments under an award for contributions made by a spouse to the other spouse's education or training, a type of proceeding similar to the other enumerated actions. Attorney's fees must be awarded, except for good cause shown, to the party who succeeds in the action, the "prevailing party," not just the party obtaining an executory judgment or judgment enforcing visitation rights. A party who successfully defends such an action must also be awarded attorney's fees, except for good cause shown. Additionally, in an action to make executory past-due installments under an award pursuant to Louisiana Civil Code articles 121-124 for contributions made by a spouse to the other spouse's education or training, the court must, except for good cause shown, award attorney's fees and costs to the prevailing party. The same consistent rule is applied to this action as is applied to an action to make executory past-due payments under a spousal or child support award and an action to enforce child visitation rights.

### III. CONCLUSION

The purpose of this article has been twofold: to preserve a historical account of the deliberations resulting in the enactment of the divorce legislation of 1990 and to provide useful commentary about the new substantive and procedural articles for the Louisiana practitioner.

Reconstructing nearly seven years of discussions and decisions in an attempt to preserve the process and content of deliberations constituted an enormous task.

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293. La. R.S. 9:305 (repealed by 1990 La. Acts No. 1009, § 9), prior to its repeal and replacement by La. R.S. 9:375 (1991), provided: "When the court renders judgment in an action to make past due alimony or child support executory, or in an action to enforce child visitation rights, except for good cause, the court shall award attorney fees and costs to the prevailing party."

The sheer volume of materials and minutes was daunting. However, now that the task is completed, the aspiration of the authors is that certain approaches to issues of marriage and divorce not be reinvented like the proverbial wheel. The authors likewise felt a responsibility to provide guidance to members of the legal community and the public in the form of commentary on the substantive and procedural articles enacted in 1990.

Even though the Persons Committee of the Law Institute had the benefit of other states' experience in reforming divorce law, the committee did not necessarily avoid the perceived mistakes made by other jurisdictions. In some cases the committee members simply rejected proposals offered to eliminate the hardships documented after the enactment of no-fault divorce reform. In other cases the Council of the Law Institute or the legislature rejected proposed legislative solutions. In fact, the revision process is not yet complete since the bill reforming the law of alimony was deferred by a committee of the House of Representatives in 1993.

No legislation can ease completely the painful experience of divorce. Divorce is a difficult decision made by one or both of the parties to terminate an intimate relationship, difficult for the children to accept, and difficult for those involved to survive unscarred. To the extent that the new divorce legislation eases the transition to a new life for the parties and their children, the members of the committee take solace. That was surely the intention.

