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Proceed with Caution: Readjusting the Procedural Requirements for Prenuptial Agreements Post-Acurio v. Acurio

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Proceed with Caution: Readjusting the Procedural Requirements for Prenuptial Agreements Post-*Acurio v. Acurio*

Emily Hickman*

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INTRODUCTION: A PRECAUTION AGAINST PRENUPS

In 1988, 23-year-old Barry Bonds was one of Major League Baseball's rising stars, averaging over 150 hits for the Pittsburgh Pirates and making \$106,000 a year.¹ That same year, Barry married Sun Magreth, a waitress and bartender, who previously emigrated to Canada from Sweden.² The two were married shortly after they met, and they entered into a prenuptial agreement under the laws of the State of California the day before their Las Vegas wedding.³ By signing this agreement, Sun forfeited any right or interest in Barry's future earnings or property.⁴ At the signing of the prenuptial agreement, Barry brought two of his lawyers and his financial advisor for assistance.⁵ Contrastingly, Sun only brought

1. *In re Marriage of Bonds*, 5 P.3d 815, 817 (Cal. 2000); *Barry Bonds Statistics and History*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/b/bondsba01.shtml> [<https://perma.cc/R2KP-JVKA>] (last updated Aug. 23, 2020).

2. *Bonds*, 5 P.3d at 817.

3. *Id.*

4. *Id.* at 817–19.

5. *Id.*

one friend from Sweden, and signed the prenuptial agreement at a time when she had an insufficient understanding of its consequences because of her limited English skills.⁶

By 1994, the National League had already named Barry Bonds the most valuable player twice, exponentially increasing his pay to an average of \$7,166,667 a year while playing for the San Francisco Giants.⁷ Also in 1994, Barry and Sun were filing for divorce.⁸ The legal effects of the couple's 1988 prenuptial agreement would now unfold.⁹ Sun did not have a claim to any of Barry's increased wealth because she signed the prenuptial agreement—a decision she had several million reasons to regret.¹⁰ Unequitable conditions that exist at the execution of prenuptial agreements can lead to results that cause one spouse, such as Sun, to be in extreme financial detriment.¹¹

The laws governing matrimonial agreements in many states have defined rules and guidelines to ensure that the agreements are voluntary and equitable.¹² Some states have principles and guidelines in place aimed at avoiding an uninhibited contractual agreement that affects the assets and legal relationship between spouses.¹³ For example, in Washington a matrimonial agreement that is entered into fraudulently, involuntarily, or overreachingly is considered invalid.¹⁴ Similarly, Texas courts will find the agreement invalid if one of the parties did not enter into the agreement voluntarily, or the agreement was executed unconscionably.¹⁵ An even

6. *Id.*

7. Murray Chass, *BASEBALL; Giants Make Investment: \$43 Million in Bonds*, N.Y. TIMES (Dec. 6, 1992), <https://www.nytimes.com/1992/12/06/sports/baseball-giants-make-investment-43-million-in-bonds.html> [<https://perma.cc/8EUR-ZFLZ>].

8. *Bonds*, 5 P.3d at 817.

9. *See generally id.* at 817–19 (the validity of the couple's premarital agreement became an issue before the California Supreme Court).

10. *Id.* at 817; Chass, *supra* note 7.

11. *See generally Bonds*, 5 P.3d at 817 (The California Supreme Court ultimately held that the matrimonial agreement was entered into voluntarily. This upheld the matrimonial agreement as valid in creating a separate property regime. Sun, therefore, was not entitled to half of Bond's earnings as community property).

12. *See Cioffi-Petrakis v. Petrakis*, 898 N.Y.S.2d 861 (N.Y. 2010).

13. *Id.*

14. *Kellar v. Estate of Kellar*, 291 P.3d 906 (Wash. Ct. App. 2012); *In re Marriage of Matson*, 730 P.2d 668, 670 (Wash. 1986).

15. “[A]n unconscionable bargain has been regarded as one ‘such as no (person) in his (or her) senses and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other.’” *Christian v.*

greater limitation is put on couples seeking to enter into a matrimonial agreement in California, where the California Family Code suggests independent counsel for each party, and a waiting period for the signing of the agreement is required if each party does not have an attorney.¹⁶ Louisiana, too, has conditions for couples entering into matrimonial agreements, specifically in the form of procedural hurdles.¹⁷

In Louisiana, there is a default community property regime under which couples share in their assets and liabilities; however, couples may enter into a matrimonial agreement to contract around the community property regime.¹⁸ Couples may enter into these agreements either before the marriage, through a prenuptial agreement, or during the marriage, by a postnuptial agreement.¹⁹ In Louisiana, if a couple desires to enter into a prenuptial agreement, like Barry and Sun, they must overcome procedural hurdles before entering into the agreement.²⁰ To validly establish their prenuptial agreement, the spouses must execute the agreement by an authentic act or an act under private signature duly acknowledged.²¹ An authentic act is an act executed and signed by the parties before a notary and two witnesses.²² An act under private signature duly acknowledged is an act the parties privately execute, but the parties must later acknowledge that their signatures are in fact their own either before a notary, a court, or other authorized officer.²³

Christian, 365 N.E.2d 849, 855 (N.Y. 1977); UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

16. CAL. FAM. CODE § 1615 (West 2019).

17. See generally LA. CIV. CODE art. 2329 (1980); *id.* art. 2331 (1979) (establishing the requirements for creating a matrimonial agreement as petitioning the court for a finding that the agreement serves the best interests of both parties if executed during marriage and through act under private signature duly acknowledged or authentic act if executed before the marriage).

18. *Id.* arts. 2340, 2329, 2331.

19. *Id.*

20. *Id.* art. 2331.

21. *Id.*

22. *Id.* art. 1833 (1984).

23. *Id.* art. 1836 (1984). “Other authorized officers” are persons considered to be *ex-officio* notaries due to the position they hold. For example, an “other officer” authorized to serve in this role would include any ambassador of the United States to a foreign country. This would also include the holder of certain public offices but for limited purposes of administering oaths and receiving sworn statements such as a duly acknowledged signature. Examples of holders of public

For some time, Louisiana appellate courts disagreed as to whether the acknowledgment of an act under private signature could take place at any time during the marriage or had to take place before the marriage.²⁴ The Louisiana Supreme Court recently resolved this question in *Acurio v. Acurio*.²⁵ The court decided that for a matrimonial agreement executed by an act under private signature duly acknowledged to be valid, this acknowledgment must take place before the marriage.²⁶ In making this decision, the Court emphasized the Louisiana Legislature's intention at the time of enacting Louisiana Civil Code article 2331, which sets forth the requirements for spouses entering into a matrimonial agreement before marriage.²⁷ The legislature emphasized the protection of the spouses who entered into the matrimonial regime. Specifically, the legislature focused on protecting spouses from: (1) being misled; (2) entering into an agreement involuntarily; or (3) entering into a disadvantageous agreement.²⁸ According to the Court, the legislature added these provisions to protect the "weaker," or financially inferior, spouse.²⁹

While the holding maintained fundamental policies underlying the enforceability of matrimonial agreements, it distorted the function of an act under private signature duly acknowledged.³⁰ When used outside of the matrimonial regimes context, an act under private signature duly acknowledged functions only as proof that a party's signature is truly his or her own.³¹ And, in those other contexts, it is clear that the acknowledgement of the signature can take place either before or after the

offices that may be considered are clerks of court, court reporters, sheriff's deputies, and state game wardens. The governor of the state is also entitled to appoint officers of the Department of Justice to be *ex-officio* notaries. Saul Litvinoff & Ronald J. Scalise, *The Law of Obligations*, in 5 LOUISIANA CIVIL LAW TREATISE § 12.16 (2d ed. 2018).

24. *Lauga v. Lauga*, 537 So. 2d 758 (La. Ct. App. 4th Cir. 1989); *Ritz v. Ritz*, 666 So. 2d 1181 (La. Ct. App. 5th Cir. 1995); *Muller v. Muller*, 72 So. 3d 364 (La. Ct. App. 5th Cir. 2011); *Rush v. Rush*, 115 So. 3d 508 (La. Ct. App. 1st Cir. 2013); *Deshotels v. Deshotels*, 150 So. 3d 541 (La. Ct. App. 3d Cir. 2014); *Acurio v. Acurio*, 197 So. 3d 253 (La. Ct. App. 2d Cir. 2016).

25. *Acurio v. Acurio*, 224 So. 3d 935, 940 (La. 2017).

26. *Id.*

27. *Id.*

28. See Katherine Spaht & Cynthia Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 89–90 (1979).

29. *Id.*

30. LA. CIV. CODE art. 1838 (1984).

31. *Id.*

act takes legal effect.³² However, according to *Acurio*, this is not the case in the context of premarital agreements, where the acknowledgement of the parties' act serves a cautionary, rather than evidentiary, function, and must be completed before the act can have any effects.³³ Through its holding in *Acurio*, the Louisiana Supreme Court created a discrepancy in the law governing the acknowledgment of acts—with one rule applying to premarital agreements and another applying to other acknowledged acts.³⁴ As this paper demonstrates, this discrepancy will have consequences on the application of the form requirement and hence the validity of many other agreements in Louisiana law; therefore, the discrepancy must be rectified.³⁵ To restore consistency within Louisiana's law of acknowledged acts while still effectuating the strong policy of protecting the spouses that underlies the holding in *Acurio*, the legislature should require the spouses entering into a matrimonial agreement to execute an authentic act.³⁶

Part I provides background information on matrimonial agreements in Louisiana and the policy behind the legislature's intention for enacting certain limitations on the creation of those agreements. Next, Part II presents the circuit split regarding the temporal requirement for the acknowledgment of premarital agreements executed by acts under private signature. Part II also presents the Louisiana Supreme Court decision, *Acurio v. Acurio*, which held that a matrimonial agreement must be executed by an act under private signature duly acknowledged before the parties' marriage. Part III considers the form requirements provided in Louisiana Civil Code article 2331 for executing a matrimonial agreement and the application and function of those requirements in Louisiana law. Finally, Part IV discusses the requirements for executing valid matrimonial agreements in other community property states and in France, and compares them to those in Louisiana. Part V suggests that revising Louisiana Civil Code article 2331 best rectifies the discrepancy created in the Louisiana Supreme Court's *Acurio v. Acurio* decision.

I. THE MATRIMONIAL AGREEMENT: A LIMITED FREEDOM OF CONTRACT

In Louisiana, the rules and principles of the matrimonial regimes system govern a couple's management of their property between each

32. *Id.*

33. *See Acurio v. Acurio*, 224 So. 3d 935, 940 (La. 2017).

34. *See generally* Jeffrey M. Surprenant, *Acurio v. Acurio: Parens Patriae in Marital Regimes*, 64 LOY. L. REV. 257, 270 (2018).

35. *Id.*

36. *See Acurio*, 224 So. 3d at 940.

other and with third persons.³⁷ A matrimonial regime is classified as either a community property regime or a separate property regime.³⁸ Under a separate property regime, the assets and gains that spouses accrue during their marriage are not automatically shared.³⁹ Separate property is the property that is considered to “exclusively” belong to the spouse who acquired it.⁴⁰ In contrast, under a community property regime, assets and gains that a spouse acquires during the marriage are considered community property, meaning those assets are shared between the spouses.⁴¹ The community property regime is the default legal regime in Louisiana, and there is a presumption that the possessions of a spouse during the marriage are community property.⁴² The spouse attempting to defeat this presumption must show, by a preponderance of the evidence, that the property is separate.⁴³ The strength of this presumption reflects that Louisiana public policy favors the community property regime.⁴⁴

Additionally, there is a strong legislative policy favoring an absolute freedom to contract for any lawful and possible purpose.⁴⁵ Spouses also have the freedom to enter into contracts with each other “as to all matters” at any time either before or during their marriage.⁴⁶ The law specifically allows for spouses to contract around the default rule of community property and alter their matrimonial regime by modifying the community property regime, or instituting a separate property regime, where the spouses each maintain separate rights over their separate assets and liabilities.⁴⁷ Spouses can accomplish this by entering into a matrimonial agreement.⁴⁸ A matrimonial agreement is a contract between the spouses that allows for a separation of some of their property, thus modifying the

37. LA. CIV. CODE art. 2325 (1979).

38. ANDREA B. CARROLL & ELIZABETH R. CARTER, LOUISIANA: MATRIMONIAL REGIMES CASES & MATERIALS 1 (2014).

39. *Id.* at 2.

40. LA. CIV. CODE art. 2341 (1981).

41. CARROLL & CARTER, *supra* note 38, at 1.

42. LA. CIV. CODE art. 2327 (1979); *id.* art. 2340 (1979).

43. *Talbot v. Talbot*, 864 So. 2d 590, 600 (La. 2003) (“As a matter of public policy and in the interest of fairness, we find that the community presumption contained in article 2340 is rebuttable by either spouse upon a showing by a preponderance of the evidence of the separate nature of property brought into the community.”).

44. CARROLL & CARTER, *supra* note 38, at 114.

45. LA. CIV. CODE art. 1971 (1984).

46. *Id.* art. 2329 (1980).

47. *Id.* art. 2328 (1979).

48. *Id.*

legal regime between them.⁴⁹ Additionally, a matrimonial agreement allows couples to completely terminate that legal regime, or the “community of acquets and gains,” that exists between them as spouses.⁵⁰ However, the spouses do not enjoy absolute contractual freedom when entering into a matrimonial agreement.⁵¹ A matrimonial agreement has certain limitations: it must not violate public policy and must meet the necessary procedural requirements.⁵²

A. The Legislation of Matrimonial Agreements: Louisiana Civil Code Acts 627 and 709

Louisiana Civil Code Act 627 of 1978 allowed couples to enter into matrimonial agreements before or during marriage and modify their agreements during marriage.⁵³ The Act eradicated the previous law that prohibited spouses from generally forming interspousal contracts.⁵⁴ This Act was a drastic deviation from the former law, and was driven by the desire to allow contractual freedom between the spouses during the marriage—a desire that outweighed the fear of one spouse taking advantage of another.⁵⁵ During the 1979 Revision of the Matrimonial Regimes title of the Civil Code, Act 709 replaced Act 627.⁵⁶ A written motion from a council member influenced the Louisiana Law Institute Council to make this quick revision.⁵⁷ The council member voiced a concern that if spouses were able to modify the community property regime during the marriage through a matrimonial agreement, nonworking spouses would have “little or no ownership interest in [what would have been community] assets or income” leading to a “substantial weakening of the community concept.”⁵⁸ Act 709 maintained Act 627’s provisions that allowed spouses to enter into matrimonial agreements both before and

49. *Id.*; *id.* art. 2327 (1979).

50. *Id.* art. 2327.

51. *See generally* Spaht & Samuel, *supra* note 28.

52. “Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.” *Id.* art. 7 (1987); *see id.* art. 2329 (1980).

53. *See* Spaht & Samuel, *supra* note 28, at 89.

54. *Id.*

55. *Id.*

56. The revision of the Matrimonial Regimes title during this period spanned two years, receiving “more attention and deliberation than almost any comparable legislation.” *Id.* at 145.

57. *Id.* at 91.

58. *Id.*

during the marriage and the ability to enter into other types of contracts not related to the marriage.⁵⁹ However, Act 709 added substantive and procedural limitations for entering into matrimonial agreements during the marriage that restrained the previous freedoms of Act 627.⁶⁰

B. Limitations of Public Policy

Under Act 709, spouses are restricted from entering into contracts that substantively violate public policy.⁶¹ For example, the Louisiana Civil Code prohibits agreements that limit or renounce the marital portion,⁶² change the line of succession,⁶³ limit the spouses' right to obligate the community property as to third persons,⁶⁴ or regulate the spouses' sexual

59. Andrea Carroll & Richard D. Moreno, *Matrimonial Regimes*, in 16 LOUISIANA CIVIL LAW TREATISE § 5.1 (4th ed. 2018).

60. See Spaht & Samuel, *supra* note 28, at 89.

61. Kathy D. Underwood, *Louisiana Notary Handbook*, in LOUISIANA PRACTICE SERIES § 7.8 (2019–20 ed), Westlaw LAPRAC-NOTARY § 7:8.

62. “When a spouse dies rich in comparison with the surviving spouse, the surviving spouse is entitled to claim the marital portion from the succession of the deceased spouse.” LA. CIV. CODE art. 2432 (1979).

The marital portion is one-fourth of the succession in ownership if the deceased died without children, the same fraction in usufruct for life if he is survived by three or fewer children, and a child's share in such usufruct if he is survived by more than three children. In no event, however, shall the amount of the marital portion exceed one million dollars.

Id. art. 2434 (1979).

63. The line of succession in a community property regime is the property descendants, then the spouse. *Id.* art. 888 (1982); *id.* art. 889 (1982). The line of succession in a separate property regime is the decedents, then siblings or parents of the decedents, then the spouse, then other ascendants, then other collateral relatives. *Id.* arts. 891–96 (1982).

64. Louisiana Civil Code article 2345 specifies, “A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation.” *Id.* art. 2345 (2020). Therefore, spouses cannot specify in the matrimonial agreement that when entering into agreements with third parties that their community property will not be obligated in the agreement. For example,

[W]hen a spouse seeks unsecured credit, the creditor can rely on the power given the spouse under the legal regime by [Louisiana Civil Code article 2345] to create a personal obligation that satisfied out of community property. The creditor need not concern himself with whether that spouse is disabled by his matrimonial agreement from obligating the community property without the other spouse's consent.

relations.⁶⁵ Otherwise, spouses are free to enter into any matrimonial agreements that do not violate these specific conditions or defy public order.⁶⁶ Both agreements entered into during the marriage, known as postnuptial agreements, and agreements entered into before the marriage, known as prenuptial agreements, cannot violate public policy and must follow specific procedural instructions.⁶⁷

C. The Procedure Behind Matrimonial Agreements: Louisiana Civil Code Articles 2329 and 2331

Spouses may enter into a matrimonial agreement that terminates or alters the matrimonial regime either before or during the marriage.⁶⁸ Louisiana Civil Code article 2329 dictates that postnuptial agreements are legally enforceable only if the couple files a joint petition with the court and the court finds that the agreement “serves their best interests⁶⁹ and [that] they understand the governing principles and rules.”⁷⁰ The spouses

See Carroll & Moreno, *supra* note 59, § 6.7; *id.* art. 2345 (1979).

65. David L. Sigler et al., *Estate Planning in Louisiana*, in 1 LOUISIANA PRACTICE SERIES § 4.5 (2018-2019 ed.), Westlaw LAPRAC-EP § 4:5.

66. Underwood, *supra* note 61, § 7.8.

67. *Id.*

68. LA. CIV. CODE art. 2329 (1980).

69. It is not easy for a judge to determine whether a matrimonial agreement is in the best interests of the spouses, as the agreement will usually financially benefit one spouse over the other. “Best interests” is not defined in Louisiana Civil Code article 2329 and may apply to more than just financial benefits. Scholars suggest that a judge may use his discretion in determining whether the agreement was in the parties’ best interests and to inquire into whether the spouses entered the agreement voluntarily. However, Louisiana Civil Code article 2329 does not give any guidance to judges on the procedure they should follow in determining what is in the parties’ best interests. Likewise, there are no articles in the Louisiana Code of Civil Procedure or Revised Statutes that lend to this guidance. It is also worth noting that, in contrast to French law, the judge need only find that the agreement is in the best interest of the spouses, and not of the family. Although the finding does not need to concern the best interests of the children, it may still affect them regarding the effect that classification of property has on heirship. See Carroll & Moreno, *supra* note 59, § 8.6; LA. CIV. CODE art. 2329 (1980).

70. See Carroll & Moreno, *supra* note 59, § 8. The Louisiana First Circuit Court of Appeal has held that when the spouses’ attorneys advise them on entering into the matrimonial agreement, the agreement may be in the spouses’ best interests and that the spouses understand the governing rules and principles. *Matter of Boyer*, 616 So. 2d 730, 732 (La. Ct. App. 1st Cir. 1993). However, the Fifth Circuit has held that even if parties enter into an agreement without the aid of counsel, those agreements may still be in the best interests of and fully understood by the parties.

must obtain court approval to form a valid contract.⁷¹ This procedural requirement inevitably demands the commencement of judicial proceedings.⁷² It would not be unusual for the parties to hire a lawyer and to appear in court to receive judicial approval.⁷³ Indeed, the agreement itself is what alters the matrimonial regime between the spouses; the court approval is a formality that gives the matrimonial agreement its full legal effects.⁷⁴ The Louisiana Law Institute Council added the formality of court approval as a requirement under Louisiana Civil Code article 2329 because of their concern for protecting the community property regime.⁷⁵ The Louisiana Supreme Court held that the purpose of requiring a joint petition⁷⁶ is to “protect a less worldly, economically vulnerable spouse

Instead, the court made this finding based on affidavits by the parties asserting that the agreement was in their best interests and that they understood it. *Bendetto v. Bendetto*, 182 So. 3d 344 (La. Ct. App. 5th Cir. 2015). The judge may question the spouses as to their understanding of the agreement, but scholars suggest that as long as the spouse who lacks thorough understanding of the agreement has not been pressured into the agreement by the other spouse, the judge should approve the agreement. *See Spaht & Samuel, supra* note 28, at 95.

71. *See Spaht & Samuel, supra* note 28, at 90; LA. CIV. CODE art. 2329 (1980).

72. Scholars suggest that “any district court in the state” would be an appropriate court to hear the judicial proceeding of a joint petition under Louisiana Civil Code article 2329. *Carroll & Moreno, supra* note 59, § 8.6; *Underwood, supra* note 61, § 7.9.

The freedom to choose any court would seemingly give the spouses a choice to petition the court in a parish in which they believe the judges are more willing to find that their matrimonial agreement meets the requirements of serving their best interests and that they understand the governing rules and principles. *See Spaht & Samuel, supra* note 28, at 94. It is also suggested that these proceedings can take place in chambers, without the parties actually appearing before the judge, or with the judge communicating with the spouses over the phone or in writing. There is no statute that explicitly provides for a procedure that must be followed to jointly petition the court. *Carroll & Moreno, supra* note 59, § 8.6; *Underwood, supra* note 61, § 7.9.

73. *Carroll & Moreno, supra* note 59, § 8.6.

74. *Id.*

75. *See Spaht & Samuel, supra* note 28, at 91.

76. Spouses who desire to enter into a matrimonial agreement during their marriage must only petition the court if they wish to alter their property regime from a community property regime to a separate property regime. If the spouses are forming a matrimonial agreement to return from a separate property regime back to the default community property regime, they do not need to petition the court. *See LA. CIV. CODE art. 2329* (1980).

from an overreaching spouse.”⁷⁷ Scholars have interpreted the general purpose of protecting the “weaker” spouse as “usually” protecting the “stereotypically weak wife” from the husband’s undue influence in entering into a matrimonial agreement that will be to her detriment.⁷⁸

Spouses may alternatively want to enter into a matrimonial agreement before their marriage to avoid the community property regime altogether.⁷⁹ The spouses electing to enter into a matrimonial agreement prior to marriage must execute the agreement either by authentic act or by act under private signature duly acknowledged.⁸⁰ The interplay between the procedural requirements of Louisiana Civil Code article 2329 for entering into matrimonial agreements during the marriage and the requirements of Louisiana Civil Code article 2331 for entering into matrimonial agreements before the marriage became a recurring theme in Louisiana appellate courts that decided the validity of matrimonial agreements.⁸¹ The courts continuously read Louisiana Civil Code articles 2329 and 2331 in tandem.⁸² As such, the courts decided that the requirement under Louisiana Civil Code article 2329 for court approval was only required for spouses executing a matrimonial agreement during the marriage.⁸³ As such, the requirements under Louisiana Civil Code article 2331 are conditions exclusively for spouses executing a matrimonial agreement before

77. Radcliffe 10, L.L.C. v. Burger, 219 So. 3d 296, 302 (La. 2017).

78. Carroll & Moreno, *supra* note 59, § 8.6.

79. Underwood, *supra* note 61, § 7.8.

80. *Id.* art. 2331 (1979). The agreement does not have to be recorded to be valid but must be recorded to be effective against third parties.

A matrimonial agreement, or a judgment establishing a regime of separation of property is effective toward third persons as to immovable property, when filed for registry in the conveyance records of the parish in which the property is situated and as to movables when filed for registry in the parish or parishes in which the spouses are domiciled.

Id. art. 2332 (1979); *see* Carroll & Moreno, *supra* note 59, § 8.5; *see* Underwood, *supra* note 61, § 7.8.

81. *See* Lauga v. Lauga, 537 So. 2d 758 (La. Ct. App. 4th Cir. 1989); Ritz v. Ritz, 666 So. 2d 1181 (La. Ct. App. 5th Cir. 1995); Muller v. Muller, 72 So. 3d 364 (La. Ct. App. 5th Cir. 2011); Rush v. Rush, 115 So. 3d 508 (La. Ct. App. 1st Cir. 2013); Deshotels v. Deshotels, 150 So. 3d 541 (La. Ct. App. 3d Cir. 2014); Acurio v. Acurio, 197 So. 3d 253 (La. Ct. App. 2d Cir. 2016).

82. Lauga, 537 So. 2d 758; Ritz, 666 So. 2d 1181; Muller, 72 So. 3d 364; Rush, 115 So. 3d 508; Deshotels, 150 So. 3d 541; Acurio, 197 So. 3d 253.

83. Lauga, 537 So. 2d 758; Ritz, 666 So. 2d 1181; Muller, 72 So. 3d 364; Rush, 115 So. 3d 508; Deshotels, 150 So. 3d 541; Acurio, 197 So. 3d 253.

marriage.⁸⁴ Of particular importance, the courts have held that the requirements of the article must be fully executed before the marriage.⁸⁵

II. THE CIRCUIT SPLIT AND THE FIX

Through a series of decisions beginning in 1989, Louisiana's appellate courts, and ultimately the Louisiana Supreme Court, held that a premarital agreement made by act under private signature must be duly acknowledged *prior* to the parties' marriage in order for the act to have any effects.⁸⁶ The legislature's purpose behind the introduction of Louisiana Civil Code article 2329's procedural obstacles was to protect "less worldly spouses" who may find themselves in a disadvantageous agreement prior to marriage.⁸⁷ As such, the Louisiana First, Third, Fourth, and Fifth Circuit Courts of Appeal interpreted the requirements for entering into prenuptial agreements as stringent requirements, more stringent than what a strict interpretation of the relevant code articles normally required.⁸⁸ Only one appellate court in Louisiana, the Second Circuit in *Acurio v. Acurio*, strayed from this strict interpretation.⁸⁹ However, the Louisiana Supreme Court reversed the Second Circuit's outlying decision and adopted the view espoused in the majority of Louisiana appellate courts, which instituted heightened burdens for spouses entering into matrimonial agreements.⁹⁰

A. Undivided Appellate Courts

Various Louisiana courts have addressed whether a matrimonial agreement executed before a marriage was valid.⁹¹ However, the decisions of the appellate courts predominately hinged on whether the matrimonial

84. *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

85. *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

86. *See Acurio v. Acurio*, 224 So. 3d 935, 936 (La. 2017).

87. *See Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253; Spah & Samuel, *supra* note 28, at 92.

88. *See Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d at 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

89. *Acurio*, 197 So. 3d 253.

90. *See Acurio*, 224 So. 3d at 936.

91. *See Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

agreements⁹² met the law's procedural requirements.⁹³ Specifically, each court ultimately had to decide whether the procedural requirements associated with entering a matrimonial agreement before the marriage—execution of an authentic act or execution and acknowledgment of an act under private signature—also had to occur before the marriage.⁹⁴ In interpreting Louisiana Civil Code articles 2331 and 2329 together, the majority of Louisiana appellate courts concluded that spouses must validly complete the form requirements of Louisiana Civil Code article 2331 when entering into a matrimonial agreement before the marriage for the agreement to be valid.⁹⁵ To do this, the spouses must either validly execute an authentic act or validly execute an act under private signature duly acknowledged before the marriage.⁹⁶ If executed via an act under private signature, the parties must acknowledge the signature before the marriage.⁹⁷ If these requirements are not met, the matrimonial agreement is not considered valid, triggering Louisiana Civil Code article 2329's joint-petitioning-of-the-court requirement.⁹⁸

1. Fourth Circuit: Lauga v. Lauga

In 1989, the Fourth Circuit addressed the issue of whether two matrimonial agreements executed by spouses both before and during the marriage were valid.⁹⁹ In *Lauga v. Lauga*, the court found that both agreements were invalid because the agreements were not executed

92. When spouses execute a matrimonial agreement, they form a marital contract; therefore, the agreement is subject to the same laws that govern contracts. As such, matrimonial agreements require the consent of both parties. A court may find a matrimonial agreement invalid if “error fraud or duress” vitiates one party’s consent, just as in most other contracts. See Carroll & Moreno, *supra* note 59, § 8.2; LA. CIV. CODE art. 1948 (1985).

93. See *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

94. *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

95. *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

96. *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

97. *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

98. *Lauga*, 537 So. 2d 758; *Ritz*, 666 So. 2d 1181; *Muller*, 72 So. 3d 364; *Rush*, 115 So. 3d 508; *Deshotels*, 150 So. 3d 541; *Acurio*, 197 So. 3d 253.

99. *Lauga*, 537 So. 2d at 760.

properly under Louisiana Civil Code articles 2331 and 2329.¹⁰⁰ Ray Lauga was convicted of a felony and sent to a federal penitentiary in Lexington, Kentucky.¹⁰¹ The next day, Ray and Wanda Nelson executed a matrimonial agreement which established a separate property regime.¹⁰² One day later, Ray married Wanda while incarcerated.¹⁰³ Ray remained incarcerated for almost a year, and upon his return to Louisiana, the Laugas entered into a second matrimonial agreement that reiterated the language of the first agreement.¹⁰⁴ The Fourth Circuit ultimately held that the matrimonial agreement executed the day before the marriage was invalid.¹⁰⁵ The court concluded that the agreement did not meet the requirements set out in Louisiana Civil Code article 2331 because the couple did not execute the agreement by authentic act or by an act under private signature duly acknowledged.¹⁰⁶ The court reasoned that the requirement in Louisiana Civil Code article 2331 that a matrimonial agreement “shall be made by authentic act or by an act under private signature duly acknowledged” is a compulsory requirement for entering into a matrimonial agreement prior to marriage.¹⁰⁷ Although the Laugas did not meet these requirements under their first matrimonial regime before their marriage, their subsequent matrimonial agreement adhered to these requirements.¹⁰⁸ However, the Fourth Circuit held that because the Laugas entered into this agreement during their marriage, the requirements of Louisiana Civil Code article 2329 must have been met, and a joint petition and a finding of the court must have been made for the agreement to be valid.¹⁰⁹

100. *Id.*

101. Although Ray Lauga was incarcerated in Kentucky, which is not a community property state, the community property laws of Louisiana still applied to the agreement. Ray’s involuntary incarceration in Kentucky did not change his domicile, and the parties did not intend to change their domiciles to Kentucky in the matrimonial agreement. *Id.* at 759–60.

102. *Id.* at 759.

103. *Id.*

104. *Id.*

105. *Id.* at 760.

106. *Id.*

107. *Id.*; LA. CIV. CODE art. 2331 (1979).

108. *Lauga*, 537 So. 2d at 760; *id.* art. 2331.

109. *Lauga*, 537 So. 2d at 760–61.

2. *Fifth Circuit: Ritz v. Ritz*

In 1996, the Fifth Circuit faced the same issue of determining whether a matrimonial agreement executed before a marriage was valid.¹¹⁰ Like the Fourth Circuit, the Fifth Circuit in *Ritz v. Ritz* held the agreement invalid because it did not meet the proper form requirements, but expanded this holding even further, stating that these requirements must be properly executed before the marriage.¹¹¹ On the night before their wedding, Craig Ritz gave his fiancé Carolyn a “marriage contract” and told her that he would only marry her if she signed it.¹¹² Carolyn signed six copies of the document, but no one witnessed the execution or signed the contract alongside her.¹¹³ Once married, the couple agreed to tear up the documents and from then on handle their property as community property.¹¹⁴ Upon an inspection of the public records, Carolyn discovered that Craig never recorded the marriage contract.¹¹⁵ The Fifth Circuit decided that the issue of whether the matrimonial agreement was valid depended upon whether the agreement was executed validly before the marriage.¹¹⁶ The Fifth Circuit reasoned that both authentic acts and acts under private signature duly acknowledged must be made before the marriage to have a valid matrimonial agreement.¹¹⁷ The act in the instant case failed to qualify as an authentic act because the person who signed the act as a witness to the agreement did not in fact witness Craig and Carolyn sign the agreement, and he did not sign the document until after the marriage.¹¹⁸ The court recognized that because Carolyn admitted in her deposition and in court that she signed the agreement, it was duly acknowledged, thus qualifying the agreement as an act under private signature.¹¹⁹ However, no acknowledgement took place before or during the marriage.¹²⁰ The Fifth Circuit reasoned that the acknowledgment required in Louisiana Civil Code article 2331 must take place before the marriage to have a valid

110. *Ritz v. Ritz*, 666 So. 2d 1181, 1185 (La. Ct. App. 5th Cir. 1995).

111. *Id.*

112. *Id.* at 1182.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1184.

117. *Id.* at 1185.

118. *Id.*

119. *Id.*

120. *Id.*

matrimonial agreement.¹²¹ Accordingly, the Fifth Circuit subsequently held that the agreement was invalid.¹²²

3. *First Circuit: Rush v. Rush*

In 2013, the First Circuit also decided that for a matrimonial agreement executed before a marriage to be valid, the parties must properly meet the form requirements prior to the marriage.¹²³ In *Rush v. Rush*, the court held that the failure of either spouse to properly acknowledge their signatures before the marriage made the agreement ineffective.¹²⁴ Randall and Lynn Rush executed a matrimonial agreement establishing a separate property regime the month before their marriage.¹²⁵ The couple signed the document before a notary; however, no witness signed the document.¹²⁶ Randall filed for divorce and executed an acknowledgement by authentic act of his signature on the agreement.¹²⁷ Lynn also recognized, during discovery proceedings, that she signed the document, but refused to make a formal acknowledgment of her signature.¹²⁸

The First Circuit then decided whether the matrimonial agreement was valid, a question it determined was based on whether the agreement was in valid form.¹²⁹ The First Circuit ultimately decided that because the agreement was not acknowledged until over 18 years after the marriage and no court approval was obtained to form the agreement, it was invalid. The court reasoned that Louisiana Civil Code articles 2331 and 2329 must be read *in pari materia*.¹³⁰ The First Circuit held that Louisiana Civil Code article 2331 does not place a temporal requirement for the spouses to acknowledge their signatures, meaning this article does not specify if the acknowledgement must take place before or during the marriage.¹³¹

121. *Id.*

122. *Id.*

123. *Rush v. Rush*, 115 So. 3d 508, 512 (La. Ct. App. 1st Cir. 2013).

124. *Id.*

125. *Id.* at 510.

126. *Id.*

127. *Id.*

128. *Id.* at 510–12.

129. *Id.* at 511.

130. *Id.* at 511–12. When Louisiana Civil Code articles are to be read or interpreted *in pari materia*, this means that they are to be interpreted “in reference to each other.” *Pierce Founds., Inc. v. Jaroy Const., Inc.*, 190 So. 3d 298, 303 (La. 2016).

131. *Rush*, 115 So. 3d at 512.

However, the court did note that Louisiana Civil Code article 2329 requires a couple to jointly petition the court and seek court approval of a matrimonial agreement if they wish to terminate a community property regime during the marriage.¹³² Further, the First Circuit held the matrimonial agreement invalid in form as an authentic act because of the absence of witnesses and because the matrimonial agreement was not an act under private signature duly acknowledged.¹³³ The agreement was not such an act because although the execution of the matrimonial agreement took place prior to the marriage, the acknowledgment of the signatures did not take place until during the marriage.¹³⁴ As such, the spouses did not complete the required forms of Louisiana Civil Code article 2331 prior to the marriage and did not properly modify the matrimonial agreement during the marriage under the requirements of Louisiana Civil Code article 2329.¹³⁵ Consequently, the court held the matrimonial agreement invalid.¹³⁶

4. *Third Circuit: Deshotels v. Deshotels*

In *Deshotels v. Deshotels*, the Third Circuit followed the logic of the other circuits when it held that a signature acknowledged in court does not meet the necessary requirement of Louisiana Civil Code article 2331 that a prenuptial agreement must be executed by an act under private signature duly acknowledged.¹³⁷ Alverda Deshotels filed for a divorce from her husband Seldon.¹³⁸ During property partition proceedings, Seldon contended that no community property regime ever existed between the couple because of a “marriage agreement” he filed in the public records.¹³⁹ The Third Circuit noted that for a contract under Louisiana Civil Code article 2331 to be valid, the couple must execute it in accordance with the specified form requirements.¹⁴⁰ The court also noted that the Deshotels entered into a matrimonial agreement prior to their marriage, or a prenuptial agreement.¹⁴¹ Therefore, the court reasoned, all of the elements of form must be “perfected” before the marriage for the prenuptial

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Deshotels v. Deshotels*, 150 So. 3d 541, 543 (La. Ct. App. 3d Cir. 2014).

138. *Id.*

139. *Id.*

140. *Id.* at 544.

141. *Id.*

agreement to be valid.¹⁴² The parties stipulated that the agreement was not executed by an authentic act, and Alverda acknowledged her signature on the “marriage agreement” only during court proceedings.¹⁴³ The Third Circuit held that the matrimonial agreement occurring before marriage was invalid, as it did not perfect all of the form requirements of Louisiana Civil Code article 2331.¹⁴⁴ Like the other circuits in the majority, the Third Circuit found that the necessary form requirements of Louisiana Civil Code article 2331 must be met before the marriage for a matrimonial agreement to be valid.¹⁴⁵

B. Second Circuit Detour: Acurio v. Acurio

In 2016, the Second Circuit took a left turn from the decisions of other circuits.¹⁴⁶ A split developed among the circuits because of the Second Circuit’s decision in *Acurio v. Acurio* that an act under private signature need not be duly acknowledged prior to the marriage.¹⁴⁷ Danielle Deon Acurio and Dr. Michael Thomas Acurio married in 1998 and divorced two years later.¹⁴⁸ However, the couple remarried two years after their divorce.¹⁴⁹ Before their second marriage, they decided to enter into a matrimonial agreement.¹⁵⁰ Danielle and Michael executed an agreement entitled “The Prenuptial Agreement” four days before their second wedding.¹⁵¹ Danielle drafted the agreement that would create a separate property regime between the couple.¹⁵² The Acurios remained married for seven years and conducted their finances under a separate property regime as they had agreed to in the prenuptial agreement.¹⁵³

The Second Circuit noted that Louisiana Civil Code article 2329, which applies to matrimonial agreements that take place during marriage, did not apply to this case because the matrimonial agreement executed between the Acurios took place before their marriage.¹⁵⁴ The Second

142. *Id.* at 545.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See Acurio v. Acurio*, 197 So. 3d 253 (La. Ct. App. 2d Cir. 2016).

147. *Id.* at 257.

148. *Id.* at 254.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 255.

154. *Id.* at 257.

Circuit contended that addressing Louisiana Civil Code article 2329 and applying it to the Acurios' situation would "negate" the relevant articles that do apply and that allow for spouses to enter into matrimonial agreements prior to marriage.¹⁵⁵ The court reasoned that, instead, because this was an agreement taking place before the marriage, it should be executed under Louisiana Civil Code article 2331—by an authentic act or an act under private signature duly acknowledged.¹⁵⁶ The parties signed the agreement before a notary, but only one witness, thus failing to meet the requirements of an authentic act.¹⁵⁷ The issue remained for the court as to whether the parties sufficiently executed the agreement as an act under private signature duly acknowledged.¹⁵⁸ The Second Circuit specifically pointed to the lack of a temporal requirement set forth in the Code under which a private signature must be acknowledged and reasoned that this acknowledgment is simply a recognition by the parties that the signature on the act is their own.¹⁵⁹ Notably, the Acurios did not acknowledge their signatures on the agreement until their depositions.¹⁶⁰ However, the court held that the Louisiana Civil Code does not require parties to a matrimonial agreement to acknowledge their signatures before the marriage for the agreement to be valid.¹⁶¹

The Second Circuit reasoned that it would be "nonsensical" to require a party to "immediately" acknowledge his or her signature for it to have legal effect.¹⁶² The court also held that imposing the requirement of immediate acknowledgment defeats the legislature's purpose of giving options in Louisiana Civil Code article 2331 of executing a matrimonial agreement by either authentic act or by an act under private signature duly acknowledged.¹⁶³ Further opining that the need for acknowledgement of the signatures only arises once the parties are married, the Second Circuit conclusively held that acknowledgment of a signature does not need to be present prior to the marriage.¹⁶⁴ The Acurios' prenuptial agreement was therefore valid as both parties signed the agreement and acknowledged that the signatures were their own.¹⁶⁵

155. *Id.*

156. *Id.*

157. *Id.* at 254.

158. *Id.* at 257.

159. *Id.*

160. *Id.* at 256.

161. *Id.* at 257.

162. *Id.* at 258.

163. *Id.*

164. *Id.*

165. *Id.*

C. *The Louisiana Supreme Court: Acurio v. Acurio*

In 2017, the Louisiana Supreme Court granted a writ of certiorari in *Acurio v. Acurio* to definitively determine whether parties must duly acknowledge their signatures prior to the marriage for the matrimonial agreement to be valid.¹⁶⁶ The Louisiana Supreme Court decided that whether parties to a matrimonial agreement duly acknowledged their signatures before or after the marriage was an issue of form that determined the validity of the agreement.¹⁶⁷

The Louisiana Supreme Court considered matrimonial agreements nominate contracts.¹⁶⁸ The Court then held that according to Louisiana Civil Code article 1916, matrimonial agreements, as nominate contracts, were subject only to the special rules governing the respective matrimonial regimes title.¹⁶⁹ The Court, therefore, reasoned it was incorrect to rely on the general rules of obligations regarding an act under private signature duly acknowledged, which clearly stated that such an act could be acknowledged at any time.¹⁷⁰ The Court held that in following the articles governing matrimonial agreements, proof was elevated “to a matter of form.”¹⁷¹ This form then required that the parties to a matrimonial agreement executed by an act under private signature duly acknowledged must acknowledge their signature before the marriage.¹⁷²

The Louisiana Supreme Court noted that Louisiana Civil Code articles 2331 and 2329 must be read *in pari materia*.¹⁷³ The Court highlighted the requirement of court approval to enter a matrimonial agreement during marriage that couples must seek under Louisiana Civil Code article 2329 as a conscious legislative decision to put a burden on spouses who choose to contract around the community property regime.¹⁷⁴ The Court noted that it was the legislature’s intent to make a couple’s decision to alter the community regime a “task that requires effort.”¹⁷⁵ The Louisiana Supreme Court further interpreted this requirement, in combination with the

166. See *Acurio v. Acurio*, 224 So. 3d 935, 940 (La. 2017).

167. *Id.*

168. Nominate contracts are those given a special designation such as a contract for sale, lease, loan, or insurance. Innominate contracts are those with no special designation. LA. CIV. CODE art. 1914 (1985); see *Acurio*, 224 So. 3d at 940.

169. See *Acurio*, 224 So. 3d at 940.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

requirements under Louisiana Civil Code article 2331, as the legislature's specific intention to create procedural barriers.¹⁷⁶ The legislature put these procedural hurdles in place so that couples would contemplate their decision to waive the default rights of the community property regime—the regime that the Louisiana Civil Code and public policy favor.¹⁷⁷

The Court also acknowledged the significance that the two options for executing a matrimonial agreement—by either an authentic act or by an act under private signature duly acknowledged—are in the same code article.¹⁷⁸ The Court reasoned that allowing for either the execution of a matrimonial agreement by the arduous requirements of an authentic act or by signing the agreement and then only later acknowledging it led to “superfluous” and “unbalanced” options.¹⁷⁹ The Court interpreted the placement of these two options alongside one another as an indication that the legislature sought to require an act under private signature duly acknowledged to match the burdensome task that an authentic act requires for execution.¹⁸⁰

Further, an agreement executed by authentic act is given immediate legal significance and presumed valid because of the method of its execution.¹⁸¹ The Louisiana Supreme Court reasoned that an act under private signature duly acknowledged, when used to execute a matrimonial agreement, should have this same immediate significance of an authentic act.¹⁸² The Court held that the requirement of acknowledgment had the same temporal requirements as an authentic act.¹⁸³ Accordingly, the Court stated that having the requirement that the parties duly acknowledge their signatures located in the same code article as the requirement that the act be under private signature makes the requirement serve both an evidentiary function and a form, or cautionary, requirement.¹⁸⁴ Specifically, the singular code article that establishes both a function of proof and the manner in which the act is executed displays the evidentiary function and the form requirement of the act.¹⁸⁵ The Court stated this gives a matrimonial agreement executed by an act under private signature duly

176. *Id.*

177. *Id.*

178. *Id.*; LA. CIV. CODE art. 2331 (1979).

179. *Acurio*, 224 So. 3d at 939.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 940.

185. *Id.*

acknowledged a temporal requirement—that the parties must sign and duly acknowledge the act before the marriage.¹⁸⁶

The Court considered the legislature’s intention to ensure that a couple wishing to execute a matrimonial agreement give “due consideration,” as well as the procedural requirements of both Louisiana Civil Code articles 2331 and 2329, when it held that an act under private signature duly acknowledged must be executed before the marriage.¹⁸⁷ Therefore, the Acurios’ failure to acknowledge their signatures before their marriage caused their matrimonial agreement to be invalid.¹⁸⁸

The Louisiana Supreme Court decision appears to clearly state that an act under private signature duly acknowledged must take place before the marriage to have a valid matrimonial agreement.¹⁸⁹ However, this decision raises issues among scholars because it contrasts with established provisions in the Louisiana Civil Code.¹⁹⁰ The Louisiana Civil Code does not expressly implicate a time requirement for when parties must duly acknowledge an act executed under private signature.¹⁹¹ Therefore, the Louisiana Supreme Court’s decision in *Acurio v. Acurio* conflicts with the established understanding of duly acknowledging acts under private signature as well as its function within the Louisiana Civil Code’s general scheme for form requirements.¹⁹²

III. FORM REQUIREMENTS: ROLE IN THE LOUISIANA CIVIL CODE AND PRACTICAL APPLICATION

The Louisiana Civil Code’s general scheme provides the function and method of execution of both an act under private signature duly acknowledged and an authentic act.¹⁹³ Both an authentic act and an act under private signature duly acknowledged are form requirements that have legal effects after execution, which are explicitly described in the Louisiana Civil Code.¹⁹⁴ Significantly, when the Louisiana Civil Code requires an authentic act as a form requirement, an act under private signature cannot serve as a substitute because the two do not provide the

186. *Id.*

187. *Id.* at 939–40.

188. *Id.* at 940.

189. *Id.*

190. *See generally* Surprenant, *supra* note 34.

191. LA. CIV. CODE art. 1836 (1985).

192. *See Acurio*, 224 So. 3d at 940; *id.* art. 1836.

193. LA. CIV. CODE art. 1833 (1984); *Acurio*, 224 So. 3d at 940; *id.* art. 1836 (1985).

194. LA. CIV. CODE art. 1833 (1984); *id.* art. 1836 (1985).

same function.¹⁹⁵ Because an authentic act and an act under private signature duly acknowledged do not have the same function, their methods of execution are not the same.¹⁹⁶ However, the Louisiana Supreme Court disregarded the Louisiana Civil Code's distinction between the two forms when it decided that spouses must duly acknowledge an act under private signature before marriage in *Acurio v. Acurio*.¹⁹⁷

In *Acurio*, the Louisiana Supreme Court correctly reasoned that a couple should face procedural hurdles that force them to contemplate their decision when entering into a matrimonial agreement that disrupts the favored community property regime.¹⁹⁸ However, an act under private signature duly acknowledged will not have this effect, even if executed before marriage, because it is not sufficiently cautionary.¹⁹⁹ The Court incorrectly placed substantial weight on the location of the option for an act under private signature duly acknowledged coinciding with an authentic act in the matrimonial regimes title and ignored the effect of these requirements in other titles of the Code.²⁰⁰ The Court reasoned that the legislature created equal alternatives when it gave two procedural options for the creation of a matrimonial agreement.²⁰¹ However, the Court failed to recognize the relative role of those form requirements elsewhere in the Code.²⁰²

A. Obligations in General: The Universal Rules

The Court's holding, while correctly analyzing the matrimonial regimes section of the Code, lacked proper contemplation of the general rules of obligations.²⁰³ Matrimonial agreements are nominate contracts; therefore, both the matrimonial regimes section of the Code and the general rules of conventional obligations and obligations in general govern

195. Litvinoff & Scalise, *supra* note 23, § 12.34; Succession of Harper v. Frederick-Harper, No. 14-1567, 2015 WL 1882759 (La. Ct. App. 1st Cir. Apr. 24, 2015).

196. Litvinoff & Scalise, *supra* note 23, § 12.34.

197. Peter S. Title, *Louisiana Real Estate Transactions*, in 1 LOUISIANA PRACTICE SERIES § 7.11 (2d ed. 2018), Westlaw LAPRAC-RE § 7:11.

198. See *Acurio*, 224 So. 3d 935.

199. See Surprenant, *supra* note 34, at 270.

200. See *Acurio*, 224 So. 3d 935.

201. *Id.*

202. *Id.*

203. *Id.*

matrimonial agreements.²⁰⁴ As such, the function of the requirements for the execution of matrimonial agreements should be understood not exclusively within their own title of the Code, but with respect to the Code as a whole.²⁰⁵ An understanding of the proper application of Louisiana Civil Code article 2331, located in the title on Matrimonial Regimes, requires a careful reading of articles 1833 through 1836, found among the provisions governing Proof of Obligations.²⁰⁶

B. The Authentic Act: A Cautionary Requirement

The authentic act plays a role in the context of executing not only matrimonial agreements, but also agreements that fall under many different titles of the Louisiana Civil Code.²⁰⁷ An authentic act is valid only if the parties to the contract meet certain form requirements.²⁰⁸ The act must be a writing that is executed before a notary in the presence of two witnesses.²⁰⁹ The notary, the witnesses, and the parties who executed the act must sign²¹⁰ the act.²¹¹ Executing an act in this way ensures that the act itself proves its legitimacy.²¹² A self-proving act is one that a party can enter into court as evidence to prove the validity of the agreement contained within the act.²¹³ An act is considered authenticated because “it proves without more” that the parties participated in what is indicated in the act.²¹⁴ The presence of the notary at the time of execution leads to the

204. Robert C. Lowe, *Louisiana Divorce*, in LOUISIANA PRACTICE SERIES § 4.15 (2019), Westlaw LAPRAC-DIV § 4:15.

205. *Id.*

206. *Id.*

207. Carroll & Moreno, *supra* note 59, § 5.1.

208. LA. CIV. CODE art. 1833 (1984).

209. *Id.*

210. A signature for purposes of an authentic act is a “handwritten inscription indicating the name of the person making the declarations contained in the instrument,” and in circumstances that a party does not know or is unable to inscribe his or her name, the Louisiana Supreme Court has held that the person’s act of making his or her mark on the writing is sufficiently considered a signature. See Litvinoff & Scalise, *supra* note 23, § 12.19.

211. *Id.* art. 1833 (1984).

212. Carroll & Moreno, *supra* note 59, § 5.1.

213. *Id.*

214. Litvinoff & Scalise, *supra* note 23, § 12.34; Succession of Harper v. Frederick-Harper, No. 14-1567, 2015 WL 1882759 (La. Ct. App. 1st Cir. Apr. 24, 2015).

indication that the act is accurate and truthful.²¹⁵ An authentic act is therefore presumed to be genuine.²¹⁶

The authentic act also serves a cautionary function.²¹⁷ A cautionary function to a form requirement guarantees that the parties who are entering into the act are aware of that act's legal effects.²¹⁸ The authentic act provides a cautionary function because it requires a notary and two witnesses.²¹⁹ The procedural barriers of an authentic act ensure the parties to the agreement fully understand and consent to the agreement they are entering.²²⁰ The cautionary measures that the parties take when authentic acts are used to execute agreements further the understanding of the parties and ensure their full consent.²²¹

Each procedural requirement serves a purpose.²²² For example, the requirement of a present notary²²³ creates an element of accuracy and indicates the seriousness of the act.²²⁴ Importantly, the notary's signature²²⁵ proves that the notary witnessed the act's valid execution.²²⁶ Further, the *Louisiana Civil Law Treatise* notes that the requirement to execute the act before a notary adds significance and formality to the procedural process.²²⁷

In all civil law jurisdictions, the notary's position is honorable and reliable because of the duties and expectations attached to the profession.²²⁸ Historically, a notary was a public witness to the acts of private parties.²²⁹ Still today, the civil law notary is a "trusted non-judicial peacemaker," giving legal advice to harmonize the interests of both parties.²³⁰ The notary is legally bound to ensure that the act will not be

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

216. DiVincenti v. McIntyre, 611 So. 2d 140, 141 (La. Ct. App. 1st Cir. 1992).

217. See Surprenant, *supra* note 34, at 263.

218. *Id.* at 262.

219. *Id.* at 263–64.

220. *Id.*; LA. CIV. CODE art. 196, 368, 213 (2009).

221. *Id.* art. 1833 (1984).

222. See Litvinoff & Scalise, *supra* note 23, §§ 12:15, 12:23.

223. A person wishing to be a notary must be a licensed attorney or pass a test. *Id.*

224. *Id.*

225. The signature of the notary is authenticated at the secretary of state's office, where an original of the notary's signature must be registered. Litvinoff & Scalise, *supra* note 23, §§ 12.17, 12.22.

226. *Id.*; C. ALAN JENNINGS ET AL., FUNDAMENTALS OF LOUISIANA NOTARIAL LAW AND PRACTICE 8 (2014).

227. Litvinoff & Scalise, *supra* note 23, § 12.17.

228. See JENNINGS ET AL., *supra* note 226, at 5.

229. Litvinoff & Scalise, *supra* note 23, § 12.15.

230. JENNINGS ET AL., *supra* note 226, at 8.

annulled later due to the circumstances under which the parties executed it.²³¹ He or she often re-reads and re-explains the act for the parties to emphasize and highlight the contents of the act.²³²

The legislature intentionally added the presence of a notary requirement to ensure that authentic acts serve their cautionary function and cause the parties to reflect on the gravity of their commitments.²³³ For example, a party must execute an authentic act to refuse an interest in an inter vivos trust of an immovable.²³⁴ By giving up this interest, a person is giving up their role as a beneficiary, or the ability to receive any benefits of the trust.²³⁵ The beneficiary does not need to accept the role of receiving interest in the trust as it is presumed.²³⁶ Therefore, to rebut the presumption of an interest in an inter vivos trust, the beneficiary must execute an authentic act, which “unequivocally” renounces their interest in the trust.²³⁷

Similarly, if a wife intends to donate her interest in community property to her spouse, thereby making it separate property, she must execute an authentic act.²³⁸ For the act to be valid, she must execute this donation gratuitously and in the proper authentic form.²³⁹ Even in the alternative, if she wants to transfer her separate property into the community, thereby giving up half of her interest in that property to her spouse, she must execute an authentic act.²⁴⁰ Regardless of his or her intentions, a heightened form requirement is mandatory when a spouse intends to give up interest in his or her property.²⁴¹

There are, however, acts that can be executed by either an authentic act or by an act under private signature duly acknowledged.²⁴² Some of these include: the modification or waiver of spousal support; a spouse’s reservation of the natural fruits, civil fruits, and revenues from separate property; and the proof of a right to use executory process to enforce a

231. *Id.*

232. Litvinoff & Scalise, *supra* note 23, § 12.17.

233. *Id.*

234. LA. REV. STAT. § 9:1985 (1964).

235. *Id.* § 9:1801 (1964).

236. *Id.*

237. *See id.* § 9:1985.

238. LA. CIV. CODE art. 2343 (1979).

239. Lowe, *supra* note 204, § 9:50.

240. LA. CIV. CODE art. 2343.1 (1979).

241. *See id.* art. 2343, 2343.1 (1979).

242. *Id.* art. 116 (1998); *id.* art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. CODE CIV. PROC. art. 1836 (1985).

mortgage for immovables.²⁴³ Parties are given the option to execute these agreements by either authentic act or by an act under private signature duly acknowledged, much like the option parties are given when executing matrimonial agreements.²⁴⁴ When parties choose to execute one of these agreements by an act under private signature duly acknowledged, there is no temporal requirement.²⁴⁵ Thus, the parties may acknowledge their signatures at any time.²⁴⁶ The absence of a time requirement is consistent with how an act under private signature duly acknowledged functions elsewhere in the Louisiana Civil Code.²⁴⁷

C. The Act under Private Signature Duly Acknowledged: An Evidentiary Requirement

Once a party acknowledges his signature on the act he intends to execute, an act under private signature duly acknowledged²⁴⁸ is a true act²⁴⁹ of that party.²⁵⁰ To acknowledge his signature, a party must recognize the signature as his own before two witnesses and before either the court, a notary, or other officer authorized to perform such function.²⁵¹ Once the party acknowledges his signature, the signature is recognized *prima facie*²⁵² as the genuine act of the party and can be “entered in

243. LA. CIV. CODE art. 116 (1998); LA. CIV. CODE art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. CODE CIV. PROC. art. 1836 (1985).

244. See LA. CIV. CODE art. 116 (1998); LA. CIV. CODE art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. CODE CIV. PROC. art. 1836 (1985).

245. LA. CIV. CODE art. 116 (1998); LA. CIV. CODE art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. CODE CIV. PROC. art. 1836 (1985).

246. LA. CIV. CODE art. 116 (1998); LA. CIV. CODE art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. CODE CIV. PROC. art. 1836 (1985).

247. LA. CIV. CODE art. 116 (1998); LA. CIV. CODE art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. CODE CIV. PROC. art. 1836 (1985).

248. This type of acknowledgment is called the “Civil Code” acknowledgment because Louisiana Civil Code article 1836 expressly authorizes this form. Title, *supra* note 197, § 7.11. It is also called an authenticated private act. Dian Tooley Knoblett & David Gruning, *Sales*, in 24 LOUISIANA CIVIL LAW TREATISE § 6.14 (2018).

249. “An act under private signature is regarded *prima facie* as the *true and genuine act of a party* executing it when his signature has been acknowledged, and the act shall be admitted in evidence without further proof.” LA. CIV. CODE art. 1836 (1985) (emphasis added).

250. *Id.*

251. *Id.*

252. “Prima facie” is defined as “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first

evidence without further proof.”²⁵³ For example, once the party to the act acknowledges that his signature is in fact his, the modification or waiver of spousal support; a spouse’s reservation of the natural fruits, civil fruits, and revenues from separate property; and the proof of a right to use an executory process to enforce a mortgage for immovables are genuine acts.²⁵⁴

No statute expressly provides that the acknowledgment of signatures must take place prior to the act having an effect.²⁵⁵ This requirement, thus, does not create the act’s legal effect, but only serves the function of proving that the parties’ signatures are theirs.²⁵⁶ The acknowledgment of a signature serves solely as an evidentiary form requirement, rather than a cautionary one.²⁵⁷ An act under private signature duly acknowledged is unlike an authentic act in that its requirements do not create a presumption of authenticity.²⁵⁸ Parties must acknowledge or deny that the signatures provided on the act are in fact theirs.²⁵⁹ Upon acknowledgment, the act is given evidentiary weight, or is effective as proof of the signatures.²⁶⁰ Because a notary does not re-read or re-explain the act to the parties in front of witnesses as done in an authentic act,²⁶¹ the parties are less likely to be aware of the significance of entering into the agreement or endorsing the contract because the extra undertakings that are associated with a notary are not present.²⁶²

An act under private signature duly acknowledged operates as a procedural form requirement in other areas of the law, but the requirement in these areas serves solely an evidentiary function.²⁶³ For example, the execution of an act under private signature duly acknowledged serves an evidentiary function when executing an inter vivos trust.²⁶⁴ Either an

examination, even though it may later be proved to be.” *Prima Facie*, BLACK’S LAW DICTIONARY (11th ed. 2019).

253. LA. CIV. CODE art. 1836 (1985).

254. *Id.* art. 116 (1998); *id.* art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. CODE CIV. PROC. art. 1836 (1985).

255. Litvinoff & Scalise, *supra* note 23, § 12.32.

256. *Id.*

257. *Id.* § 8.7.

258. *Id.* § 12.31.

259. *Id.*

260. *Id.*

261. See Spaht & Samuel, *supra* note 28, at 92.

262. *Id.*

263. See generally LA. CIV. CODE art. 116 (1998); LA. CIV. CODE art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); LA. REV. STAT. ANN. § 12:1309(B); LA. CODE CIV. PROC. art. 1836 (1985).

264. LA. REV. STAT. § 9:1752 (1964).

authentic act or an act under private signature duly acknowledged can be used to execute an inter vivos trust.²⁶⁵ In *Francois v. Tufts*, the Louisiana Fourth Circuit interpreted the Louisiana Trust Code's requirements for executing an inter vivos trust.²⁶⁶ Specifically, the court decided whether the act under private signature must have been duly acknowledged at the same time that it was signed.²⁶⁷ The court ultimately held that Louisiana Civil Code article 1836 does not require an act under private signature to be simultaneously acknowledged and signed.²⁶⁸ Thus, an inter vivos trust executed by an act under private signature and later acknowledged is still a valid trust.²⁶⁹

Similarly, amendments to the articles of a limited liability company can be made by either acknowledgement of at least one of the members who signed the articles of amendment or by the execution of an authentic act.²⁷⁰ In *Metro City Redevelopment Coalition, Inc. v. Brockman*, the Louisiana First Circuit Court of Appeal held an article of amendment was valid when a party to the amendment appeared before a notary and two witnesses and acknowledged his signature on the amendment.²⁷¹ In *Brockman*, the husband allowed his wife to sign the amendment, but only he acknowledged the signature.²⁷² The court held that this amendment was properly executed as an act under private signature duly acknowledged.²⁷³ The use of Louisiana Civil Code article 1836 in the context of articles of amendment clearly indicates that it serves an evidentiary purpose.²⁷⁴ The Louisiana First Circuit Court of Appeal held that it was inconsequential if the party did in fact sign the amendment.²⁷⁵ The husband's acknowledgement that the signature was his own made the amendment valid.²⁷⁶ The authorization of an act under private signature duly acknowledged has only been elevated to a cautionary role when it is

265. *Id.*

266. *Francois v. Tufts*, 491 So. 2d 673, 676 (La. Ct. App. 4th Cir. 1986).

267. *Id.*

268. *Id.*

269. *Id.*

270. LA. REV. STAT. § 12:1309(B).

271. *Metro City Redevelopment Coal., Inc. v. Brockman*, 143 So. 3d 495, 501 (La. Ct. App. 1st Cir. 2014).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

hindered with a temporal requirement—in the context of matrimonial agreements.²⁷⁷

D. Acurio's Obscure Application of the Form Requirements

The Louisiana Supreme Court's decision in *Acurio v. Acurio*, imposing a time condition under which the parties must duly acknowledge their signatures, inevitably gave the form requirement of an act under private signature duly acknowledged a cautionary effect.²⁷⁸ But the procedural limitation contained in Louisiana Civil Code article 2331 that the spouses must duly acknowledge an act under private signature neither provides that the parties must immediately acknowledge the act nor contains any express time period under which the parties must satisfy the requirement.²⁷⁹

Mr. Acurio was correct in suggesting that the Court should consider Louisiana Civil Code article 1836 when evaluating whether a signature duly acknowledged has a time requirement.²⁸⁰ Louisiana Civil Code article 1836 provides the definition and requirements for a private signature duly acknowledged.²⁸¹ Specifically, it provides that an acknowledged signature is considered a “true and genuine act of the party.”²⁸² The purpose of executing a duly acknowledged act under private signature is the signatures of the parties, which indicates that the policy behind this form is solely evidentiary.²⁸³

It is inconsequential that the duly acknowledged signature at issue is related to a matrimonial agreement because the rules governing duly acknowledged signatures in the context of matrimonial agreements are identical when governing other aspects of the law on this matter.²⁸⁴ No matter the area of the law in which the parties use the form requirement to execute an act under private signature duly acknowledged, courts deciphering the validity of the act should uniformly apply its requirements.²⁸⁵

277. See *Acurio v. Acurio*, 224 So. 3d 935, 940 (La. 2017).

278. *Id.*

279. See Carroll & Moreno *supra* note 59, § 8.7; Title, *supra* note 197, § 7.11.

280. See *Acurio*, 224 So. 3d at 940.

281. LA. CIV. CODE art. 1836 (1984).

282. *Id.*

283. See *id.* art. 1838.

284. *Id.* art. 1915–16.

285. Leigh B. Ackal, *What's Mine Is Yours, or Is It: The Bright Line between Marital Agreements Executed before Marriage and Those Executed after Marriage*, 91 TUL. L. REV. 789, 794 (2017).

The Civil Code is the “solemn expression of legislative will.”²⁸⁶ The Code itself instructs that each article should not be read independently, but in conjunction with related articles.²⁸⁷ Considering these fundamental principles, it is not appropriate to “simply ignore some laws passed by the legislature in favor of others.”²⁸⁸ Those reading and interpreting the Louisiana Civil Code should view it as a comprehensive work to ensure “that no section, clause, or word becomes superfluous and meaningless.”²⁸⁹

Although the *Acurio* Court’s imposition of a temporal requirement for the acknowledgment of a matrimonial agreement is inconsistent with the general law of obligations, it furthers the important policies underlying the implementation of prerequisites for the execution of a matrimonial agreement.²⁹⁰ The Court’s holding reflects a desire to protect a vulnerable spouse from a disadvantageous agreement that would unfairly strip the spouse of important property rights.²⁹¹ Although the Court enforces this policy, it is not merely judicial; as noted in *Acurio* and other appellate court opinions, the legislature’s administration of form requirements for a matrimonial agreement reflects the legislature’s will to protect the weaker spouse.²⁹² Considering that the act under private signature duly acknowledged serves only evidentiary, rather than cautionary functions, the legislature’s choice to permit the execution of a premarital agreement by the more lenient requirement of an act under private signature duly acknowledged is not sound.²⁹³ Considering the legislature’s intention to enact law that would protect spouses when entering into contracts, it should not have ratified this less rigorous option when the opportunity for one spouse to take advantage of another is possible.²⁹⁴ Certainly, the legislature should not have offered this permissive requirement where the

286. *Id.* art. 2 (1987).

287. *Id.* art. 13.

288. *See* Ackal, *supra* note 285, at 798.

289. *Barilleaux v. NPC, Inc.*, 730 So. 2d 1062, 1064–65 (La. Ct. App. 1st Cir. 1999).

290. *See Acurio v. Acurio*, 224 So. 3d 935, 940 (La. 2017).

291. *Id.*

292. *See Lauga v. Lauga*, 537 So. 2d 758; *Ritz v. Ritz*, 666 So. 2d 1181 (La. Ct. App. 5th Cir. 1995); *Muller v. Muller*, 72 So. 3d 364 (La. Ct. App. 5th Cir. 2011); *Rush v. Rush*, 115 So. 3d 508 (La. Ct. App. 1st Cir. 2013); *Deshotels v. Deshotels*, 150 So. 3d 541 (La. Ct. App. 3d Cir. 2014); *Acurio v. Acurio*, 197 So. 3d 253 (La. Ct. App. 2d Cir. 2016); *see also Spaht & Samuel, supra* note 28, at 90; LA. CIV. CODE art. 2329 (1979).

293. *See Spaht & Samuel, supra* note 28, at 90; LA. CIV. CODE art. 2329 (1979).

294. *Spaht & Samuel, supra* note 28, at 90; *id.* art. 2329.

alteration of the community property regime is concerned, considering the strong legislative intent and public policy in favor of protecting the regime.²⁹⁵ Spouses should not be able to validly execute a matrimonial agreement by an act under private signature duly acknowledged, as this would violate the established policy of protecting the community property regime that has a strong foundation in Louisiana.²⁹⁶

IV. MATRIMONIAL AGREEMENTS OUTSIDE OF LOUISIANA: OTHER COMMUNITY PROPERTY STATES AND FRANCE

Protecting the community property regime is a strong policy that is rooted in Louisiana's history as one of the minority of American states that follow community property laws.²⁹⁷ Louisiana is one of nine states in the United States²⁹⁸ that operate under a default community property regime.²⁹⁹ Indeed, Louisiana is the only state in the United States that practices under the civil law; therefore, it arguably has the original, strongest, and "historically purest" community property system in the United States.³⁰⁰ The Louisiana civil law has the procedural barriers of an authentic act or act under private signature duly acknowledged in place for spouses attempting to contract around the default community property regime.³⁰¹ These procedural barriers, perhaps surprisingly, are not the most stringent or protective among the community property states.³⁰²

295. Spaht & Samuel, *supra* note 28, at 90; *id.* art. 2329.

296. *See* Spaht & Samuel, *supra* note 28, at 90; *id.* art. 2329; CARROLL & CARTER, *supra* note 38, at 7.

297. *See* CARROLL & CARTER, *supra* note 38, at 7.

298. Puerto Rico also operates under a default community property regime, and Alaska and Tennessee allow couples to choose a community property system for their marriage. *Id.*

299. *Id.*

300. *Id.*

301. *See id.* art. 2331.

302. *See generally* Christian v. Christian, 365 N.E.2d 849, 855 (N.Y. 1977); UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

A. Other Community Property States: A Small but Mighty Group

Louisiana, California, Washington, Arizona, Texas, Nevada, New Mexico, Idaho, and Wisconsin operate under a default community property regime.³⁰³ The majority of these states can trace their community property regimes to Spain and France.³⁰⁴ While Louisiana functions as a civil law system, the remaining eight states have adopted the traditional civil law ideology of a community property regime into their common law legal systems.³⁰⁵

1. California: Representation or Full Understanding

California has a more stringent form requirement than Louisiana for entering matrimonial agreements.³⁰⁶ For a California court to consider a premarital agreement valid, the party against whom the agreement is being enforced must have independent legal counsel.³⁰⁷ The party, however, may waive counsel in an independent writing after having been advised to seek counsel.³⁰⁸ If the party chooses to waive counsel, he must have at least seven days between the initial time the other party presented him with the agreement and when he was advised to seek legal counsel and the eventual signing of the agreement.³⁰⁹ If a party waives counsel, he must be fully

303. See CARROLL & CARTER, *supra* note 38, at 7.

304. *Id.*

305. *Id.*

306. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

307. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

308. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

309. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-

informed of all the basic effects of the agreement and the rights he is giving up by signing the agreement.³¹⁰ The counsel of the represented party must provide the unrepresented party with an explanation of his rights in writing and in a language the unrepresented party is proficient in.³¹¹ The unrepresented party must then sign a document before the premarital agreement is signed declaring that he received the explanation of his rights and understood them.³¹² California's stringent requirements emphasize protecting both spouses and ensure the spouses have full knowledge of their rights.³¹³ These regulations were the result of legislative action taken in response to the dispute that arose over the aforementioned prenuptial agreement between Barry Bonds and Sun.³¹⁴

2. Washington: Substantive or Procedural Fairness

Washington law also ensures that demanding requirements are in place for spouses entering into prenuptial agreements.³¹⁵ In Washington, for a premarital agreement to be valid, it must either be substantively or

3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

310. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

311. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

312. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

313. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

314. J. Gordon Hylton, *Barry Bonds' Contribution to the Growth of American Law*, MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG (Oct. 20, 2009), <https://law.marquette.edu/facultyblog/2009/10/barry-bonds'-contribution-to-the-growth-of-american-law> [<https://perma.cc/VL97-SE3K>].

315. *Kellar v. Estate of Kellar*, 291 P.3d 906 (Wash. 2012).

procedurally fair.³¹⁶ Washington courts consider an agreement to be substantively fair if it contains provisions that are “fair and reasonable” in favor of the party who is not seeking to enforce the agreement.³¹⁷ “[F]air and reasonable” provisions do not contain any overreaching or fraud.³¹⁸ If the court considers the agreement to be substantively fair, then the agreement as a whole is considered fair.³¹⁹ The court only takes an inquiry into procedural fairness if the agreement is considered substantively unfair.³²⁰ The court considers the agreement procedurally fair if the parties (1) fully disclosed the amount, value, and character of their property; (2) were both represented by independent counsel; (3) entered into the agreement freely and voluntarily; and (4) had full knowledge of their rights.³²¹ The substantive or procedural fairness requirement ensures that the parties are entering into the agreements voluntarily and knowingly.³²²

3. The Uniform Premarital Agreement Act: Arizona, Texas, Nevada, New Mexico, Idaho, and Wisconsin

The remaining community property states—Arizona, Texas, Nevada, New Mexico, Idaho, and Wisconsin—embrace the Uniform Premarital Agreement Act, which is used in other common law states³²³ as well.³²⁴ It guarantees legitimate agreements between the parties in which they are fully aware of the effects of the agreement.³²⁵ The procedures set forth in

316. *Id.*

317. *Matter of Marriage of Matson*, 730 P.2d 668, 670–71 (Wash. 1986).

318. *Id.*

319. *See Kellar*, 291 P.3d 906.

320. *Id.*

321. *Id.* at 913–14.

322. *Id.* at 913.

323. Twenty-eight states have adopted the Uniform Premarital Agreement Act. *Uniform Premarital and Marital Agreements Act*, 46 FAM. L. Q. 345 (2012); Joanna L. Groassman, “Dot the i’s and Cross the t’s”: Louisiana Supreme Court Voids Prenuptial Agreement for Signature Defect, *VERDICT* (May 23, 2017), <https://verdict.justia.com/2017/05/23/dot-cross-ts> [<https://perma.cc/5ALC-ZXVZ>].

324. *See* UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

325. *See* UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-

the Act require that the premarital agreement be in writing and that both parties sign the agreement.³²⁶ The Act ensures that consideration for entering into the agreement is not required.³²⁷ The agreement becomes effective upon marriage.³²⁸ The court will find the agreement invalid if one of the parties did not enter into the agreement voluntarily or the agreement was executed unconscionably.³²⁹ Unconscionability is likely to be found if one of the spouses did not reasonably disclose his or her financial and property obligations or ownership, or a right to such disclosure was not expressly waived.³³⁰ The court will also likely find the agreement to be involuntary or unconscionable if one of the parties did not or could not have reasonable knowledge of the other party's financial and property assets and obligations.³³¹ The National Conference of Commissioners for

3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

326. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

327. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019). “Consideration” is defined as “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.” *Consideration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

328. UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.004 (West 1997); NEV. REV. STAT. ANN. § 123A.060 (West 2019); N.M. STAT. ANN. § 40-3A-5 (West 2019); IDAHO CODE ANN. § 32-924 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

329. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

330. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

331. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West

Uniform State Laws promulgated these regulations as an aim to create consistent national guidelines.³³²

B. An International Comparison: French Law

Countries around the world regulate matrimonial agreements.³³³ Internationally, most countries operate under a community property regime.³³⁴ For example, Continental Europe, specifically France, utilizes a community property system.³³⁵ Prenuptial agreements affect spouses in France in much the same way as they do in the community property jurisdictions of the United States.³³⁶ In fact, Louisiana's historic community property system originated in the Spanish and French possessions before the Louisiana Territory became the property of the United States in 1803.³³⁷ After the French sold the Louisiana Territory to the United States, the territory maintained its civil law tradition inherited from Spain and France; therefore, Louisiana maintained the civil law tradition of community property.³³⁸ The French Civil Code heavily influenced the first Louisiana Civil Code of 1808 and its subsequent revisions in 1825 and 1870.³³⁹ However, the Louisiana Civil Code is more lenient than the French Civil Code on spouses entering matrimonial agreements that alter the community property regime.³⁴⁰

French Civil Code article 1394 requires that matrimonial agreements be executed before a notary, much like the Louisianan authentic act, and be conducted in the presence and with the consent of the parties or their mandataries.³⁴¹ However, the execution of the matrimonial agreement

1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

332. Laura W. Morgan, *The Uniform Premarital Agreement Act: What the Law Says, and How Courts Are Interpreting It*, 24-WTR FAM. ADVOC. 12 (2002).

333. See generally CARROLL & CARTER, *supra* note 38, at 1; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1394 (Fr.).

334. See generally CARROLL & CARTER, *supra* note 38, at 1.

335. *Id.*

336. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1394 (Fr.).

337. See generally CARROLL & CARTER, *supra* note 38, at 8.

338. *Id.*

339. A.L. Yiannapolous, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 386–89 (2004).

340. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1394 (Fr.).

341. French law differs from Louisiana law, in that a person standing in for the spouse as a notary, or person with judicial authorization may be a party to the matrimonial agreement in the spouse's place. *Id.* art. 218, 1394.

under the French law has an even greater cautionary function than the execution of the matrimonial agreement under Louisiana law.³⁴² Particularly, French law expressly requires that spouses draft matrimonial agreements before the marriage.³⁴³ Further, the agreements do not take effect until the day of the marriage.³⁴⁴

The French requirement that the spouses execute the matrimonial agreement in the presence of a notary is a more stringent requirement than the requirements under Louisiana law.³⁴⁵ Although a notary is a “protected profession” in Louisiana, it is not held to the same standard as a civilian notary.³⁴⁶ The French notary is considered an officer of the court and holds his position for life.³⁴⁷ To qualify for the position of notary, a person must meet the qualifications of an *officier ministériel*,³⁴⁸ or public officer. Additionally, a statute regulates the notary profession.³⁴⁹ The *Chambre des Notaires*³⁵⁰ oversees notaries and their professional behavior and may even invoke disciplinary action, including the loss of any political rights and the right to vote, for disregarding notarial duties.³⁵¹ Because French notaries are held to a higher standard, the execution of a matrimonial agreement in the presence of one is a serious and deliberate gesture.³⁵²

Through Act 627 in 1978, the Louisiana Legislature formerly proposed requirements to execute a matrimonial agreement that more closely matched the French requirements.³⁵³ Act 627 required the “solemn

342. *Id.* art. 1395.

343. *Id.*

344. *Id.*

345. *See generally* Litvinoff & Scalise, *supra* note 23, § 12.15.

346. *Id.*

347. *See generally* JENNINGS ET AL., *supra* note 226, at 65; Litvinoff & Scalise, *supra* note 23, § 12.15.

348. As an *officier ministériel*, a French notary must “buy another *notaire*’s office before he qualifies for official appointment.” To qualify for appointment, an aspiring notary must pass an exam that is known to be particularly difficult. Most people seeking to become qualified French notaries are also attorneys. An applicant must also be of French nationality, have good character, have fulfilled all military service obligations, and worked as a clerk in a notary office for at least six years. PETER E. HERZOG, CIVIL PROCEDURE IN FRANCE 102–03 (1967).

349. *See* Litvinoff & Scalise *supra* note 23, § 12.15.

350. The *Chambre des Notaires*, or Chamber of Notaries, is a professional organization of notaries divided into local chapters with a national council in Paris. Every member must join the *Chambre des Notaires*. HERZOG, *supra* note 348, at 106.

351. *See generally* Litvinoff & Scalise, *supra* note 23, § 12.15.

352. *See generally id.*

353. *See* Spaht & Samuel, *supra* note 28, at 92.

formalities” of an authentic act to enter into a prenuptial agreement; however, the legislature relaxed these requirements in the 1979 Revision of the Louisiana Civil Code.³⁵⁴ This proposal aligned with the many previous versions of the Louisiana Civil Code, which provided that authentic acts were the only method for the execution of matrimonial agreements, and explicitly excluded acts under private signature as a valid method of execution.³⁵⁵ Scholars—who were present at the formal meetings of groups concerned with the revision of the act, the legislative committee hearings discussing the revision of the act, and the legislative floor debates discussing the revision of the act—noted that the legislature’s decision was “surprising,” considering the concern with “spousal overreaching,” in other revised articles.³⁵⁶ The provision, which formerly required the cautionary formalities of an authentic act, was changed to allow execution by either an authentic act or an act under private signature duly acknowledged, a lesser formality.³⁵⁷

France, Louisiana, California, Washington, Arizona, Texas, Nevada, New Mexico, Idaho, and Wisconsin have historic community property regimes that implicate their jurisdictions’ policies.³⁵⁸ As such, these legal systems strongly favor and protect their community property regimes.³⁵⁹ Although the Louisiana Supreme Court’s decision in *Acurio* protected the public policy surrounding Louisiana’s community property regime, it completely disregarded procedural form and skewed the act under private signature’s function.³⁶⁰

V. LEGISLATIVE INTERVENTION: A CHANGE TO THE CODE

The decision in *Acurio v. Acurio* reasonably imposed cautionary protections for spouses entering into matrimonial agreements; however, an act under private signature duly acknowledged is not a cautionary protection.³⁶¹ The *Acurio* Court incorrectly reasoned that entering a matrimonial agreement by an authentic act or acknowledgement is

354. *Id.*

355. LA. CIV. CODE art. 2308 (1825); *id.* art. 2328 (1920).

356. *See Spaht & Samuel, supra* note 28, at 92.

357. *Id.*

358. *See generally* CARROLL & CARTER, *supra* note 38, at 7–11; CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 218, 1394 (Fr.).

359. CARROLL & CARTER, *supra* note 38, at 7–11; CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 218, 1394 (Fr.).

360. *See Acurio v. Acurio*, 224 So. 3d 935, 940 (La. 2017); LA. CIV. CODE art. 1836 (1984).

361. *See Acurio*, 224 So. 3d at 940; LA. CIV. CODE art. 1836 (1984).

“superfluous” without requiring an act under private signature to be duly acknowledged prior to the marriage.³⁶² In many Louisiana Civil Code articles, parties entering into agreements are given the option to execute an authentic act or an act under private signature duly acknowledged, and the language in these code articles is not “superfluous,” as acknowledgement can take place at any time.³⁶³ In *Acurio*, the Louisiana Supreme Court determined that when parties execute a matrimonial agreement they must duly acknowledge their signatures before the marriage and that acknowledgement at a later time would undermine the option to execute the matrimonial agreement by authentic act.³⁶⁴ However, the reasoning the Louisiana Supreme Court provided is contrary to the operation of an authentic act in the rest of the Louisiana Civil Code.³⁶⁵

Even if the Louisiana Supreme Court affirmed the Second Circuit Court of Appeal’s decision that an act under private signature need not be duly acknowledged until after the marriage, the error in interpretation of Louisiana Civil Code article 2331 would persist.³⁶⁶ The Second Circuit’s holding allows acknowledgment of the parties’ signatures to effectively occur during depositions or court proceedings related to a divorce between the parties.³⁶⁷ As a result, the spouses would likely only acknowledge their signatures when the classification of property is at issue such as during divorce proceedings, when creditors are seeking to foreclose on property, or when the rights of heirs are involved.³⁶⁸ Consequently, the legislative intent of requiring a cautionary intrusion for spouses before entering into matrimonial agreements is not met.³⁶⁹

362. See *Acurio*, 224 So. 3d at 940.

363. *Acurio*, 224 So. 3d at 939; LA. REV. STAT. § 9:1752 (1964); LA. CIV. CODE art. 116 (1998); LA. CIV. CODE art. 2339 (1980); LA. CODE CIV. PROC. art. 2635 (1989); *Metro City Redevelopment Coal., Inc. v. Brockman*, 143 So. 3d 495 (La. Ct. App. 1st Cir. 2014); LA. CODE CIV. PROC. art. 1836 (1985).

364. See *Acurio*, 224 So. 3d at 940.

365. *Id.*

366. See generally *id.*

367. See generally *id.*; see Surprenant, *supra* note 34.

368. LA. CIV. CODE art. 2345 (1979); LA. CIV. CODE art. 1505 (1996); LA. CIV. CODE art. 105 (1991).

369. See generally Spaht & Samuel, *supra* note 28, at 90–92. (“[A]n acknowledgment of the execution of a contract, unlike an authentic act, does not entail the customary reading or paraphrasing by the notary of the act’s contents to the parties in the presence of the witnesses. The acknowledgment is thus not as likely as is an authentic act to alert a spouse to the seriousness of what he is doing. It is, therefore, surprising that the lesser formalities are permitted in legislation which, in its other provisions, is concerned with spousal overreaching.”).

To rectify the Louisiana Supreme Court's transgression, the legislature should revise the Code to eliminate the act under private signature duly acknowledged as a means of creating a matrimonial agreement. The act under private signature duly acknowledged serves a solely evidentiary function in all other titles of the Louisiana Civil Code.³⁷⁰ Alternatively, an authentic act serves both an evidentiary and cautionary function as applied to other areas of Louisiana law.³⁷¹ The legislature made a clear indication that when parties are making decisions concerning community property or contracting in a way that affects their matrimonial regime, the law requires a cautionary function to ensure solemnity.³⁷² The legislature must modify Louisiana Civil Code article 2331 to allow for the execution of a matrimonial agreement before the marriage only by the more stringent form requirement: the authentic act. The legislature should remove an act under private signature duly acknowledged as an option for execution of a matrimonial agreement and revise Louisiana Civil Code article 2331 to read: "A matrimonial agreement may be executed by the spouses before or during marriage. This shall be executed by authentic act." Enacting this more heightened requirement will realign Louisiana law with the French Code, ensure the legislative intent of establishing a cautionary procedural safeguard, and restore consistency in the Louisiana Civil Code.³⁷³

Revising the article in this way would not only strengthen Louisiana law's policy of protecting the community property regime, but also align Louisiana law more closely with that of other community property states.³⁷⁴ In other community property states, more demanding requirements must be met to enter into a prenuptial agreement such as disclosure of property, financial ownership, and obligations.³⁷⁵ Indeed,

370. *Id.* art. 1836 (1984).

371. *See generally* Spaht & Samuel, *supra* note 28, at 92. ("[A]n acknowledgment of the execution of a contract, unlike an authentic act, does not entail the customary reading or paraphrasing by the notary of the act's contents to the parties in the presence of the witnesses. The acknowledgment is thus not as likely as is an authentic act to alert a spouse to the seriousness of what he is doing. It is, therefore, surprising that the lesser formalities are permitted in legislation which, in its other provisions, is concerned with spousal overreaching.")

372. *Id.*

373. *See id.* at 90; LA. CIV. CODE art. 2329 (1979); CARROLL & CARTER, *supra* note 38, at 7.

374. *See* Acurio v. Acurio, 224 So. 3d 935, 940 (La. 2017).

375. *See* UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-

disclosure is an inflexible requirement that spouses must follow.³⁷⁶ If the legislature revised Louisiana Civil Code article 2331 to require an authentic act to enter into a prenuptial agreement, the legislature would make entering into prenuptial agreements more onerous on the parties, similar to disclosure.³⁷⁷ The requirement for spouses to execute a matrimonial agreement by authentic act would operate as a substitute for explicitly requiring disclosure of assets prior to entering into the agreement, while still carrying the same cautionary effect of disclosure.³⁷⁸

The cautionary requirements of an authentic act, such as the presence of a notary, help to ensure that the couples fully understand the legal consequences of their matrimonial agreement.³⁷⁹ As a result, a separate code article or statute requiring disclosure or legal counsel as a procedural requirement is unnecessary because the cautionary effect intended by these requirements is met in the execution of an authentic act.³⁸⁰ Washington and California have demanding requirements, such as the need for each party to have legal representation to enter into a matrimonial agreement.³⁸¹ The cautionary requirements of an authentic act, specifically the presence of a notary, help to ensure that the couples have a full understanding of the legal consequences of the agreement, the role that counsel plays in other jurisdictions.³⁸² A separate code article or statute that would require disclosure or legal counsel as a prerequisite, as in other states, need not be created in Louisiana because the cautionary effect intended by these requirements, of ensuring that the spouse has contemplated the legal effects of the agreement, is met by the requirements of an authentic act.³⁸³

3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

376. See Carroll & Moreno, *supra* note 59, at 586.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. Kellar v. Estate of Kellar, 291 P.3d 906 (Wash. 2012); see UNIF. PREMARITAL AGREEMENT ACT §6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

382. LA. CIV. CODE art. 1833 (2005); see UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202 (2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

383. See generally Carroll & Moreno, *supra* note 59, § 8.6; UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987); ARIZ. REV. STAT. ANN. § 25-202

If an authentic act was the only means to execute a matrimonial agreement prior to marriage, the confusion of the spouses entering into such agreements would be eliminated.³⁸⁴ As the multitude of cases presented to the circuit courts of appeal demonstrates, the article creates confusion for the spouses and the courts as presently written and interpreted.³⁸⁵ Spouses who, although not fully executing a matrimonial agreement by authentic act, later try to claim their agreements are valid because they met the requirements of an act under private signature duly acknowledged.³⁸⁶ Revising the Louisiana Civil Code to express that a prenuptial agreement can only be executed by an authentic act creates a limited and specific set of guidelines that must be followed before marriage.³⁸⁷ A singular option presents spouses with streamlined requirements.³⁸⁸ This simplified option would readily clarify to the spouses and to courts interpreting the validity of the matrimonial agreement whether or not the spouses have in fact executed the requirements for a valid agreement.³⁸⁹

CONCLUSION

The Louisiana Supreme Court incorrectly held in *Acurio v. Acurio* that a matrimonial agreement should be executed by an act under private signature duly acknowledged prior to marriage.³⁹⁰ Although the Court's decision aligned with the majority of appellate courts' holdings, it ignored the discrepancy between the interpretation of Louisiana Civil Code article 2331 and the rest of the Louisiana Civil Code.³⁹¹ Cautionary procedural safeguards are necessary to ensure that couples are prudent when entering into a matrimonial agreement.³⁹² As evident in other areas of Louisiana

(2019); TEX. FAM. CODE ANN. § 4.006 (West 1997); NEV. REV. STAT. ANN. § 123A.080 (West 2019); N.M. STAT. ANN. § 40-3A-7 (West 2019); IDAHO CODE ANN. § 32-925 (West 2019); WIS. STAT. ANN. § 766.58 (West 2019).

384. See Carroll & Moreno, *supra* note 59, § 8.6.

385. *Id.*

386. *Id.*

387. *Id.*; LA. CIV. CODE art. 2331 (1979).

388. Carroll & Moreno, *supra* note 59, § 8.6.

389. *Id.*

390. See *Acurio v. Acurio*, 224 So. 3d 935, 940 (La. 2017).

391. See *Lauga v. Lauga*, 537 So. 2d 758; *Ritz v. Ritz*, 666 So. 2d 1181 (La. Ct. App. 5th Cir. 1995); *Muller v. Muller*, 72 So. 3d 364 (La. Ct. App. 5th Cir. 2011); *Rush v. Rush*, 115 So. 3d 508 (La. Ct. App. 1st Cir. 2013); *Deshotels v. Deshotels*, 150 So. 3d 541 (La. Ct. App. 3d Cir. 2014); *Acurio v. Acurio*, 197 So. 3d 253 (La. Ct. App. 2d Cir. 2016); LA. CIV. CODE art. 1836 (1984).

392. See *generally* Spaht & Samuel, *supra* note 28, at 90.

law, an act under private signature duly acknowledged is not a cautionary procedural safeguard.³⁹³ For this reason, the legislature should amend Louisiana Civil Code article 2331 to remove an act under private signature duly acknowledged as an option for executing a matrimonial agreement.

If the legislature would have previously amended article 2331 in this way and applied it to the prenuptial agreement between Barry Bonds and Sun, the outcome would likely have been much more financially favorable for Sun.³⁹⁴ In fact, if Barry and Sun executed their matrimonial agreement by authentic act, the presence of a notary and two witnesses may have given Sun pause before she entered into the matrimonial agreement.³⁹⁵ The notary would have re-read the agreement to ensure that Sun understood its legal significance.³⁹⁶ Most importantly, Sun would have contemplated the legal consequences of the prenuptial agreement and at least hesitated, if not withdrawn, her consent to the agreement altogether.³⁹⁷

393. *See generally id.* at 92.

394. *See In re Marriage of Bonds*, 5 P.3d. 815, 817 (Cal. 2000).

395. *Id.*

396. *Id.*

397. *Id.*

