Matrimonial Regimes: Recent Developments

Kenneth Rigby
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This article reviews the significant recent decisions concerning Matrimonial Regimes and notes others relevant to the decisions reviewed.

I. CLASSIFICATION OF ASSETS

In Johnson v. Wetherspoon, Mr. Wetherspoon was a member of the Teachers' Retirement System of Louisiana (TRSLA) during his first and second marriages. He died during his second marriage. He named his second wife as his beneficiary pursuant to Louisiana Revised Statutes 11:762(D), and she commenced receiving the death benefits upon his death. Ten years later, his first wife filed suit to have the court determine her interest, as a former spouse, in any of these benefits which resulted from or were attributable to contributions made by Mr. Wetherspoon to TRSLA during the existence of the

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1. 694 So. 2d 203 (La. 1997).
   B. This system shall be known as the "Teachers' Retirement System of Louisiana," and by such name or its nominee name, which is hereby established as "TRSLA," all of its business shall be transacted, all of its funds invested and all of its cash and securities and other property held, except as provided in Subsection C hereof.
3. Mr. Wetherspoon married his first wife on March 23, 1957. The parties lived under a community property regime. Mr. Wetherspoon became a member of TRSLA on August 28, 1958 and continued as an active member until his death. Mr. and Mrs. Wetherspoon were legally separated on January 6, 1967, which judgment terminated the community retroactively to November 15, 1966. Their community property was never partitioned. Mr. Wetherspoon was a member of TRSLA for over eight years during this legal regime.
4. After his divorce from his first wife, Mr. Wetherspoon married his second wife on December 21, 1974, and they remained married unto each other until Mr. Wetherspoon's death.
   A surviving spouse without minor children shall be paid per month, for the remainder of his life, the Option 2 equivalent of the benefit amount based on years of service that the member had earned to the date of his death using the two and one-half percent benefit formula; or three hundred dollars per month, whichever is greater, provided the surviving spouse had been married to the deceased member for at least one year prior to death, and provided the deceased member was an active member at the time of death and had ten or more years of service credit, at least two of which were earned immediately prior to death or provided the deceased member had twenty or more years of service credit regardless of when earned or whether the deceased member was in active service at the time of death.
community which previously had existed between her and Mr. Wetherspoon. 8
TRSLA is a defined benefit plan 9 and provides two primary categories of
benefits: retirement benefits 10 and survivor benefits. 11 At issue was the
classification of the survivor benefits.

The supreme court reviewed the firmly established principles that a former
spouse is entitled to a pro rata share of the retirement benefits of a member
spouse to the extent the retirement benefits were attributable to the former
community 12 and that this right to share in the retirement benefits applies
whether the plan in question is private or public. 13 The court noted that
TRSLA survivor benefits are calculated in the same manner as retirement
benefits, using the number of years of creditable service, as well as the average
earnable compensation of the member. 14 The court declined to treat the
payment of survivor benefits differently from the payment of retirement
benefits, 15 holding that the legislative intent was to treat these types of benefits
synonymously when determining the interest of a former spouse in community

9. In the typical defined contribution plan, the plan outlines the contributions that are to be
made to the plan by the employer or employee, or both, but does not define the benefits to be
received by the employee upon retirement. The employee’s interest in the plan is the total of the
contributions made by him or on his behalf by the employer plus his proportionate share of the
earnings, gains, or losses of the plan. On the other hand, a defined benefit plan outlines the benefits
to be received by the employee upon retirement, usually calculated upon the age of the employee,
the years of service, and the employee’s compensation. These factors that are used in determining
the amount of the benefits to be received by the employee upon retirement are usually in the form
of a formula. Although a member of TRSLA contributes a percentage of his salary to the system
and the employer of a member also contributes a percentage of its employee’s salary to the system,
TRSLA is a defined benefit plan, because the monthly payments that become payable under the plan
are not based on the amount of contributions made by the member and the employer, but instead are
calculated based upon a member’s highest average compensation, years of service credit, and the
member’s age. Johnson v. Wetherspoon, 694 So. 2d 203, 204-05 (La. 1997).
10. Louisiana Revised Statutes 11:768 outlines the manner in which retirement benefits are
calculated. The actual retirement benefit received by the member upon retirement varies depending
upon which of the four Options provided in Louisiana Revised Statutes 11:783 is selected by him.
11. Survivor benefits are paid either to the surviving spouse with minor children, the surviving
12. Frazier v. Harper, 600 So. 2d 59 (La. 1992); Hare v. Hodgins, 586 So. 2d 118 (La. 1991);
Sims v. Sims, 358 So. 2d 919 (La. 1978); T. L. James & Co. v. Montgomery, 332 So. 2d 834 (La.
1975). The court overruled several early court of appeal cases holding that benefits payable under
the Teachers’ Retirement System of Louisiana are the separate property of the member because of
the limited membership in the system, the exemption from seizure provisions of the act, and
particularly the unassignability language contained in the act. The overruled cases include Blalock
1st Cir. 1968); Moore v. Moore, 187 So. 2d 145 (La. App. 2d Cir. 1966); and Scott v. Scott, 179
So. 2d 656 (La. App. 2d Cir. 1965). Johnson, 694 So. 2d at 205 n.3.
13. Johnson, 694 So. 2d at 205.
14. Id. at 209.
15. Id. at 207.
in these benefits. Therefore, the court concluded that the legislature did not intend to exempt survivor benefits payable by TRSLA from the claims of a former spouse in community. The court noted that this construction of TRSLA harmonizes and reconciles that statute with similar statutes and with the general community property laws. Since colonial days, Louisiana has been a community property state, whose basic policy has always been that the spouses share equally the acquests and gains of either spouse during marriage. In this respect, Louisiana treats married persons as true equal "partners" with respect

16. Id. at 207.

17. The court stated:

Legislative Intent

In addressing defendant's second contention, we must examine whether the legislature intended that the survivor benefits payable under TRSLA be paid solely to the named beneficiary, to the exclusion of any spouse in community. Defendant argues that because of La.R.S. 11:762(D) directs payment of survivor benefits solely to the surviving spouse, the legislature intended to exclude any and all other claimants. Again, we disagree.

Id. at 210.

18. The court concluded:

It is the duty of courts to interpret laws on the same subject matter in reference to each other. La. Civ. Code art. 13. Thus, we adopt a construction of TRSLA that harmonizes and reconciles it not only with other statutes dealing with the same subject matter, but also with general community property laws. As stated above, applies community property principles to survivor benefits, as they are already applied to retirement benefits, accomplishes this goal. Therefore, unless specifically provided for otherwise by the legislature, any benefit payable by a retirement plan, to the extent attributable to the community, is an asset of the community. Applying this rule to the present facts, we conclude that the legislature did not intend to exempt survivor benefits payable by TRSLA from the claims of a former spouse in community.

Id. at 211.

19. Katherine Shaw Spaht & W. Lee Hargrave, Matrimonial Regimes § 1.1 Introduction, at 1, 2; § 3.2 Introduction, at 47, in 16 Louisiana Civil Law Treatise (2d ed. 1997).

20. The legal regime of community of acquests and gains was previously described in the Civil Code of 1870 as a "partnership or community of acquests and gains" in Articles 2399, 2402, 2403, 2404, 2406, 2409, 2411, 2418, 2419, and 2423. Book III, title VI, chapter 3 of the Louisiana Civil Code of 1870 is titled "Of the Community or Partnership of Acquests and Gains." It was properly understood that the community of property, created by marriage, was not a partnership as that term was used generally in the law. Article 2807 of the Louisiana Civil Code of 1870 provided: "The community of property, created by marriage is not a partnership; it is the effect of contract governed by rules prescribed for that purpose in this Code." Used in its common understanding, the term partnership, when used to refer to married persons, conveys a sense of joint effort, community of endeavor, common interests, and equal rewards that characterize a solid and lasting marriage.

In Boggs v. Boggs, 117 S. Ct 1754 (1997), the United States Supreme Court recognized both in the majority opinion and the dissenting opinion the pivotal role that Louisiana community property laws play in effectuating this public policy of equality in the sharing by the spouses of the "acquests and gains" of the marriage:

This case lies at the intersection of ERISA pension law and state community property law. None can dispute the central role community property laws play in the nine community property States. It is more than a property regime. It is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship. State community property laws, many of ancient lineage, "must have
to the monetary rewards of their labors during the marriage. The principal
inquiry in *Johnson* was whether or not the legislature intended to treat the
survivor benefits of TRSLA in a manner different from this general social policy.
The court did not find a legislative intent to exempt survivor benefits payable
by TRSLA from the claims of a former spouse in community, to the extent that
these claims (an entitlement to share)\(^2\) are attributable to the deceased spouse's
employment during that former community.

The court stated this broad principle:

> Therefore, unless specifically provided for otherwise by the
> legislature, any benefit payable by a retirement plan, to the extent
> attributable to the community, is an asset of the community.\(^2\)

The decision is a consistent application of the equal benefit sharing policy of
Louisiana community property law.

continued to exist through such lengths of time because of their manifold excellences and
are not lightly to be abrogated or tossed aside.” 1 W. de Funiak, Principles of
Community Property 11 (1943). The community property regime in Louisiana dates from
1808 when the territorial legislature of Orleans drafted a civil code which adopted Spanish
principles of community property. *Id.*, at 85-89. Louisiana's community property laws,
and the community property regimes enacted in other States, implement policies and
values lying within the traditional domain of the States. These considerations inform our
pre-emption analysis. See *Hisquierdo v. Hisquierdo*, 439 US 572, 581, 59 L Ed 2d 1, 99
S Ct 802 (1979).

*Boggs*, 117 S. Ct. at 1760 (majority opinion).

Judge Wisdom, writing for the Fifth Circuit in this case, described Louisiana's
community property law as a "system" that "conceives of marriage as a partnership in
which each partner is entitled to an equal share." 82 F.3d 90, 96 (1996); see also W.
McClanahan) (community property law views marriages "as a civil contract between two
person who ente[r] into the relationship as equals and retai[n] their individual personali-
ties"). Recognizing "the value a spouse, though non-employed, contributes to a
marriage," 82 F. 3d, at 96, the state law provides that the interest in pension benefits that
accrued during Isaac's marriage to Dorothy belongs both to Isaac and to Dorothy—that
is, to them as a community—and not to the one any more than the other. La.Civ.Code
Ann., Art. 2338 (West 1985) (community property includes "property acquired during the
existence of the legal regime through the effort, skill, or industry of either spouse"); *T.L. James & Co. v. Montgomery*, 332 So.2d 834, 841-844, 846 (La.1975) (pension benefits
are community property even if the employee spouse makes no cash contributions to the
plan).

*Boggs*, 117 S. Ct. at 1768 (Breyer, J., dissenting).

21. "When acquired during the existence of a marriage, the right-to-share (in a retirement plan)
is a community asset..." *Sims v. Sims*, 358 So. 2d 919, 922 (La. 1978) (quoting T.L. James &
Co., Inc. v. Montgomery, 332 So. 2d 834, 851 (La. 1976)).

22. *Johnson v. Wetherspoon*, 694 So. 2d 203, 211 (La. 1997). *Johnson* was applied in
*Succession of Silbernagel*, 708 So. 2d 485 (La. App. 1st Cir. 1998), to the surviving spouse
benefits of a Municipal Employees' Retirement System (MPERS) plan because the "legislation governing the
MPERS is substantially similar to that reviewed by the supreme court in *Wetherspoon*." *Silbernagel*,
708 So. 2d at 487.
The decision in Johnson v. Wetherspoon\(^{23}\) is not impacted by the decision of the United States Supreme Court in Boggs v. Boggs.\(^{24}\)

In Boggs, the wife of a participant in South Central Bell retirement plans\(^{25}\) died. She bequeathed to her three sons the naked ownership of two thirds of her estate, subject to a lifetime usufruct in favor of her husband.\(^{26}\) The husband remarried and retired. He received a monthly annuity payment during his retirement together with other retirement benefits.\(^{27}\) Upon his death, his widow (the second wife) received survivor annuity payments.\(^{28}\) Two of the three sons of Mr. Boggs filed a state court action seeking recovery from the second wife of a portion of all of the retirement benefits received by their father and the second wife's survivor payments, both those already received by her and to be received by her in the future.\(^{29}\)

The second wife brought a federal court action seeking

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23. 694 So. 2d 203 (La. 1997).
25. The retirement plans were the Bell System Savings Plan for Salaried Employees (Savings Plan), Bell South Employee Stock Ownership Plan (ESOP), and Bell South Service Retirement Program. Upon retirement, Mr. Boggs received a lump sum distribution from the Savings Plan, which he rolled over into an Individual Retirement Account (IRA), shares of AT&T stock from the ESOP plan, and a monthly annuity payment from the Retirement Program. \textit{Id. at} 1758.
26. All agree that, absent pre-emption, Louisiana law controls and that under it Dorothy's will would dispose of her community property interest in Isaac's undistributed pension plan benefits. \textit{Id. at} 1758.
27. \textit{Id. at} 1758.
28. The annuity at issue is a qualified joint and survivor annuity mandated by ERISA. Section 1055(a) provides:
   
   Each pension plan to which this section applies shall provide that—
   
   (1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity.

   ERISA requires that every qualified joint and survivor annuity include an annuity payable to a nonparticipant surviving spouse. The survivor's annuity may not be less than 50\% of the amount of the annuity which is payable during the joint lives of the participant and spouse. § 1055(d)(1).

   Provision of the survivor's annuity may not be waived by the participant, absent certain limited circumstances, unless the spouse consents in writing to the designation of another beneficiary, which designation also cannot be changed without further spousal consent, witnessed by a plan representative or notary public. § 1055(c)(2). Sandra Boggs, as the surviving spouse, is entitled to a survivor's annuity under these provisions. She has not waived her right to the survivor's annuity, let alone consented to have the sons designated as the beneficiaries. Boggs, 117 S. Ct. at 1761.

   The Court noted that the Retirement Equity Act of 1984 (REA), Pub.L. 98-397, 98 Stat. 1426, enlarged ERISA's protection of surviving spouses in significant respects, including those outlined by the court. \textit{Id. at} 1761.
29. After Isaac's death, two of the sons filed an action in state court requesting the appointment of an expert to compute the percentage of the retirement benefits they would be entitled to as a result of Dorothy's attempted testamentary transfer. They further sought a judgment awarding them a portion of: the IRA; the ESOP shares of AT&T
a declaratory judgment that the Employee Retirement Income Security Act of 1974 (ERISA) pre-empts Louisiana community property and succession laws to the extent that they recognize the sons' claim to an interest in the disputed retirement benefits.\(^{30}\)

The Supreme Court held that because there was a "direct clash between state law and the provisions and objectives of ERISA, the state law cannot stand," and the sons' state-law claims are pre-empted by ERISA.\(^{31}\) The court noted that the annuity at issue was a qualified joint and survivor annuity mandated by ERISA.\(^{32}\) It held that Louisiana community property law conflicted with ERISA and operated to frustrate its objects.\(^{33}\) The statutory object of the qualified joint and survivor annuity provisions is to assure a stream of income to surviving spouses.\(^{34}\) Louisiana law undermines that object. The fact that the claim is only against the beneficiary of the annuity, not the retirement plan itself, does not prevent preemption, as the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit.\(^{35}\) The obligation of the recipient to

stock; the monthly annuity payments received by Isaac during his retirement; and Sandra's survivor annuity payments, both received and payable.

Id. at 1759.

30. Id. at 1759.

31. Id. at 1762. Dumont v. Charles Schwab & Co., Inc., 717 So. 2d 1182, 1183-84 (La. App. 4th Cir. 1998), defined the test for preemption to be:

Under the Supremacy Clause of Article VI of the U.S. Constitution, enforcement of state law may be preempted by federal provisions if the Congress has either enacted a clear expression of that intent or it has legislated so comprehensively in a field that no room is left for state regulation. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580 (1984). Preemption will also be found if it is impossible to comply with both the federal and state provisions, or when application of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id., quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Where Congress creates an administrative agency to effectuate its statutory goals, those regulations issued within the legislative grant of authority may have the same preemptive effect as federal statutes. United States v. Shimer, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961).

32. Louisiana law, to the extent it provides the sons with a right to a portion of Sandra Boggs' § 1055 survivor's annuity, is pre-empted.

Id. at 1762.

33. Id. at 1761.

34. Id. at 1765. The Court defined the limits of the nonparticipant spouse's community property interests in pension plans consistent with ERISA:

The QDRO and the surviving spouse annuity provisions define the scope of a nonparticipant spouse's community property interests in pension plans consistent with ERISA.

Id. at 1765.

35. Id. at 1761.

36. "If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit." Id. at 1766.
provide an accounting for the benefits received is itself a burden of significant proportions.37

The reason that Boggs38 does not impact the decision in Johnson v. Wetherspoon39 is because the Teachers' Retirement System of Louisiana (TRSLA) is a "governmental plan." A governmental plan includes a plan established or maintained for its employees by the Government of the United States, by the government of any state or political subdivision of a state, or by any instrumentality of any of these, as well as certain other types of retirement plans.40 These are commonly called "public plans." None of the provisions of ERISA or regulations promulgated pursuant to ERISA apply to these type plans.41 Not being subject to ERISA, a "public plan" presents no preemption issue. However, the impact of Boggs42 must be considered if community

37. See 117 S. Ct. at 1766. The court discussed its prior decision in Free v. Bland, 369 U.S. 663, 82 S. Ct. 1089 (1962), holding that state law was preempted by federal law and Treasury Regulations:

Free v. Bland, supra, is of particular relevance here. A husband had purchased United States savings bonds with community funds in the name of both spouses. Under Treasury regulations then in effect, when a co-owner of the bonds died, the surviving co-owner received the entire interest in the bonds. After the wife died, her son—the principal beneficiary of her will—demanded either one-half of the bonds or reimbursement for loss of the community property interest. The Court held that the regulations pre-empted the community property claim, explaining:

"One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings. Notwithstanding this provision, the State awarded full title to the co-owner but required him to account for half of the value of the bonds to the decedent's estate. Viewed realistically, the State has rendered the award of title meaningless." Id., at 669, 8 L Ed 2d 180, 82 S Ct 1089.

The same reasoning applies here.

Boggs, 117 S. Ct. at 1766. See Gaupp v. Tarver, 691 So. 2d 107 (La. App. 1st Cir.) writ denied, 692 So. 2d 1093 (1997), in which the court held that United States savings bonds registered in beneficiary form are subject to Louisiana inheritance taxes, and that this state taxation does not conflict with federal regulations. Therefore, the state court concluded, there is no federal preemption.

39. 694 So. 2d 203 (La. 1997).

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935, or 1937 [45 U.S.C. 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C. 288 et seq.].

41. 29 U.S.C. § 1003(b)(1) (1994) provides:

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 1002(32) of this title).

42. 117 S. Ct. 1754 (1997).
property claims are asserted against survivor benefits and other retirement benefits in a plan subject to ERISA.43

Federal preemption was the issue in Thibodeaux v. Thibodeaux.44 During the legal regime, the husband was injured in a work accident.45 He applied for social security disability benefits for his period of disability resulting from the accident.46 After he returned to work,47 the parties divorced and the legal regime was terminated effective January 23, 1992. The husband was awarded social security benefits for his period of disability. He received the benefits in two payments, one on January 4, 1992 and the second on March 16, 1992.48 The issue on appeal was the community or separate classification of the social security disability benefits received by the husband both prior to and after termination of the legal regime, but covering the period of disability which occurred during the existence of the legal regime. On its own motion, the appellate court analyzed the central issue to be whether the Old Age and Survivors Disability Family Benefit Plan (OASDI) of the Social Security Act preempts classification of social security disability benefits in accordance with Louisiana's community property law.49

After reviewing the Social Security Act50 and its anti-attachment provision,51 the amendments to that provision, and United States Supreme Court decisions and state court decisions, the court concluded that the treatment of social security disability benefits as community property would do “major damage” to “clear and substantial” federal interests, in that it “would interfere with the uniform federal system of distribution which Congress has established” through the Old Age Survivors and Disability Insurance Family Benefit Plan

43. Except for public plans and other types of plans exempted from ERISA by 29 U.S.C. § 1003, the vast majority of private plans are subject to ERISA.
44. 712 So. 2d 1024 (La. App. 1st Cir. 1998).
45. In October, 1986. See id. at 1025.
46. See id.
47. Mr. Thibodeaux returned to work some time in 1990. See id.
48. See id.
49. Id. at 1025-26.
51. 42 U.S.C. § 407 (1994) provides in pertinent part:
The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
This provision is similar to the non-assignability, non-transferability provisions of Louisiana Revised Statutes 17:573 (now Louisiana Revised Statutes 11:704) in the Teachers' Retirement System of Louisiana statute, Louisiana Revised Statutes 17:571-781 (now Louisiana Revised Statutes 11:701-941), that were the basis for decreeing these benefits to be separate property of the teacher spouse in early cases, which were subsequently overruled. See Johnson v. Wetherspoon, 694 So. 2d 203 (La. 1997). See also a discussion of these cases in supra note 12.
(OASDI) of the Social Security Act. This being so, the court concluded that the federal act preempted Louisiana community property law, which would classify the social security disability benefits either wholly or partially as community property. The court found “a Congressional intent to replace state family law as it applies to social security.” Although the court did not cite nor discuss Boggs v. Boggs, the reasoning, the application of federal preemption considerations, and the result are consistent with Boggs.

A public retirement plan similar to that in Johnson v. Wetherspoon, the Louisiana State Employees Retirement System (LASERS), was involved in Bailey v. Bailey. This plan, which covers state officers and employees, provides that a member who is eligible for regular retirement may make a one time election to participate in the Deferred Retirement Option Plan (DROP) for a specified period not exceeding three years. If the member does so, the member is considered to be in a retired status although he continues to work and is paid for his work. However, for retirement benefit purposes, his final average compensation and creditable service remain fixed, or “frozen,” as of the date of commencement of participation in DROP. The member’s retirement benefits, based on his final average compensation and creditable service, which otherwise would otherwise be payable to him, are not paid to him but are credited to a DROP account during his participation in DROP. The funds in the DROP account are invested, and the member is credited with his proportionate share of the account’s earnings and growth, or losses. At the member’s termination of both his employment and his participation in DROP, the amount credited to him in the DROP account is paid to him either in a lump sum or in installments. Additionally, he then commences to receive his regular monthly

52. Thibodeaux, 712 So. 2d at 1028. In Boggs v. Boggs, 117 S. Ct. 1754 (1997), the United States Supreme Court held that the statutory object of the qualified joint and survivors annuity provisions in ERISA is to assure a stream of income to surviving spouses, supra note 35, and that Louisiana community property law undermines that object of the federal law. Therefore, the state law must yield to the federal law under the preemption clause of the United States Constitution, Article VI, clause 2. Id. at 1761-62.
53. Thibodeaux, 712 So. 2d at 1028.
54. Id.
56. 694 So. 2d 203 (La. 1997).
57. 708 So. 2d 354 (La. 1998).
60. See Bailey, 708 So. 2d at 356.
retirement benefits,⁶⁵ which previously had been deposited in the DROP account.

Mr. Bailey became a member of LASERS in 1963. The Baileys married in July, 1977. At the end of 30 years’ service, Mr. Bailey opted in October, 1993, to participate in LASERS’ DROP program in lieu of regular retirement. As a result, his monthly retirement benefits were credited to his DROP account for a period of three years. In the meantime, the Baileys divorced. The community of acquits and gains existing between them was terminated effective January 28, 1994. In a partition proceeding, the classification of the funds credited by LASERS to Mr. Bailey’s DROP account subsequent to January 28, 1994 was in dispute.⁶⁶ The issue was whether the retirement benefits paid into the DROP account for the benefit of Mr. Bailey were fully earned at the time of his retirement and option to participate in DROP,⁶⁷ which was prior to the termination of the community, or whether Mr. Bailey’s continued employment in DROP subsequent to the termination of the community should be included in the Sims formula apportionment,⁶⁸ i.e., whether or not the continued deposits of retirement benefits into his DROP account after that date depended upon Mr. Bailey’s continued employment subsequent to the termination of the community.⁶⁹ The court held that these benefits were fully earned during the existence of the community and that the funds credited to the DROP account post-termination were community.⁷⁰ The court found no statutory requirement that Mr. Bailey continue to complete his three year DROP election in order to earn these retirement benefits⁷¹ or any legislative intent to alter a non-employee spouse’s right to the retirement benefits because of the employee spouse’s participation in DROP.⁷²

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⁶⁷. See id. at 355 and 356-57.
⁶⁸. See id. at 356-57.
⁶⁹. See id.
⁷⁰. The court held:

The employment and retirement contributions that gave rise to Mr. Bailey’s right to have funds credited to the DROP account occurred prior to and during the existence of the community, and not after the termination. It follows then that the right to receive the funds in the DROP account, at least the portion attributable to Mr. Bailey’s labor and efforts and retirement contributions during the existence of the community prior to entering the DROP program, constitutes a community asset.

Id. at 357 (footnotes omitted).
⁷¹. Id. at 357 n.2.
⁷². Id. at 359. The issue of whether income received after the termination of the community was fully earned prior to its termination and thus is community, or was earned partially during and partially after the termination of the community and should be pro-rated as community and separate, has been presented several times to the courts. See Due v. Due, 342 So. 2d 161 (La. 1977) (attorney fees); Michel v. Michel, 484 So. 2d 829 (La. App. 1st Cir. 1986) (literary works); Futch v. Futch, 643 So. 2d 364 (La. App. 2d Cir. 1994) (renewal commissions after the termination of the community on policies sold during the community); Preis v. Preis, 649 So. 2d 593 (La. App. 3d Cir.
Overton v. Overton involved the application of the Hare v. Hodgins principles concerning the effect that post-termination efforts of the employed spouse have on the calculation of the community and non-community components of retirement benefits in a defined benefit plan. Mr. Overton was employed as a pilot by Delta Air Lines for about 30 years. Both equipment flown and routes are subject to "bids" based upon the seniority of the pilot. To upgrade to larger and newer aircraft, the successful bidder must undergo ground school and flight training for the new aircraft. Once qualified for a new aircraft, Mr. Overton "bid" the routes that aircraft flew. He was upgraded several times after the termination of the community. He contended that these efforts constituted personal and extraordinary effort or achievement justifying a Hare authorized modification to the Sims formula for determining the community and non-community portions of his Delta retirement benefits. The court found


See also Saacks v. Saacks, 708 So. 2d 1077 (La. App. 5th Cir.), writ denied, 717 So. 2d 232 (1998). In Saacks, the community regime was terminated effective September 8, 1993. Mr. Saacks received $325,000.00 in settlement of a disputed claim for lobbying activities rendered on behalf of a gaming company, payable in two installments of $162,500.00 each on August 23, 1993 and January 7, 1994. The court held the settlement money to be community property because all the lobbying services were rendered during the community regime. Id. at 1080-81.

73. 694 So. 2d 491 (La. App. 5th Cir.), writ denied, 703 So. 2d 26 (1997).
74. 586 So. 2d 118 (La. 1991).
75. In Hare, the supreme court held that where the income received by the employee spouse contains a substantial increment due to the working spouse's personal effort or achievement after termination of the community, that spouse may be entitled an adjustment of the community fraction of the Sims v. Sims, 358 So. 2d 919 (La. 1978), formula to give credit for that personal effort or achievement. Hare, 586 So. 2d at 128. The court provided the following criteria for determining whether or not credit should be given to the employee spouse for his post-termination efforts in apportioning the retirement benefits:

Thus, for the courts the process may be viewed as a winnowing of increments of post-community increases in the employee spouse's earnings for the purpose of determining whether the increases are due purely to personal merit. First, the increment must represent a fairly substantial increase in the employee spouse's post-community earnings. Second, the increment must not be due to a non-personal factor, such as cost-of-living raises, etc. Third, the increment must be attributable to the employee spouse's meritorious individual efforts or achievements. Moreover, since the employee spouse has the burden of production of the evidence and persuasion, cases of doubt should be resolved in favor of the community and against the employee's [sic] spouse's separate estate or subsequent marital community.

Id.
76. See Overton, 694 So. 2d at 493.
77. See id.
78. See id.
79. See id.
that his advancement to larger and newer aircraft was a natural progression in his career as a pilot. The decision is eminently correct, as the process he went through is the standard for the airline industry; he did what all other airline pilots are required to do in order to advance their careers as pilots.

The classification of distributions of net profits received by a physician indirectly from a limited partnership after the termination of the community was at issue in Chance v. Chance. A medical partnership owned a one-half interest in a limited partnership which performed ultrasound testing procedures for the medical partnership, in which the physician husband was a partner. The medical partnership interest was community. The medical partnership distributed the fees it received from the limited partnership to its physician partners based upon the physicians' productivity in the limited partnership. When referring a patient to the limited partnership for testing, the physician accompanied his patient, supervised the testing, and interpreted the results. The court held the fees received by the physician husband were his separate property, being fees generated by his professional skill and effort after the termination of the community, and not returns on a community investment.

80. From the trial court's ruling it is apparent that it did not find Captain Overton's argument for adjustment under Hare convincing. On review we find no error in that ruling. We believe the move to the L-101 was a natural progression in Captain Overton's career as an aviator. The nature of aviation requires that a pilot receive additional training before advancing to more technologically complex aircraft. Captain Overton admits he has flown many different planes in his thirty years with Delta and training was required for each upgrade. He also admitted that his failure to upgrade his skills would have led to a demotion and cut in pay upon return to a less technologically advanced aircraft.

81. 694 So. 2d 613 (La. App. 2d Cir. 1997).
82. The name of the medical partnership was Urology Associates.
83. The name of the limited partnership was Prostate Center. This limited partnership was owned one-half by its general partner, Urology Associates, and the other one-half interest was owned by various children and spouses of the physicians who were partners in Urology Associates.
84. See Chance, 694 So. 2d at 618.
85. Dr. Chance owned a twenty percent interest in the medical partnership, Urology Associates. See id. at 617.
86. See id.
87. Urology Associates, owning a fifty percent interest in Prostate Center, received fifty percent of its net profits; the other fifty percent was distributed to the individual owners in proportion to their ownership interests. Urology Associates distributed the net profits it received from Prostate Center to the physician partners of Urology Associates based upon their productivity in Prostate Center.
89. The services for which the fees were paid and the payment of the fees both occurred after the termination of the community. Id. at 618.
90. Id. at 618.
91. Mrs. Chance claimed that Dr. Chance's portion of the Prostate Center net profit distributions to Urology Associates was a return on a community investment, i.e., civil fruits, and thus were community property.
Also at issue in *Chance* was the classification of monthly disability benefits received by the physician husband after termination of the community. The disability policy was issued during the community and the premiums were paid during the community with community funds. The disability payments did not represent deferred compensation in the nature of retirement or pension income. The court held that the disability insurance benefits payable to the physician subsequent to the community termination were his separate property.

A case presenting an interesting classification issue, resolved by the application of well-settlement principles, was *Noil v. Noil*, 699 So. 2d 1134 (La. App. 1st Cir. 1997). The wife, during the legal regime, entered a "sweepstakes contest" sponsored by a newspaper by filling out and sending in a "word search puzzle" which appeared in the newspaper. She won $25,000.00. Although she claimed the prize money as her separate property, the court correctly held it to be community property because her winnings were the "result of her own skill and effort in correctly finding the hidden words, and thereafter mailing her entry into the sweepstakes." *Noil*, 699 So. 2d at 1137.

92. *Chance*, 694 So. 2d at 618. The fact that a disability policy is issued during the community and the premiums paid with community funds does not necessarily lead to the conclusion that the disability benefits received from the policy are community property. *Brant v. Brant*, 649 So. 2d 111, 113 (La. App. 2d Cir. 1995).

93. On examination of the policy, the court concluded that it clearly did not accord deferred compensation or retirement benefits. *Chance*, 694 So. 2d at 618. Instead, its benefits were payable only for total physical disability, and Dr. Chance’s insurer had acknowledged that he was totally disabled and eligible for benefits until such time as his health improved. *Id.* at 619. Dr. Chance subsequently died.

94. See Spaht & Hargrave, supra note 19, at 51-54 for a comprehensive discussion of the application of the principle of real subrogation in classifying disability benefits received both during the existence of the community and thereafter. Disability benefits are payable in lieu of or as compensation for the loss of earning capacity. *Easterling v. Succession of Lamkin*, 211 La. 1089, 31 So. 2d 220, 224 (La. 1947). Under the real subrogation theory, disability benefits take the classification of the income that they replace. If the benefits are to replace or compensate for lost community income, the benefits are classified as community; if they are to replace or compensate for lost separate income, they are classified as separate property. *Brant*, 649 So. 2d at 114; *Johnson v. Johnson*, 582 So. 2d 926 (La. App. 2d Cir. 1991); *Howard v. Howard*, 580 So. 2d 696 (La. App. 2d Cir. 1991).

*Thibodeaux v. Thibodeaux*, 712 So. 2d 1024 (La. App. 1st Cir. 1998), contains the following succinct statement of these principles governing disability benefits:

Under Louisiana's community property law, classification of disability benefits requires a determination of whether the disability payments represent deferred compensation in the nature of retirement or pension income. If the disability payments are in the nature of retirement or pension income, the benefits are classified as community to the extent attributable to years of service performed during the existence of the community. On the other hand, disability payments that do not qualify as deferred income should be classified in accordance with the approach utilized for tort damages and workers' compensation benefits. Regarding tort damages and workers' compensation benefits for injuries sustained by a spouse during the existence of the community, that portion of any award designed to compensate for loss of earnings would be community property during the existence of the marital regime, but separate property following termination.

*Id.* at 1026 (citations omitted).

See also *Hyde v. Hyde*, 697 So. 2d 1061 (La. App. 1st Cir.), writ denied, 703 So. 2d 1274 (1997), which reviewed the Exxon disability retirement plan and the pertinent jurisprudence and classified monthly disability payments received by Mr. Hyde from Exxon after the termination of the
Morris v. Morris95 held that a punitive damage award in favor of the husband, obtained after the termination of the community for a tort committed during the community,96 was community property. Not only is the decision correct, the analysis of the court97 is to be commended. Presumptions play a significant role in the classification of property98 and of obligations99 of married persons living under a legal regime of community of acquets and gains.

It is helpful to engage in a sequential step by step analysis in determining whether a thing is to be classified as a community thing or a separate thing. The first issue is whether the subject matter which is the subject of the classification inquiry is a “thing.”100 The matrimonial regimes articles of the Civil Code use community as his separate property, finding them not to be in the nature of deferred compensation. See also Bordes v. Bordes, 707 So. 2d 471 (La. App. 5th Cir. 1998), in which benefits payable by the Parochial Employees’ Retirement System of Louisiana due to the disability of Mr. Bordes were classified as community to the extent attributable to the years of service performed during the existence of the community. The court found that the payments were deferred compensation, “in the nature of an early retirement, albeit one forced by medical reasons.” Id. at 474. On the other hand, the benefits received by Mr. Bordes from the Employees Retirement System of Jefferson Parish as a result of this disability were classified as his separate property, the court concluding that these benefits were not the result of the effort, skill or industry of Mr. Bordes during the community and were not deferred compensation. In each case, the court looked to the provisions of the plan to determine its nature for the purpose of classifying the benefits received by Mr. Bordes. On application of Mr. Bordes, the Louisiana Supreme Court granted a writ of review, 721 So. 2d 897 (La. 1998).

95. 685 So. 2d 673 (La. App. 3d Cir. 1996), writs denied, 690 So. 2d 40 (1997).
96. Id. at 674.
97. After holding Louisiana Civil Code article 2344 classifying compensatory damages for personal injury as separate property to be inapplicable to punitive damages, the court stated:

Rather, we conclude that the answer may be found elsewhere, in La. Civ. Code art. 2338, most commonly referred to as the “omnibus clause,” which clearly states that “community property comprises: all other property not classified by law as separate property.” Accordingly, Mr. Morris, in order to overcome the presumption set forth in La. Civ. Code art. 2340 and encompass the receipt of punitive damages as his separate property, would have to fit the property at issue into one of the following articles classifying property as separate in nature. La. Civ. Code art. 2341, La. Civ. Code art. 2341.1, La. Civ. Code art. 2342, La. Civ. Code art. 2343, or La. Civ. Code art. 2344.

Inasmuch as none of these articles can be said to classify punitive damages as separate property, we affirm the trial judge’s finding that the punitive damages settlement received by Mr. Morris constituted community property to which Mrs. Morris is entitled to her one-half interest. Morris, 685 So. 2d at 675.

98. La. Civ. Code art. 2340 provides with respect to property:

Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.

99. La. Civ. Code art. 2361 provides with respect to obligations:

Except as provided in Article 2363, all obligations incurred by a spouse during the existence of a community property regime are presumed to be community obligations.

100. The classic example of skipping this threshold question is in In re Marriage of Sullivan, 184 Cal. Rptr. 796 (Cal. Ct. App. 1982). The issue posed was whether a professional degree was
the words "thing" or "things,"\textsuperscript{101} "assets,"\textsuperscript{102} "patrimony,"\textsuperscript{103} and "property."\textsuperscript{104} In most instances, the characterization as a thing, an asset, or as community property or separate property under California community property law. After holding that it was community property, upon rehearing the court decided that the degree was not property at all because it did not meet the traditional definitions and characteristics of property. In response to that decision, the California legislature enacted Cal. Civ. Code § 4800.3 (Supp. 1989) classifying it as community property and providing a method of compensation to the other spouse who contributed to the education resulting in the degree.

Subsequently, the California Supreme Court applied that statute and held the degree to be community property. \textit{In re Marriage of Sullivan}, 691 P.2d 1020 (1984). Cal. Civ. Code § 4800.3 has been repealed. See Cal. Fam. Code § 2641 (West 1994) for current provision.

In drafting proposed Louisiana Civil Code articles 121-124 regulating the claim for contributions to the education or training of a spouse, the Louisiana State Law Institute carefully avoided classifying the education or training either as property or the claim as one for spousal support because of the conceptual difficulties encountered by other states in doing so.

La. Civ. Code art. 121 cmt. (b) states in part:

This cause of action is not based upon classification of an education or training as community property, nor is the claim subject to the same factors as spousal support.

La. Civ. Code art. 121 cmt. (f) states:

This Article rejects the approach of treating the degree, trade, or license acquired by the supported spouse as marital property subject to distribution. The only Louisiana appellate court that has been presented with this issue has avoided it. Harmon v. Harmon, 486 So.2d 277 (La.App. 3d Cir.), writ denied, 489 So.2d 916 (1986) (holding that the question whether a wife had "a cause of action to partition a professional medical education" was moot because previously settled, indirectly, by agreement of the parties). Such claims have also not received widespread approval in other states. See Mahoney v. Mahoney, 182 N.J. Super. 598, 442 A.2d 1062 (N.J.Super.App.Div. 1982). The second paragraph of this Article is intended to make clear that the contemplated award is not spousal support or a disposition of community property.

\textsuperscript{101} Louisiana Civil Code articles 2336, 2337, 2338, 2340, 2341, 2342, 2343, and 2343.1 use the words "thing" or "things." Book II, \textit{Things and the Different Modifications of Ownership}, of the Louisiana Civil Code, articles 448-818, almost universally uses the words "thing" or "things." Title III, \textit{Personal Servitudes}, of that book uses the words "things" or "thing" and "property." The co-ownership articles contained in Book II, articles 797-818, consistently use the terms "the thing" or "a thing."

\textsuperscript{102} The words "asset" and "assets" are used in Louisiana Civil Code articles 2339, 2347, 2353, 2366, 2367, 2367.1, and 2367.2.

\textsuperscript{103} Louisiana Civil Code article 2358.1 provides that reimbursement shall be made from the "patrimony" of the spouse who owes reimbursement.

\textsuperscript{104} In all other cases, the Louisiana Civil Code articles governing matrimonial regimes use the word "property." Louisiana Civil Code articles 2325, 2335, 2338, 2339, 2341, 2341.1, 2343, 2357, 2364, 2364.1, 2365, 2367, 2369.4 and 2371 use the word "property" in referring to individual items of property. These and other articles also use the word "property" numerous times in referring to a classification of a type of property, i.e., community property and separate property, and the separation of property regime. Although broader or narrower definitions may have been intended by the selective use of one or another of these terms in particular situations, see Spaht & Hargrave, \textit{supra} note 19, at 24, the differences are not apparent from the text of the articles.

These words appear to have been generally used interchangeably, but selectively for semantical purposes, in some circumstances. The use in Louisiana Civil Code article 2336 of the term "either the community nor things of the community" and the use in Article 2337 of the term "in the community or in particular things of the community" distinguishes between the whole and any of its
property is clear. Corporeal movables and immovables are examples. Many incorporeal movables and immovables are easily classified as a thing, an asset, or as property. Some matters are not so easily defined as a thing, or an asset, or as property. The education or training which a person receives, the degree or license that results from that education, the increased knowledge, perception or wisdom resulting from the education or training or from experience, goodwill acquired over the years while practicing a profession, concepts and ideas still confined to the brain, and a natural talent that has been nourished component parts. It appears that the words “thing” or “things” may have been used instead of “property” when a more limited or restrictive application was intended. But one needs to be careful in making conclusions; the terms appear to be synonymous in Louisiana Civil Code article 2338 classifying as community property “property acquired with community things or with community and separate things,” and Louisiana Civil Code article 2341 classifying as separate property “property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used.”

In the final analysis, classification cannot be accomplished by definition alone. See infra note 107, suggesting a functional approach in the use of these terms for matrimonial regimes purposes. See also Expose des Motifs to Book II, Title I, entitled Things, Civil Code of 1870 articles 448 et seq, as amended by 1978 La. Acts, No. 728, § 1, effective Jan. 1, 1979, (vol. 3, West’s LSA Civil Code 1980, p. 3) which, after discussing the prior use of the words “estate” and “thing” and the decision to use the word “thing” in the revision without defining it, states:

In the light of these considerations the council of the institute decided to omit a definition of the word things. Definition will be made by doctrine and jurisprudence in the light of prevailing conceptions in society. Thus, for example, according to contemporary notions, human blood or hair may be regarded a thing under certain circumstances. In the last analysis, determination of which corporeals and incorporeals may become objects of property rights ought to be made in the light of the function, present and future, of the entire legal system.

105. Louisiana Civil Code article 461 defines corporeals as things that have a body, whether animate or inanimate, and can be felt or touched.

106. Louisiana Civil Code article 461 defines incorporeals as things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property. Louisiana Civil Code article 473 defines incorporeal movables as rights, obligations, and actions that apply to a movable thing and gives as examples bonds, annuities, and interests and shares in entities possessing juridical personality. A familiar example is the incorporeal, movable right acquired by an employee’s spouse to share in any retirement benefits earned during the marriage by the employed spouse. Eskine v. Eskine, 518 So. 2d 505, 507 (La. 1988). A bank account is an incorporeal movable. Bertucci v. Bertucci, 690 So. 2d 841, 843 (La. App. 1st Cir. 1997).

107. See Spaht & Hargrave, supra note 19, at 23-33, for a thorough and scholarly discussion suggesting that a broad approach is warranted in defining the scope of these terms for matrimonial regimes purposes. The authors correctly point out that the civilian concept of “patrimony” is too broad to be used in every situation, and that traditional notions of property are too narrow. The civil law of patrimony includes the total mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. Due v. Due, 342 So. 2d 161, 165 (La. 1977). The authors suggest a functional approach, a determination of whether the asset or thing under consideration is able to function reasonably well under the basic rules governing the community, particularly the rules governing the acquisition, management and division of community assets. Spaht & Hargrave, supra note 19, at 27.
and developed may all fit within a broad notion of patrimony, property, assets, or things, but do not functionally fit within the rules and principles governing the ownership, management, and division of the property of married persons, and should not be classified as things, assets, or property subject to classification for matrimonial regimes purposes.

If the subject of the inquiry is found to be a thing, an asset, or property, the next step in the analysis is a determination of whether it was in the possession of a spouse during the existence of the legal regime. If so, it is presumed to be community. Louisiana Civil Code article 2340 provides that things in the possession of a spouse during the existence of the legal regime are presumed to be community. The presumption is created by the possession of the thing by a spouse during the existence of the legal regime, not the acquisition of it by a spouse during the legal regime.

The next step in the analysis is a determination of whether the thing in question has been statutorily classified as community. If so, the classification inquiry ends. Louisiana Civil Code articles 2338, 2339, 108. Spaht & Hargrave, supra note 19, at 200-01, point out that possession is more than simple physical detention or custody of the thing. Louisiana Civil Code article 3424 requires that, to acquire possession, one must intend to possess as owner. Possession may be corporeal possession, La. Civ. Code arts. 3424, 3425, constructive possession, La. Civ. Code art. 3426, or civil possession, La. Civ. Code art. 3431. If a spouse does not enjoy one of these types of possession of a thing or does not have the intention to possess the thing as owner during the legal regime, the Louisiana Civil Code article 2340 presumption does not apply with respect to that thing. In that instance, the spouse claiming the thing to be community has the burden of proving that classification of the thing because that spouse does not enjoy the benefit of the presumption of community. In these instances, if the evidence shows that the thing possessed by a spouse is the property of a third party, the community presumption is not overcome; it simply never applied to that thing, because the spouse did not have the intention to possess it as owner.

109. Although Louisiana Civil Code article 2340 is most often cited for the proposition that property acquired during the marriage is presumed to be community, see Noel v. Noel, 699 So. 2d 1134, 1136 (La. App. 1st Cir. 1997), Barrow v. Barrow, 669 So. 2d 622, 624 (La. App. 2d Cir.), writ denied, 675 So. 2d 1080 (1996), Madele v. Madere, 632 So. 2d 1180, 1184 (La. App. 5th Cir. 1994), Doland v. Doland, 562 So. 2d 994, 997 (La. App. 3d Cir. 1990), the community presumption arises upon proof that a spouse has the possession of the thing during the existence of the legal regime. See also Spaht & Hargrave, supra note 19, at 201 n.7.

The presumption that a thing in the possession of a spouse during the legal regime is a community thing is a broader presumption than one which provides that a thing acquired by a spouse during the legal regime is presumed to be a community thing.

110. La. Civ. Code art. 2338 provides:

The community property comprises: property acquired during the marriage is presumed to be community; property acquired with the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

111. La. Civ. Code art. 2339 provides:

The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in
2343.1,\textsuperscript{112} and 2344\textsuperscript{113} catalogue those things falling within the presumption which are classified by law as community things.

If the type of thing in question is not listed, the "omnibus clause" of Article 2338, classifying as community "all other property not classified by law as separate property," is consulted as the next step. This involves the review of Louisiana Civil Code articles 2339,\textsuperscript{114} 2341,\textsuperscript{115} 2341.1,\textsuperscript{116} payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged.

As to the fruits and revenues of immovables, the declaration is effective when filed for registry in the conveyance records of the parish in which the immovable property is located. As to fruits of movables, the declaration is effective when filed for registry in the conveyance records of the parish in which the declarant is domiciled.

\textsuperscript{112} La. Civ. Code art. 2343.1 provides:

The transfer by a spouse to the other spouse of a thing forming part of his separate property, with the stipulation that it shall be part of the community, transforms the thing into community property. As to both movables and immovables, a transfer by onerous title must be made in writing and a transfer by gratuitous title must be made by authentic act.

\textsuperscript{113} La. Civ. Code art. 2344 provides:

Damages due to personal injuries sustained during the existence of the community by a spouse are separate property.

Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after the termination of the community property regime is the separate property of the injured spouse.

\textsuperscript{114} See supra note 111.

\textsuperscript{115} La. Civ. Code art. 2341 provides:

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime.

\textsuperscript{116} La. Civ. Code art. 2341.1 provides:

A. A spouse's undivided interest in property otherwise classified as separate property under Article 2341 remains his separate property regardless of the acquisition of other undivided interests in the property during the existence of the legal regime, the source of improvements thereto, or by whom the property was managed, used, or enjoyed.

B. In property in which an undivided interest is held as community property and an undivided interest is held as separate property, each spouse owns a present undivided one-half interest in that portion of the undivided interest which is community and a spouse owns a present undivided interest in that portion of the undivided interest which is separate.
2342,\textsuperscript{117} 2343,\textsuperscript{118} and 2344\textsuperscript{119} to determine if the thing in question has been statutorily classified as a separate thing. If so, the classification inquiry ends. If not, the presumption of the community classification of the thing subsists and the thing is classified as a community thing. In this manner, a thing may be classified as community, although not statutorily classified as community, by a proper application of the presumption. The analysis may terminate at any step, resulting in no classification or resulting in a community or a separate classification of the thing.\textsuperscript{120}

\textsuperscript{117} La. Civ. Code art. 2342 provides:

A. A declaration in an act of acquisition that things are acquired with separate funds as the separate property of a spouse may be controverted by the other spouse unless he concurred in the act. It may also be controverted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse.

B. Nevertheless, when there has been such a declaration, an alienation, encumbrance, or lease of the thing by onerous title, during the community regime or thereafter, may not be set aside on the ground of falsity of the declaration.

C. (1) The provision of this Article that prohibits setting aside an alienation, encumbrance, or lease on the ground of the falsity of the declaration of separate property is hereby made retroactive to any such alienation, encumbrance, or lease prior to July 21, 1982.

(2) A person who has a right to set aside such transactions on the ground of the falsity of the declaration, which right is not prescribed or otherwise extinguished or barred upon July 21, 1982, and who is adversely affected by the provisions of this Article, shall have six months from July 21, 1982 to initiate proceedings to set aside such transactions or otherwise be forever barred from exercising such right or cause of action. Nothing contained in this Article shall be construed to limit or prescribe any action or proceeding which may arise between spouses under the provisions of this Article.

\textsuperscript{118} La. Civ. Code art. 2343 provides:

The donation by a spouse to the other spouse of his undivided interest in a thing forming part of the community transforms that interest into separate property of the donee. Unless otherwise provided in the act of donation, an equal interest of the donee is also transformed into separate property and the natural and civil fruits of the thing, and minerals produced from or attributed to the property given as well as bonuses, delay rentals, royalties, and shut-in-payments arising from mineral leases, form part of the donee's separate property.

\textsuperscript{119} See supra note 113.

\textsuperscript{120} If the subject of the inquiry is found not to be a thing, an asset, or property, it is not subject to classification and the inquiry ends. If it is found to be a thing but it is owned by a third party, no classification is made and the inquiry ends. See Madere v. Madere, 632 So. 2d 1180 (La. App. 5th Cir. 1994); Doland v. Doland, 562 So. 2d 994 (La. App. 3d Cir. 1990); and Cabral v. Cabral, 543 So. 2d 952 (La. App. 5th Cir.), writ denied, 548 So. 2d 328 (1989). See Saacks v. Saacks, 708 So. 2d 1077 (La. App. 5th Cir.), writ denied, 717 So. 2d 232 (1998), in which a residence was held to be owned by the brother of the husband, not the husband as the wife claimed; therefore, the property was neither community property of the spouses nor the separate property of the husband. If the thing is statutorily classified as either community or separate, the inquiry ends. If not so classified, the presumption of community subsists, and the thing is therefore classified as community.
This approach, or analysis, is helpful whether the thing in question is a familiar one frequently dealt with by the courts or is a new, unique thing, one that is res nova, as was the case in Morris.\textsuperscript{121}

II. VALUATION OF ASSETS

An issue frequently raised in partition proceedings is whether the tax consequences of the partition should be taken into account in the valuation of community assets. If a spouse is allocated, or charged with, community taxable income previously received by that spouse, such as retirement benefits, rent, interest, and dividends, he should be given credit for income taxes actually paid on the community income received, i.e., the asset should be valued at a net value after deduction for the income taxes paid. Overton\textsuperscript{ }v. Overton\textsuperscript{122} correctly allowed this credit. Additionally, if the partition itself creates tax consequences that are immediate and specific, they should be taken into account. For example, if a partition judgment orders the sale of a community asset, and the sale triggers a capital gain or ordinary income, then the tax consequence of the partition is immediate and not speculative. If the claimed tax consequence is a future one that will arise upon the disposition of an asset allocated to a spouse in the partition, from the receipt of future income, or because of the occurrence of some unknown future event, the future tax consequence should not be considered in valuing the asset. The uncertainty as to if and when the tax-creating event will occur, the tax rates generally and of that spouse at that uncertain time, the existence of other facts that might reduce or increase a tax liability at that time, and other presently unknown future factors justify a rejection of the contention that the present value of property received in a community property partition should be reduced by uncertain future tax consequences.\textsuperscript{123}

\textsuperscript{121} Morris v. Morris, 685 So. 2d 673 (La. App. 3d Cir. 1996), \textit{writ denied}, 690 So. 2d 40 (1997).

\textsuperscript{122} 694 So. 2d 491 (La. App. 5th Cir.), \textit{writ denied}, 703 So. 2d 26 (1997). In Overton, the husband was charged in the partition with community pension payments received by him. The trial court awarded him credit for taxes he had paid on the pension payments, but at his wife's tax rate, which was less than his. The court of appeal held that he was entitled to be credited for the actual taxes he had paid on the money received. The court in Barrow\textit{ v. Barrow}, 669 So. 2d 622, 628 (La. App. 2d Cir.), \textit{writ denied}, 675 So. 2d 1080 (1996), allowed the physician husband credit in the valuation of his accounts receivable for state and federal income taxes he had paid on the accounts receivable collected by him.

\textsuperscript{123} The American Institute of Certified Public Accountants (AICPA) \textit{Statement of Position} 82-1, 1982, paragraph 20, \textit{quoted in} Spaht & Hargrave, \textit{supra note} 19, at 598 n.19, states that normal accounting standards require that provision be made "for estimated income taxes on the differences between the estimated current value of assets and the estimated current amounts of liabilities and their tax bases, including consideration of negative tax bases of tax shelters, if any." However, AICPA admits that this principle "is especially controversial in valuations for divorce purposes" and "whether the deferred taxes will be allowed in the business evaluation for divorce purposes will depend upon the applicable state law." \textit{The CPA as a Valuation Advocate in Divorce, Estate, and Gift Tax Cases}, 1985, AICPA publication at 6-4, \textit{quoted by} Spaht & Hargrave, \textit{supra note} 19,
Sherrod v. Sherrod\textsuperscript{124} rejected the contention of a spouse that a greater portion of certain tax deferred individual retirement accounts should be allocated to him because of a potential future tax liability with respect to them. This rejection is in line with the other Louisiana cases\textsuperscript{125}

\textsuperscript{124} 709 So. 2d 352 (La. App. 5th Cir. 1998).

\textsuperscript{125} In Sherrod v. Sherrod, 709 So. 2d 352 (La. App. 5th Cir. 1998), the husband was allocated a larger percentage of several tax deferred individual retirement accounts than were allocated to the wife in order to equalize the net distribution to the spouses. The husband complained that the trial judge did not take into account the negative tax consequences associated with assigning a larger percentage of the retirement accounts to him. The court rejected this argument because it rested on an uncertain future tax liability.

Nearly all states that have considered the issue, both community and non-community property states, have rejected an adjustment in value of assets due to estimated future tax consequences to be incurred if, as, and when the asset is disposed of. See \textit{In re Goldstein}, 583 P.2d 1343 (Ariz. 1978); \textit{In re Fostein}, 552 P.2d 1169 (Cal. 1969); Burkhart v. Burkhart, 349 N.E.2d 707 (Ind. Ct. App. 1976); Fick v. Fick, 375 N.W.2d 870 (Minn. Ct. App. 1985); Beck v. Beck, 631 P.2d 282 (Mont. 1981); Orgler v. Orgler, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989); Carpenter v. Carpenter, 657 P.2d 646 (Okla. 1983); Hovis v. Hovis, 541 A.2d 1378 (Pa. 1988). The disallowance, in valuing assets, of the tax consequences of the disposition of that property in the future has been based upon the speculative nature of the claim. Whether the asset will be disposed of or held until death, the nature of the disposition, the value of the asset at the time of disposition, the tax rates and tax treatment of the transaction at the time of disposition, the tax rate of the taxpayer at that time, and numerous other unknown contingencies militate against the allowance of uncertain future tax consequences in valuing property in a partition.

In \textit{Callender v. Callender}, 625 So. 2d 257 (La. App. 5th Cir. 1993), \textit{writ denied}, 633 So. 2d 583 (1994), the husband contended that the value of a certain retirement and savings plan should have been discounted to reflect the after tax value of the asset. The court held that the value of an asset could not be reduced to reflect a reduction in value as the result of an uncertain tax liability.

\textit{Mexic v. Mexic}, 577 So. 2d 1046 (La. App. 4th Cir. 1991), disallowed a husband’s claim that the value of his real estate partnership interest should be reduced to reflect the future tax consequence of a recapture of investment tax credits if, as, and when that property was sold. The court stated that the value of community interests in real estate partnerships should not and cannot be predicated on tax consequences of some future uncertain event.

In \textit{Ramstack v. Ramstack}, 470 So. 2d 162 (La. App. 4th Cir.), \textit{writ denied}, 474 So. 2d 1310 (1985), the husband was allocated an IRA account. He contended that he should be credited, in valuing the account, for the income tax penalty he would incur if he prematurely withdrew the funds in the account. The court disallowed the credit, pointing out that the husband had the option of withdrawing the funds or leaving them on deposit earning interest.

\textit{Guillaume v. Guillaume}, 603 So. 2d 235, 238 (La. App. 4th Cir. 1992), involved a different type issue of deferred tax liabilities. The appellate court approved the trial court’s deferral of a ruling on the potential IRS liabilities of a medical corporation and/or the community. As of the hearing date in the trial court, there was no final IRS ruling as to the tax liability. The court declined “to hold off partitioning a community awaiting the outcome of contingent liabilities” and held that when the liabilities are determined, “the parties may seek the appropriate relief.” \textit{Id}.

The same issue was resolved in the same manner in \textit{Panzico v. Panzico}, 716 So. 2d 505, 510 (La. App. 2d Cir. 1998), involving a pending IRS audit of the separately owned business of the husband and of the husband personally. The Court stated that it would be premature to assign the potential IRS obligation of the parties prior to its assessment, adding that both spouses may be parties “in any
as well as the cases from other states\textsuperscript{126} that have considered the issue in detail.

\textit{Chance v. Chance}\textsuperscript{127} involved the valuation of the physician husband’s interest in a medical partnership. The court disapproved of the capitalization of the physician’s earnings for the last twelve months preceding the community’s termination as a factor to be added to the value of the tangible assets to arrive at the value of the partnership interest.\textsuperscript{128} Although it was asserted that this value assigned to the partnership interest in excess of the value of its physical property was not goodwill, the court disallowed the excess value under the well settled rule that goodwill does not form a part of the assets of a medical practice, in that goodwill results from the physician’s professional competence and his relationship with patients, not from any affiliation between a medical corporation or partnership and the patient.\textsuperscript{129} The court approved the valuation method of Dr. Chance’s expert: utilizing the same technique, or formula, twice recently employed in two separate arms-length transactions when one physician bought into the practice and when another doctor sold out. The court found no error in the trial court’s conclusion that this method provided the more reliable indication of value. The valuation of an asset is a factual issue, not a legal issue, and the dispute with the IRS or any other creditor with a contingent and unliquidated claim for a community obligation.”

\textsuperscript{126} See cases cited in supra note 123.

\textsuperscript{127} 694 So. 2d 613 (La. App. 2d Cir. 1997).

\textsuperscript{128} To valuate the medical practice, Bayer assigned values to the various components and holdings of the partnership. Although Mrs. Chance’s expert, Gibson, began with this same approach, he eventually added approximately \$830,000 to represent the future cash flow of the business. That figure resulted from capitalizing, or applying a 2.5 multiple to, Dr. Chance’s earnings for the last twelve months preceding the community’s termination. Appellee asserts that this sum represents “goodwill” and should not be included in the assessment. \textit{Chance}, 694 So. 2d at 617.

\textsuperscript{129} It is well-settled that goodwill does not form a part of the corporate assets of a medical practice in that the goodwill results from the physician’s professional medical competence and his relationship with patients, not from any affiliation between the corporation and the patient. \textit{Chance}, 694 So. 2d at 617.


This rule is not applicable to a commercial business, in which goodwill is recognized as an element of the value of a business in addition to the tangible assets of the business. See Head v. Head, 714 So. 2d 231 (La. App. 2d Cir. 1998); LeBlanc v. LeBlanc, 694 So. 2d 1172 (La. App. 1st Cir.), \textit{writ denied}, 701 So. 2d 990 (1997); Godwin v. Godwin, 533 So. 2d 1009 (La. App. 1st Cir. 1988), \textit{writ denied}, 537 So. 2d 1165 (1989); Taylor v. Taylor, 473 So. 2d 867 (La. App. 4th Cir.), \textit{writ denied}, 477 So. 2d 1126 (1985).
The valuation of accounts receivable was also in dispute. The valuation of this type asset is also a factual issue, not a legal issue. Different experts use different methods to value accounts receivable, including average versus historical collection rates, different criteria for discounting for bad debts or for valuing uncollectible accounts, different methods of computing costs of collection, and other variables. A court’s acceptance of a method used by one expert over one used by another expert is a factual determination subject to the manifest error rule for appellate review and will not be disturbed if it is not clearly wrong.131

III. CLASSIFICATION OF OBLIGATIONS

At issue in Keene v. Reggie132 was the liability, if any, of the wife for a loan incurred by her husband evidenced by a promissory note signed by her husband alone. The court analyzed the issue of the liability of the wife in terms of whether the obligation was a community obligation or the separate obligation of the husband.133 Finding that the borrowed money was not used for the benefit of the legal regime of the defendant husband and wife,134 the court held

130. Where expert testimony differs, it is the trier of fact who must determine the more credible evidence, and factual findings based upon that determination may not be overturned unless manifest error appears in the record. The fact-trier is entitled to assess the credibility and accept the opinion of an expert just as with other witnesses, unless the stated reasons of the expert are patently unsound. Of course, the effect and weight to be given such expert testimony depends upon the underlying facts and rests within the broad discretion of the trial judge. Moreover, in deciding to accept the opinion of one expert and reject that of another, a trial court can virtually never be manifestly erroneous.

Chance, 694 So. 2d at 617 (citations omitted).

See also Head v. Head, 714 So. 2d 231 (La. App. 2d Cir. 1998) and Sherrod v. Sherrod, 709 So. 2d 352, 355 (La. App. 5th Cir. 1998).

131. Chance, 694 So. 2d at 617. However, Head v. Head, 714 So. 2d 231 (La. App. 2d Cir. 1998), held that the trial court’s acceptance of a minority interest/lack of marketability discount by an expert in valuing a business was error, when a sale of the business to a third party is not contemplated. When the business is being valued for partition purposes, with one spouse being allocated the business in the partition, the value of the stock of the corporate business should be determined without discounting for lack of marketability because of a minority ownership interest in the business.

132. 701 So. 2d 720 (La. App. 3d Cir. 1997).

133. The plaintiff made Mr. Reggie’s wife a party defendant in the suit. The wife answered the suit, asserting “the debt was not a community obligation and she did not personally undertake to pay any portion of it.” Id. at 722.

134. The trial court did not manifestly err in finding the money was not used for the benefit of the Reggies’ community estate.

Id. at 729.

The test for determining whether an obligation incurred by a spouse during the existence of a community property regime is a community obligation is whether or not the obligation was incurred
that the husband and wife had successfully rebutted the presumption that the obligation was a community obligation and that, therefore, the wife was exonerated from any liability on the note signed by her husband.\textsuperscript{135}

The classification of an obligation as community or separate is not determinative of the liability of the non-incurring spouse for it. The Civil Code does provide that during the existence of the legal regime that both a separate and a community obligation may be satisfied from community property and from the separate property of the spouse who incurred the obligation.\textsuperscript{136} However, the non-incurring spouse is not personally liable for the incurring spouse's debt during the legal regime, whether that debt is his separate obligation or is a community obligation. Similarly, the first paragraph of Louisiana Civil Code article 2357\textsuperscript{137} provides that an obligation incurred by a spouse before or

\begin{itemize}
  \item \textit{for the common interest of the spouses or for the interest of the other spouse}, La. Civ. Code arts. 2360 and 2363, not whether it benefitted the legal regime of community of acquets and gains. The writer acknowledges that the second paragraph of Louisiana Civil Code article 2363 defines two types of obligations as separate obligations based upon their lack of benefit to "the community." One is defined in terms of the purpose ("An obligation arising from an intentional wrong not perpetuated for the benefit of the community") and the other in terms of the result ("...an obligation incurred for the separate property of a spouses to the extent that it does not benefit the community...") of the incurring of the obligation. In the use of the words "the community," the reference seems to be community property, not the spouses. Nor are the words used in the sense of "the community" possessing juridical personality. This view is fortified by the use of the words "the community" in Louisiana Civil Code article 2363 in the classification of an obligation resulting from an intentional wrong and the use of the broader phrase in the same sentence in the classifying as a separate obligation one incurred for the benefit of a spouse to the extent that it does not benefit "the community, the family, or the other spouse."

\textsuperscript{135} Keene, 701 So. 2d at 729.

\textsuperscript{136} La. Civ. Code art. 2345 provides:

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.

\textsuperscript{137} The first paragraph of La. Civ. Code art. 2357 provides:

An obligation incurred by a spouse before or during the community property regime may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation. The same rule applies to an obligation for attorney's fees and costs in an action for divorce incurred by a spouse between the date the petition for divorce was filed and the date of the judgment of divorce that terminates the community regime.

This paragraph includes both community obligations and the separate obligations of spouses. The latter are limited to separate obligations of a spouse incurred before or during the community property regime, thus excluding those incurred after the termination of the legal regime, with the exception of attorney fees and costs in an action for divorce incurred by a spouse between the date the petition for divorce was filed and the date of the judgment of divorce that terminates the community regime. These are included in the rule contained in the first paragraph of Louisiana Civil Code article 2357, as these obligations are community obligations. La. Civ. Code art. 2362.1. See Kenneth Rigby & Katherine Shaw Spaht, \textit{Louisiana's New Divorce Legislation: Background and Commentary}, 54 La. L. Rev. 19, 55-56 n.147, 60 n.177 (1993) for a discussion of the effect of these provisions concerning attorney fees and costs incurred in an action for divorce, and Rigby & Spaht, \textit{supra}, at 59-60, nn.162-176 for the definition and discussion of an action.
during the community property regime may be satisfied after termination of the
regime from the property of the former community and from the separate
property of the spouse who incurred the obligation. After the termination of the
legal regime, the non-incuring spouse is not personally liable for the debt of the
spouse who incurs an obligation, whether the obligation be a community one or
is the separate obligation of the incurring spouse, except in two circumstances.
(1) If a spouse disposes of property of the former community for a purpose other
than the satisfaction of community obligations, he is liable for all obligations
incurred by the other spouse up to the value of the community property disposed
of. 138 (2) If a spouse by written act assumes responsibility for one-half of each

Brown v. Hobson, 706 So. 2d 1030 (La. App. 2d Cir. 1998), held that an obligation incurred by
a widower seven years after the death of the wife was not a community obligation, and that the one-
half interest of the heirs in former community property could not be seized and sold to
satisfy that obligation. The court also held that Louisiana Civil Code article 2364, providing for
reimbursement when community property has been used to satisfy a separate obligation, applies only
to a separate obligation incurred before or during the existence of the legal regime, not after the
termination of the legal regime. Louisiana Civil Code article 2357 applies only to any obligation
incurred by a spouse before or during the community property regime. It does not apply to a
separate obligation incurred by a spouse subsequent to the termination of the community. Therefore,
the interest of the heirs of the deceased wife in former community property could not be used to
satisfy the obligation.

138. The second paragraph of La. Civ. Code art. 2357 provides:
If a spouse disposes of property of the former community for a purpose other than the
satisfaction of community obligations, he is liable for all obligations incurred by the other
spouse up to the value of that community property.

See Lawson v. Lawson, 535 So. 2d 851 (La. App. 2d Cir. 1988), and Janet Riley, Analysis of the
held:

Professor Riley’s Analysis, supra, describes the second paragraph of Art. 2357 as “a
valiant attempt to preserve for all creditors the entire assets of the former community, by
imposing upon the spouse who disposers of them for other purposes a penalty in the form
of personal liability for all obligations, separate and community, incurred by the other
spouse, up to the value of the property thus disposed.” 26 Loy.L.Rev. at 512, with our
emphasis.

When the first two paragraphs of Art. 2357 are read together, it is apparent that the non-
debror spouse is not personally liable for separate or community debts incurred by the
other spouse unless the non-debtor spouse has disposed of former community property,
which would have been available to satisfy all pre-termination obligations incurred by
either spouse, and has done so for a purpose other than the satisfaction of community
obligations. If personal liability attaches, it extends to the value of the former community
property which is no longer available to the creditor, and not to the value of the non-
debtor spouse’s interest in the entire community estate, as plaintiff argues.

Lawson, 535 So. 2d at 853. Lawson was followed in Hall v. Lilly, 666 So. 2d 1328 (La. App. 2d
Cir. 1996).

La. Civ. Code art. 2372 provides that if the spouses live under a separation of property regime a
spouse is solidarily liable with the other spouse who incurs an obligation for necessaries for himself
or the family. Hall, 666 So. 2d 1328, applied this article to spouses living under a community
property regime, but held that in order for a spouse to be liable to the creditor for the purchases of
the other spouse, it must be shown that the obligation is for a necessity which the other spouse failed
community obligation incurred by the other spouse, the assuming spouse may
dispose of community property without incurring further responsibility for the
obligations incurred by the other spouse. In these two circumstances
outlined in the second and third paragraphs of Louisiana Civil Code article 2357,
it is the affirmative act of the non-incurring spouse after the termination of the
legal regime that creates the personal liability of that spouse for the obligations
incurred by the other spouse, for which the non-incurring spouse would not
otherwise be personally liable. Except in these two exceptions, the creditors are
given substantially the same rights after the termination of the community
property regime as were given them during the existence of that regime.

With the two exceptions noted, neither during the existence of the legal regime
nor after its termination is the non-incurring spouse liable for a debt incurred by
the other spouse, irrespective of whether the obligation is classified as communi-
ty or separate. In Reggie, the wife did not incur the obligation; therefore, the
wife was not liable for the obligation. The classification of the obligation as
community or separate was irrelevant to the issue of the liability of the wife for
it.

Another case perpetuating the misunderstanding that the personal liability of
a spouse for an obligation incurred by the other spouse depends upon whether
the obligation is classified as a community obligation or a separate obligation is
Wichser v. Major, et al. The court found that the husband committed an

or refused to furnish. It cited General Tire Service v. Nash, 273 So. 2d 539 (La. App. 1st Cir. 1973),
which involved the liability of a husband for the purchase price of tires purchased by his wife. That
case was decided under prior law, under which the husband was the head and master of the
community. Except in isolated instances, the wife could not obligate the husband. One of those
exceptional instances was an obligation for necessities which the husband failed to or refused to
provide the wife. The courts resorted to various legal theories, including express or implied
authorization, ratification by consent or acquiescence, estoppel, and mandate to impose liability on
the husband for obligations incurred by the wife. There is no reason to resort to these principles
under current principles of equal management in community property regimes. Except where
expressly limited, either spouse may incur community obligations. Clearly, an obligation incurred
for the necessities of life by either spouse would be classified as a community obligation, subjecting
community property and the separate property of the incurring spouse to be used to satisfy that
obligation. The same is true of a separate obligation incurred by a spouse before or during the

139. The third paragraph of La. Civ. Code art. 2357 provides:

A spouse may by written act assume responsibility for one-half of each community
obligation incurred by the other spouse. In such case, the assuming spouse may dispose
of community property without incurring further responsibility for the obligations incurred
by the other spouse.

140. Under Art. 2345 and the first paragraph of Art. 2357, the creditor of a spouse has
the same property available to satisfy the debt after the community regime has ended as he
had during its existence: all assets of the community, including the interest of the non-
debtor spouse, as well as the separate property of the spouse who incurred the debt. Note,

Lawson, 535 So. 2d at 852.

141. 694 So. 2d 924 (La. App. 4th Cir. 1995).
assault and battery upon a third person, an intentional wrongful act.\textsuperscript{142} Since the facts revealed that the intentional wrong was not perpetrated for the benefit of the community, the court held that the obligation created by that act was the husband’s separate obligation and that the wife was correctly not cast in judgment.\textsuperscript{143} The result is correct; the reasoning is not. The wife was not liable for the obligation incurred by her husband as a result of his intentional tortious act, whether the obligation that was created by him as the result of his act is classified as community or separate. Therefore, she was correctly not cast in judgment for the resulting damages.

A case which compounds this misunderstanding is \textit{Ford Motor Credit Company v. Epps}.\textsuperscript{144} The issue was the personal liability of the spouses for a deficiency judgment after a foreclosure on an automobile. Mrs. Epps signed a promissory note for the purchase of the automobile and forged her husband’s signature on it.\textsuperscript{145} Because of the forgery, the trial court held that the husband was released as a party to the note, but held that “he is liable in solido with his wife for any and all community debts.”\textsuperscript{146} The court of appeal found the obligation to be a community obligation and affirmed the solidary judgment against the husband and wife, finding no error in the ruling of the trial court.\textsuperscript{147}

\textsuperscript{142} \textit{Id.} at 928.
\textsuperscript{143} The court stated:

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Finally, the Majors contend that Ava Wichser should have been cast in judgment with her husband. We find that the trial judge did not err by failing to cast her in judgment. George Wichser was found liable for assault and battery, which are intentional acts. Louisiana Civil Code article 2363 states that “[a]n obligation resulting from an intentional wrong not perpetrated for the benefit of the community” is a separate obligation. Therefore, the trial court correctly rendered judgment against George Wichser alone. \textit{Id.} at 928.

Another case erroneously analyzing the liability of the wife for the intentional tort of the husband in terms of whether the resulting obligation is a community obligation or the separate obligation of the husband is \textit{Williams v. Williams}, 655 So. 2d 405 (La. App. 5th Cir. 1995). See other cases discussed in Spaht & Hargrave, \textit{supra} note 19, at 303-15, containing this same faulty analysis based upon the erroneous assumption that one spouse is liable for community obligations incurred by the other spouse, but not for separate obligations incurred by the other spouse. \textsuperscript{144} 708 So. 2d 824 (La. App. 3d Cir. 1998).
\textsuperscript{145} \textit{Epps}, 708 So. 2d at 825.
\textsuperscript{146} \textit{Id.} at 826:

\ldots it is the ruling and finding of this Court \ldots that Nathaniel Epps, Sr. is released as a party to this initial contract, however, under the laws of matrimonial regime [sic], he is liable in solido with his wife for any and all community debts.

\textsuperscript{147} The court of appeal stated:

Nevertheless, the trial court found that both Barbara and Nathaniel were liable for the deficiency judgment insofar as the debt was a community debt. Defendants now appeal. We find no error in the ruling of the trial court and affirm. \textit{Epps}, 708 So. 2d at 825.

The court of appeal concluded:
Using the Louisiana Code of Civil Procedure procedural article 148 providing that either spouse is the proper party defendant, during the existence of the marital community, in an action to enforce an obligation against community property, the court of appeal erroneously held that the husband was "a proper defendant to be held in judgment," 149 thus improperly imposing a substantive obligation on him.

Under the facts found by the court, not only was the husband not liable in solido with his wife for this community obligation, he was not liable at all. A spouse is not liable for either separate or community obligations incurred by the other spouse. 150 Implicit in this misunderstanding of the liability of a spouse for obligations incurred by the other spouse is the erroneous assumption that both spouses are liable for a community obligation incurred by a spouse but not for a separate obligation incurred by one of the spouses. A proposal to impose responsibility equally on spouses at dissolution for one-half of the community

CONCLUSION

The trial court was correct in finding Barbara liable as a party to the contract between herself and FMCC and both Barbara and Nathaniel liable for Barbara's debt as members of the community of acquets and gains.

Based upon the foregoing, we find no error in the judgment of the trial court. Costs of these proceedings to be paid by defendants-appellants, Nathaniel Epps, Sr. and Barbara Epps.

Id. at 828.

The court erroneously referred to the spouses as "members of the community of acquets and gains," and it earlier stated, "A creditor is free to pursue either member of the community of acquets and gains or both." Id. at 828 (emphasis added). The words "member" or "members" connote that the community regime has juridical personality, i.e. is a juridical person, such as a partnership. See supra discussion at note 20. See also La. Civ. Code art. 2801. "A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons." La. Civ. Code art. 2325. The legal regime is a particular set or system of principles and rules governing the ownership and management of the property of married persons contained in Louisiana Civil Code articles 2334 et seq. A correct understanding of the nature of a legal regime is fundamental to a correct analysis and application of the Civil Code articles governing matrimonial regimes.

148. La. Code Civ. P. art. 735 provides:

Either spouse is the proper defendant, during the existence of the marital community, in an action to enforce an obligation against community property; however, if one spouse is the managing spouse with respect to the obligation sought to be enforced against the community property, then that spouse is the proper defendant in an action to enforce the obligation.

When doubt exists whether the obligation sought to be enforced is a community obligation or the separate obligation of the defendant spouse, that spouse may be sued in the alternative.

When only one spouse is sued to enforce an obligation against community property, the other spouse is a necessary party. Where the failure to join the other spouse may result in an injustice to that spouse, the trial court may order the joiner of that spouse on its own motion.


obligations, regardless of who contracted them, was rejected in the formulation of Acts 1979, No. 709, section 1, effective January 1, 1980, more commonly known as the Matrimonial Regimes Act.\footnote{151}

An earlier case, \textit{Lawson v. Lawson},\footnote{152} involved two promissory notes which were executed during the marriage by the husband to his mother. After divorce, the mother sought a money judgment for the amount of the notes against her son and his former wife. After an extensive analysis of Louisiana Civil Code articles 2345 and 2357 and commentary concerning the policy decisions underlying these articles, the court correctly held that the former wife was not liable:

\[ \ldots \text{the non-debtor spouse is not personally liable for separate or community debts incurred by the other spouse unless the non-debtor spouse has disposed of former community property, which would have been available to satisfy all pre-termination obligations incurred by either spouse, and has done so for a purpose other than the satisfaction of community obligations. If personal liability attaches, it extends to the value of the former community property which is no longer available to the creditor} \ldots \] \footnote{153}

\textit{Lawson} was followed in \textit{Tri-State Bank and Trust v. Moore}\footnote{154} involving promissory notes signed only by the husband. The trial court imposed personal solidary liability on the wife as a result of determining that these debts were community obligations.\footnote{155} In reversing the trial court, the appellate court correctly held that the wife

\[ \ldots \text{not personally liable for separate or community debts incurred by her husband. It is therefore error for the judgment to reflect any liability on behalf of Nedra Moore.}\footnote{156}

Simply put, Louisiana Civil Code article 2345 and the first paragraph of Article 2357 do not impose personal liability on a spouse for a community or separate obligation incurred by the other spouse; they simply identify the property available to a creditor for the satisfaction of obligations incurred before or during the debtor’s marriage, if the spouses live under a community property regime.\footnote{157}


\footnotesize{152. 535 So. 2d 851 (La.App. 2d Cir. 1988). \textit{See supra} note 138.}

\footnotesize{153. \textit{Lawson}, 535 So. 2d at 853.}

\footnotesize{154. 609 So. 2d 1091 (La. App. 2d Cir. 1992).}

\footnotesize{155. \textit{id. at} 1092.}

\footnotesize{156. \textit{id. at} 1092.}

In Bagwell v. Bagwell\(^{158}\) the court correctly rejected the contention that a step-parent of a minor child is liable in solido with his wife, the obligor parent, for child support. Noting that fathers and mothers are solidarily liable for the support of their own children, born of them or adopted by them,\(^{159}\) the court correctly held that a step-parent is neither personally nor solidarily obligated with his or her spouse to support the other spouse's children, his step-children.\(^{160}\) The fact that this obligation may be enforced against the totality of the community property does not create a personal obligation owed by the step-parent.\(^{161}\)

The classification of an obligation as separate or community does have an important function, although that function is not defining the rights of creditors. The community or separate classification of an obligation incurred by a spouse may affect the reimbursement claim of a spouse arising from the use of community or separate funds to satisfy that obligation.\(^{162}\) In Sims v. Sims,\(^{163}\) the husband was indicted during the community on a homicide charge resulting from his act occurring during the community. He borrowed money from a bank during the community to post bail in the criminal proceedings and to hire an attorney to defend him against the homicide charge.\(^{164}\) He was tried and

\(^{158}\) 698 So. 2d 746 (La. App. 2d Cir. 1997).

\(^{159}\)  Id. at 748.

\(^{160}\)  Id. at 748.

\(^{161}\)  Id. at 748. The obligor spouse (the wife and the parent of the children) is personally liable for the support of her own two minor children born of a previous marriage, and, to the extent that the support payments become due during the second community regime, that obligation is a community obligation of that community. La. Civ. Code art. 2362; Cutting v. Cutting, 625 So. 2d 1112 (La. App. 3d Cir. 1993), writ denied, 631 So. 2d 453 (1994); Callender v. Callender, 625 So. 2d 257, 264 (La. App. 5th Cir. 1993); Connell v. Connell, 331 So. 2d 4, 9 (La. 1976) (Tate, J., concurring). However, this classification of the support obligation does not affect the property that is available to satisfy that obligation.

\(^{162}\)  La. Civ. Code art. 2364 provides:

If community property has been used to satisfy a separate obligation of a spouse, the other spouse is entitled to reimbursement upon termination of the community property regime for one-half of the amount or value that the property had at the time it was used.

La. Civ. Code art. 2365 provides:

If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. The liability of a spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations.

Nevertheless, if the community obligation was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, and education of children of either spouse in keeping with the economic condition of the community, the spouse is entitled to reimbursement from the other spouse regardless of the value of that spouse's share of the community.

See Spahit & Hargrave, supra note 19, at 367-68, for a discussion of three other important reasons for the classification of obligations at the termination of the legal regime.

\(^{163}\)  677 So. 2d 663 (La. App. 2d Cir. 1996).

\(^{164}\)  Id. at 664-66.
acquitted of the charge during the community. \(^\text{165}\) After the termination of the community, he satisfied the bank loans from separate funds. \(^\text{166}\) In partition proceedings, he asserted a reimbursement claim against his wife for one-half (\(\frac{1}{2}\)) of the attorney fees. \(^\text{167}\) The trial court denied the claim because he presented

\(^{165}\) Mr. Sims was acquitted on March 25, 1988. The Sims community was terminated effective July 8, 1988.

\(^{166}\) The bank loans were satisfied out of the proceeds from the sale of his separate immovable property. Sims, 677 So. 2d at 666.

\(^{167}\) Sims illustrates the importance of correctly identifying the obligation to be classified for reimbursement purposes. In Sims, there were three obligations arising out of the facts presented. The first was an ex delicto obligation arising out of the alleged intentional wrongful act itself. The second was the obligation to the attorney incurred in hiring the attorney to defend against the criminal charges. The third was the obligation to the bank incurred when money was borrowed from it to pay the attorney fees. All these obligations arose during the existence of the legal regime. The potential reimbursement claim arose from the use of separate funds to satisfy the loan obligation to the bank. Whether a reimbursement claim arose in favor of Mr. Sims under Louisiana Civil Code article 2365 depended upon the classification of the obligation satisfied by the use of his separate property.

It is clear that the court identified the obligation being classified was the obligation for attorney fees incurred to defend the criminal charges. Sims, 677 So. 2d at 665. That obligation was satisfied by the proceeds of a bank loan incurred during the existence of the community. The bank loan obligation was satisfied after the termination of the community from the proceeds resulting from the sale of Mr. Sims' separate property. However, much of the analysis appears to be directed to the potential ex delicto obligation arising from the intentional tort in favor of the victim or his survivors under Louisiana Civil Code articles 2315, 2315.1, and 2315.2. The court suggested that the wife, in order to overcome the presumption that the attorney fee obligation was community, must show under Louisiana Civil Code article 2363 that her husband committed an "intentional wrong" not for the benefit of the community, and cited a series of intentional tort cases. This analysis properly relates to the classification of the ex-delicto obligation resulting from the intentional act. Obligations arise from contracts and other declarations of will. They also arise directly from the law, in instances such as wrongful acts. La. Civ. Code art. 1757. The attorney fee obligation analysis should be in terms of the purpose of incurring the obligation for attorney fees (or the resulting benefit or lack of benefit to the spouses or the other spouse). La. Civ. Code art. 2360. See infra discussion. See also the second part of the analysis in Albritton v. Albritton, 561 So. 2d 125, 129 (La. App. 3d Cir.), writs denied, 565 So. 2d 445, 454 (1990), involving an obligation for attorney fees incurred to defend a DWI charge. Both the trial court in Sims and the appellate court in Albritton, 561 So. 2d at 129, raise the issue of whether the spouse who committed the intentional act resulting in criminal charges (a homicide charge in Sims and a DWI charge in Albritton) was on a "community mission" at the time the intentional act was done. This test was used by the courts prior to the enactment of the equal management principles of the Matrimonial Regimes Act. Previously, the husband was the head and master of the community. La. Civ. Code art. 2404, Civil Code of 1870, as amended by 1926 La. Acts No. 96. With a few exceptions, the wife could not obligate the husband as head and master of the community. In order to reach a solvent party, the courts applied principles of mandate or agency, ratification, estoppel, and other principles to classify the conventional and delictual obligations of the wife as community obligations. One was the "community mission" doctrine. See Tandy v. Simoneaux, 344 So. 2d 406 (La. App. 1st Cir. 1977). Another was "agency" or mandate. See Neiman Marcus Co. v. Viser, 140 So. 2d 762 (La. App. 2d Cir.), cert. denied, June 15, 1962. See Spaht & Hargrave, supra note 19, at 374 n.47. These analyses are no longer needed nor appropriate under the equal management principles of the Matrimonial Regimes Act, 1979 Acts No. 709, eff. Jan. 1, 1980, as amended.
no evidence to show that he had been on a "community mission" at the time of
the charged offense or that his acquittal somehow aided the community.168 The
court of appeal allowed the reimbursement claim, pointing out that Mr. Sims did
not have the burden of proving that the obligation was a community obligation,
that once he established that the debt had been incurred during the community
regime, he benefitted from the presumption that the debt was community without
the necessity to present further evidence.169 Under the appellate court's
analysis, Mrs. Sims had the burden of proving that Mr. Sims had committed an
intentional wrong not for the benefit of the community.170 Because she did not
do so, the court held that the trial court erred in classifying the attorney's fees
as the husband's separate debt and allowed the reimbursement claim.171

Louisiana Civil Code article 2360 defines a community obligation as one
incurred by a spouse during the existence of a community property regime for
the common interest of the spouses or for the interest of the other spouse.172
The italicized language connotes that the purpose of incurring the obligation
determines its classification, not whether the obligation actually benefits the
spouses jointly or the other spouse after it has been incurred. Both Keene
v. Reggie,173 and the earlier case of Johno v. Johno174 present this
definitional issue. Keene175 and a number of other cases classifying

168. Sims, 677 So. 2d at 665. The "community mission" doctrine, no longer applicable to either
spouse, applied under prior jurisprudence only to the wife who committed a tort, not the husband.
See supra discussion at note 167.
169. Sims, 677 So. 2d at 665.
170. Id. at 665. As noted in supra note 167, this analysis was not necessary in classifying the
attorney fee obligation. Like the discussion in Allbritton, it also constitutes obiter dictum. The
obligation was incurred during the community property regime and therefore was presumed to be a
community obligation. La. Civ. Code art. 2361. The wife presented no evidence to rebut the
presumption. Sims, 677 So. 2d at 665. Therefore the attorney fee obligation is classified as
community through the application of the unrebutted presumption.
171. Sims, 677 So. 2d at 665.
172. La. Civ. Code art. 2360 provides:
An obligation incurred by a spouse during the existence of a community property
regime for the common interest of the spouses or for the interest of the other spouse is
a community obligation.
(Emphasis added).
173. 701 So. 2d 720 (La. App. 3d Cir. 1997).
174. 633 So. 2d 966 (La. App. 5th Cir. 1994).
175. Keene stated:
On March 16, 1987 Edmund Reggie and Keene signed the note evidencing Keene's
$311,763 loan to Edmund. The note was presumed a community obligation pursuant to
Civil Code article 2361.
However, the presumption that obligations incurred by a spouse during the existence of
the community property regime are debts of the community is rebuttable. In order to
counter this presumption, a spouse must show that the debt in question was not incurred
for the benefit of the community; thus, it is necessary to examine the uses to which the
borrowed money was put. Such evidence must be shown by an intermediate standard of
proof "more traditionally stated as 'clear and convincing.'"
loans\textsuperscript{176} look to the uses to which the borrowed money was put in determining if the loan actually benefitted the spouses or the other spouse in determining whether the obligation is classified as community or separate. If the purpose of the loan or other obligation is one intended to benefit the spouses or the other spouse and the obligation actually results in such a benefit, this definitional issue is not presented. However, if the intended benefit does not materialize, it appears that the purpose in incurring the obligation should prevail over the actual result for classification purposes. \textit{Johno}\textsuperscript{177} contained this issue. The wife incurred a debt during the marriage for tuition expenses for a medical transcription course, “with the full intent, at the time the debt was incurred, that it would benefit the community.”\textsuperscript{178} After completing the course, the wife was unable to pass the necessary test to obtain employment. “Thus, the community did not benefit from the plaintiff’s education.”\textsuperscript{179} The court held that the debt was community on the basis that the presumption of community had not been rebutted.\textsuperscript{180}

Doris and Edmund Reggie sufficiently rebutted the community presumption by presenting “clear and convincing” evidence that $300,000 of the money borrowed from Keene was then lent to Edmund’s personal friend, John Yemelos.

The trial judge did not manifestly err in finding the money was not used for the benefit of the Reggies’ community estate.

\textit{Keene}, 701 So. 2d at 728-29 (emphasis supplied) (citations omitted).

176. “In order to determine whether this money [a bank loan] benefitted the community, or was used for the ‘common interest of the spouses,’ it is necessary to examine the uses to which it was put,” \textit{Webb v. Pioneer Bank & Trust Co.}, 530 So. 2d 115, 118 (La. App. 2d Cir. 1988); “These expenditures presumptively benefitted the community,” \textit{Cutting v. Cutting}, 625 So. 2d 1112, 1117 (La. App. 3d Cir. 1993); “When an obligation is incurred for the benefit of the community and the community is enriched or bettered by that obligation, then the community is bound by that obligation,” \textit{Cabibi and Cabibi v. Hatheway}, 570 So. 2d 104, 110 (La. App. 4th Cir. 1990), \textit{writ denied}, 572 So. 2d 91 (1991).

177. \textit{Johno}, 633 So. 2d 966.

178. \textit{Id. at 969}.

179. \textit{Id. at 969-70}.

180. The husband claimed that the outstanding balance of $5,900.00 on the tuition debt was the separate debt of the wife, “despite its being incurred during the community, because the community did not benefit from plaintiff’s training.” \textit{Id. at 969}.

Although the court did not differentiate between the purpose and result of incurring the obligation, the court concluded:

However, that is not sufficient to negate the presumption that the debt, incurred during the existence of the community, was a community debt. \textit{Id. at 970}.

Implicit in the court’s conclusions is that the statutory classification of the obligation depends upon the purpose and intent in incurring the obligation, not how it turns out.

The failure to realize or accomplish the purpose of incurring an obligation may arise in a number of situations. In \textit{Sims v. Sims}, 577 So. 2d 663 (La. App. 2d Cir. 1996), for example, the purpose in incurring the attorney fee obligation was to benefit the spouses by keeping Mr. Sims out of jail so he could support himself and his wife. His acquittal of the criminal charges resulted in this
A similar type of analysis, or approach, suggested earlier for the classification of things is applicable to the classification of obligations.

Implicit in the classification of an obligation as community or separate is the assumption that the claimed obligation is in fact an obligation. A not unusual issue in a community property partition action is the claim of a spouse that he is indebted unto another person, typically a parent, and that the obligation is classified as a community obligation. Obviously, if the court concludes that the claimed obligation does not exist or has not been proved in the manner required by law, no classification issue is presented. Another situation involves a conditional obligation, commonly known as a contingent liability. A conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until the uncertain event occurs, the

181. La. Civ. Code art. 1756 provides:
An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing, or not doing something.
182. Compare Sherrod v. Sherrod, 709 So. 2d 352, 354-55 (La. App. 5th Cir. 1998) (claimed indebtedness to mother of husband disallowed); Bridges v. Bridges, 692 So. 2d 1186 (La. App. 3d Cir. 1997) (part of money received from the wife's mother classified as a loan, a community obligation, and part held to be a donation inter vivos); Gautreaux v. Gautreaux, 697 So. 2d 1339, 1352-53 (La. App. 3d Cir. 1997) (claimed loan by mother of wife held to be donation to both husband and wife); Cenac v. Cenac, 492 So. 2d 39 (La. App. 1st Cir. 1986) (claimed debt to father disallowed); Feazel v. Feazel, 471 So. 2d 851 (La. App. 2d Cir. 1985) (claimed debt to father allowed); Azar v. Azar, 185 So. 2d 113 (La. App. 4th Cir. 1966) (claimed loans from father held to be gifts and disallowed).
183. La. Civ. Code art. 1846 requires that if the value of a contract is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances. These evidentiary requirements apply to claimed loans to a spouse or claimed loans by a spouse. These types of intra-family loans are frequently disallowed for failure to comply with these evidentiary requirements. In Cenac, 492 So. 2d 39, several claimed loans by the husband to family members and to a corporation owned by a family member were disallowed for lack of compliance with the proof requirements of La. Civ. Code art. 1846. See also Bourg v. Bourg, 720 So. 2d 59 (La. App. 1st Cir. 1998), in which a claimed $7,000.00 loan by the husband to a family owned corporation was disallowed as a community obligation because only the husband testified as to the existence of the debt; no corroborative testimony or other evidence was produced. The court held that the fact that the wife did not dispute the debt at trial did not dispense with the proof requirements. The court stated that her failure to dispute the debt was not the required "corroborating circumstances" to prove the debt.
184. La. Civ. Code art. 1767 provides, in part:
A conditional obligation is one dependent on an uncertain event.
If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.
condition is suspensive.\textsuperscript{187} In \textit{Butler v. Butler},\textsuperscript{188} the husband owned as separate property shares of stock of Butler Brothers Furniture Company, Inc. During the community, Mr. Butler endorsed a note executed by the corporation to a third party. Mr. Butler's liability was contingent on non-payment of the note by the primary obligor, the furniture company. The court held that since that contingency had not arisen when the community was terminated, that "the community can no longer be held responsible"\textsuperscript{189} and that, therefore, the contingent liability should not be classified as a community obligation.

Except for those obligations statutorily classified as separate obligations in Louisiana Civil Code article 2363,\textsuperscript{190} all obligations incurred during the existence of the legal regime by either spouse are presumed to be community obligations.\textsuperscript{191} Except for two specific obligations statutorily defined as community\textsuperscript{192} and the obligations statutorily classified as separate obliga-

\begin{footnotesize}
\begin{enumerate}
\item[188.] 228 So. 2d 339 (La. App. 1st Cir. 1969).
\item[189.] \textit{Id.} at 344. \textit{See also} Panzico v. Panzico, 716 So. 2d 505 (La. App. 2d Cir. 1998); Guillaume v. Guillaume, 603 So. 2d 235 (La. App. 4th Cir. 1992); Mohr v. Mohr, 374 So. 2d 203 (La. App. 4th Cir. 1979) and Mexic v. Mexic, 577 So. 2d 1046 (La. App. 4th Cir. 1991).
\item[190.] La. Civ. Code art. 2363 provides:
A separate obligation of a spouse is one incurred by that spouse prior to the establishment of a community property regime, or one incurred during the existence of a community property regime though not for the common interest of the spouses or for the interest of the other spouse. An obligation incurred after termination of a community property regime, except an obligation incurred for attorney’s fees and costs under Article 2362.1, is a separate obligation.
An obligation resulting from an intentional wrong not perpetrated for the benefit of the community, or an obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse, is likewise a separate obligation.
\item[191.] La. Civ. Code art. 2361 provides:
Except as provided in Article 2363, all obligations incurred by a spouse during the existence of a community property regime are presumed to be community obligations.
\item[192.] Obligations that are statutorily defined as community obligations are an alimentary obligation imposed by law on a spouse, La. Civ. Code art. 2362, and an obligation for attorney’s fees and costs in an action for divorce incurred before the date of the judgment of divorce that terminates
\end{enumerate}
\end{footnotesize}
tions,\textsuperscript{193} classification of an obligation incurred during the existence of the legal regime depends upon whether (1) the obligation was incurred for the common interest of the spouses or for the interest of the other spouse, in which case it is classified as a community obligation,\textsuperscript{194} or (2) the obligation was incurred not for the common interest of the spouses or the interest of the other spouse, in which case the obligation is classified as the separate obligation of the incurring spouse.\textsuperscript{195}

IV. REIMBURSEMENT CLAIMS

The circuit courts of appeal are divided with respect to the extent of the amount of the reimbursement due to a spouse for separate funds used for maintenance and upkeep,\textsuperscript{196} or used to pay insurance premiums, and

\begin{itemize}
  \item the community property regime, La. Civ. Code art. 2362.1.
  \item La. Civ. Code art. 2363.
  \item La. Civ. Code art. 2360 provides:
    \begin{quote}
      An obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation.
    \end{quote}
  \item La. Civ. Code art. 2363. Unfortunately, the inclusion of the introductory phrase "Except as provided in Article 2633" to article 2361 complicates a logical sequential analysis of the Civil Code articles classifying obligations. Except for that phrase, the structure of the articles classifying things and the structure of the articles classifying obligations are the same, and the analysis suggested for the classification of things applies to the classification of obligations. That analysis is: A presumption of community applies to all obligations incurred during the legal regime; certain obligations are statutorily classified as community and some are statutorily classified as separate. If an obligation does not fit within either of these statutory classifications, the community presumption subsists and the obligation is community.
  \item La. Civ. Code art. 2361 creates a presumption that it is a community obligation, unless it is overcome by application of Article 2363. The writer believes that Article 2361, as presently written, does not create a community presumption for all obligations incurred during the legal regime, which presumption is rebutted or overcome by the application of Article 2363. The writer believes that Article 2361 excludes from the community presumption those types of obligations described in Article 2363, which are statutorily classified as separate obligations. However, under either analysis, the classification result is the same. Article 2340, creating the presumption that things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, does not contain a similar introductory phrase excepting those things statutorily classified as the separate property of a spouse. It would be better if the structure of the Civil Code articles classifying things and obligations, respectively, were parallel.
  \item If separate property of a spouse has been used for the acquisition, use, improvement, or benefit of community property, that spouse upon termination of the community is entitled to one-half of the amount or value that the property had at the time it was used. The liability of the spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations.
\end{itemize}
note payments due on a movable used exclusively by that spouse after the termination of the community. The third, fourth, and fifth circuits deny the reimbursement claim. This line of cases originated in *Gachez v. Gachez*, in which the court distinguished the allowing of reimbursement for mortgage payments on the family home under similar conditions on the ground that an automobile is a depreciable asset and the use of the movable is directly related to its depreciation. It held that it would be inequitable to allow the reimbursement claim under these circumstances. In *Chance v. Chance*, the second circuit joined with the first circuit and allowed the reimbursement, finding no distinction in Louisiana Civil Code article 2365 between an obligation related to movables and one related to immovables. This rule is the preferable one. Equity may be resorted to only when no rule for a particular situation can be derived from legislation or custom. The measure of the

Buildings, other constructions permanently attached to the ground and plantings made on community property with separate assets of a spouse become community property. Upon termination of the community, the spouse whose assets were used is entitled to one-half of the amount or value that the separate assets had at the time they were used. The liability of the spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations.

197. La. Civ. Code art. 2365 provides:

> If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. The liability of a spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community liabilities.

Nevertheless, if the community obligation was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, and education of children of either spouse in keeping with the economic condition of the community, the spouse is entitled to reimbursement from the other spouse regardless of the value of that spouse's share of the community.


200. *Id.* at 613-14. This "automobile exception" and its reasoning was applied to telephone equipment used by a husband from termination of the community until its partition in *Jurgelsky v. Pinac*, 614 So. 2d 1331, 1333-34 (La. App. 3d Cir. 1993).

201. 694 So. 2d 613, 616 (La. App. 2d Cir. 1997).


203. La. Civ. Code art. 4 provides:

> When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.

Equitable considerations cannot be permitted to prevail when in conflict with the positive written law. See *Palermo Land Co., Inc. v. Planning Comm'n of Calcasieu Parish*, 561 So. 2d 482, 488 (La. 1990).
The reimbursement claim is the value of the separate thing used to satisfy the community obligation or to benefit the community property. Reimbursement is due whether the enhancement in value of the community thing is less or greater than the value of the separate thing used. The denial of reimbursement in this instance because the thing depreciates effectively applies the pre-1980 rule of reimbursement. However, there is no reason why the co-ownership rule of Louisiana Civil Code article 806 is not applicable to

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206. Under prior Louisiana Civil Code article 2408, repealed by 1979 La. Acts No. 709, § 1, eff. Jan. 1, 1980, and the jurisprudential application of this article to reimbursement claims arising from the use of separate funds to satisfy community obligations or to benefit community property, the measure of reimbursement was one-half of the enhanced value of the community property, not one-half of the value of the separate thing used. See Abraham v. Abraham, 230 La. 78, 87 So. 2d 735 (La. 1956); Williams v. Williams, 215 La. 839, 41 So. 2d 736 (La. 1949); Succession of Bell, 194 La. 274, 193 So. 645 (La. 1939); White v. White, 159 La. 1065, 106 So. 567 (La. 1925).

A welcomed decision is White v. Broussard, 720 So. 2d 392 (La. App. 3d Cir. 1998), which held that the measure of reimbursement for the premiums paid during the existence of the legal regime with community funds on a separate life insurance policy of a spouse is the value of the community funds used to pay the premiums, not the increase in the cash value of the policy during that period of time. White correctly held that Connell v. Connell, 331 So. 2d 4 (La. 1976) was legislatively overruled by La. Civ. Code art. 2366.

207. La. Civ. Code art. 806 provides:

A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.

If the co-owner who incurred the expenses had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of his enjoyment.
this situation. If the co-owner of the movable has incurred necessary expenses for the discharge of a private burden or expenses for ordinary maintenance and repair, but he has had the enjoyment, i.e., use, of the thing, his reimbursement claim can be reduced by the value of his enjoyment, or use, of the thing.²⁰⁸

The Second Circuit Court of Appeal in Sims v. Sims²⁰⁹ joined the other circuits in concluding that a reimbursement claim based upon the use of community funds to repay a loan on separate property of a spouse that is used as the family home of the spouses is limited to one-half of the principal payments made on the debt, and that the interest, taxes, and insurance are not includible in the reimbursement claim.²¹⁰ This determination is justified on the ground that the payment of the entire separate obligation with community funds was only partially for the benefit of the spouse owning the separate property. The payment of the principal portion of the obligation served to benefit the separate property of the spouse; the payment of the interest, taxes, and insurance was for the common interest of the spouses and their family in maintaining a family home.²¹¹

V. PARTITION AGREEMENTS

In McCarroll v. McCarroll,²¹² the conventional partition agreement did not explicitly describe the retirement benefits of the husband, although it allocated to him all “movable property” in his name or in his possession that was acquired during the community of acquets and gains.²¹³ Because the agreement was ambiguous as to whether the retirement benefits were partitioned, the court permitted parole evidence, which established that the wife agreed to relinquish her right in the husband’s retirement benefits in exchange for the exclusive use of the family home until their youngest child reached the age of eighteen years.²¹⁴ The court held that the value of this use of the residence was properly considered as in-kind value for the purpose of determining whether the partition agreement was lesionary.²¹⁵ The supreme court expressly approved

²⁰⁸. See infra text accompanying notes 244-253 for a discussion of the application of Louisiana Civil Code articles 527 and 806 to co-owned former community property. Credit may be given under this article for the value of the use of the movable thing as an offset or reduction in the amount of the reimbursement claim without doing violence to the principles contained in the Civil Code articles governing the reimbursement claims.

²⁰⁹. 677 So. 2d 663 (La. App. 2d Cir. 1996).

²¹⁰. Id. at 667.

²¹¹. See id. at 667. Louisiana Civil Code article 2363 provides, in part, that an obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse, is a separate obligation. See Spaht & Hargrave, supra note 19, at 400-01 for a critique of the court’s analysis in this case.

²¹². 701 So. 2d 1280 (La. 1997).

²¹³. Id. at 1282.

²¹⁴. Id. at 1283.

²¹⁵. Id. at 1287.
of the decision in *King v. King* \(^{216}\) that a waiver of a right that benefits one spouse to the detriment of the other may be considered as value to the beneficiary of the waiver for purposes of lesion. \(^{217}\)

*Brignac v. Brignac* \(^{218}\) presents troublesome issues. The parties executed two documents entitled COMMUNITY PROPERTY SETTLEMENT and COMMUNITY PROPERTY SETTLEMENT AND SIDE AGREEMENT, respectively. \(^{219}\) The first document partitioned certain described property and relieved each party from further accounting for the community. \(^{220}\) In the second document, the wife agreed that she would drop pending suits against the husband addressing community property issues and not pursue any further litigation against the husband resulting from the marriage. \(^{221}\) Over ten years later, she filed a suit seeking the partition of the former husband's Parochial Employees Retirement System (PERS) benefits. \(^{222}\) She claimed that the described documents did not partition these benefits. \(^{223}\)

The *Brignac* case and several others reaffirm the advisability of the careful inclusion of a detailed description of all community assets and obligations and the judicious use of omnibus clauses or residual disposition clauses in a community property partition agreement. *Langlinais v. David* \(^{224}\) held that if the partition agreement does not contain a residual disposition of unlisted assets, an asset omitted from it by mutual oversight may be the subject of a supplemen-

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\(^{216}\) 493 So. 2d 679 (La. App. 2d Cir.), writ denied, 497 So. 2d 316 (1986). In *King*, the wife in a community property partition agreed that she would never seek an increase in her alimony above the amount provided for in the agreement and further agreed that the alimony would forever terminate upon the husband's retirement, at which time the wife would commence receiving her portion of his retirement benefits which had been allocated to her in the partition agreement. The court held that in order to determine if the agreement was lesionary, the value of the alimony rights contractually waived must be determined and that value added to the property received by the husband.

In *McCarroll*, the court stated:

We agree with the holding in *King* that a waiver of a right that benefits one spouse to the detriment of the other may be considered as value to the beneficiary for purposes of lesion.

*McCarroll*, 701 So. 2d at 1288.

\(^{217}\) *McCarroll*, 701 So. 2d at 1287.

\(^{218}\) 698 So. 2d 953 (La. App. 3d Cir. 1997).

\(^{219}\) Id. at 954-55.

\(^{220}\) Id. at 955.

\(^{221}\) Id. at 955.

\(^{222}\) Id. at 955. Mr. Brignac had transferred approximately 11½ years of his service under LASERS, earned while he was an employee of the State of Louisiana, Department of Agriculture, as a marketing specialist and as the Assistant Director of the Louisiana Department of Public Works, to PERS when he became the Administrator and Executive Director of the Teche-Vermilion Fresh Water District.

\(^{223}\) Id. at 955.

nal partition because it remains unpartitioned. Moon v. Moon held that military retired pay, omitted from a partition agreement because both parties believed that it was the husband’s separate property, was not partitioned by the residual disposition of all unlisted assets in the agreement, but was subject to a supplemental partition. On the other hand, in Chrisman v. Chrisman, the settlement agreement, which contained a residual disposition clause, did not expressly allocate the husband’s military retired pay, but the wife knew that the military retired pay of her husband was community property, although in subsequent support proceedings she treated it as her husband’s separate property. The court held that the wife had waived her right to claim it as community property in the settlement agreement. A supplemental partition of it was disallowed.

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226. Moon, 345 So. 2d at 175. Moreau v. Moreau, 457 So. 2d 1285 (La. App. 3d Cir. 1984), involved the same issue as Moon. Although both parties were aware of the military retired pay and the community property settlement agreement contained a residual clause, both parties believed that the retirement benefits were the husband’s separate property because of McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728 (1981). A supplemental partition of these benefits was permitted.

A contract is formed by the consent of the parties established through offer and acceptance. La. Civ. Code art. 1927. Consent may be vitiated by error, fraud, or duress. La. Civ. Code art. 1948. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. La. Civ. Code art. 1949. Error may concern a cause when it bears on the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation. La. Civ. Code art. 1950. See Adams v. Adams, 503 So. 2d 1052 (La. App. 2d Cir. 1987). Therefore, unilateral or mutual error as to the law may vitiate consent. Comment (e), Revision Comments—1984 to La. Civ. Code art. 1950. However, these cases do not involve an attempt to rescind the partition due to error, but are actions for a supplemental partition to include the omitted property. The court invoked the provisions of Louisiana Civil Code article 1401, which regulates the partition of succession effects and which provides that the mere omission of a thing, belonging to the succession, is not ground for rescission, but simply for a supplementary partition.

227. 487 So. 2d 140 (La. App. 4th Cir. 1986).

228. In short, Mrs. Chrisman’s conduct before and after the partition leads us to believe that she intended to waive her right to claim the retirement benefits as community property.

Id. at 142. Chrisman was distinguished in Faucheux v. Faucheux, 706 So. 2d 654 (La. App. 4th Cir. 1998), in which the court held that under the circumstances of that case, the wife had not waived her right to the retirement benefits in the partition agreement, although she knew of their existence.

229. In an earlier case, Rasbury v. Baudier, 410 So. 2d 262 (La. App. 4th Cir. 1982), the husband’s military retired pay was omitted from specific mention in the community property partition agreement after the parties had discussed it with their respective attorneys “because it had no cash surrender value and they did not want the agreement to be subject to attack on the grounds of lesion.” Rasbury, 410 So. 2d at 263. The court concluded that the failure to mention the retirement pay in
An additional issue is presented in Brignac. The court treated the SIDE AGREEMENT as a transaction or compromise, but resolved the issue of whether the PERS benefits were partitioned in the SIDE AGREEMENT by determining whether or not Mrs. Brignac believed that her husband's retirement benefits were his separate property. Deciding that she did not, it concluded that the SIDE AGREEMENT was a valid transaction or compromise precluding

the settlement agreement was not a mutual oversight, but, rather, was a waiver on the wife's part to have it included in the act. Id. at 263. A supplemental partition was denied.

See also Nungesser v. Nungesser, 694 So. 2d 312 (La. App. 1st Cir. 1996), in which a partition consent judgment recited that all the community assets were partitioned, and which described the former family home, but not a contiguous one acre lot. The lot had been the subject of negotiations. The court held that its omission was not the result of mutual oversight and that the lot was partitioned in the judgment.

The Louisiana Supreme Court in Schexnayder v. Holbert, 714 So. 2d 680 (La. 1998), resolved a long standing conflict between the courts of appeal with respect to military retired pay. In McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728 (1981), the United States Supreme Court held that military retired pay was not subject to division under state marital property law, including state community property law, on federal preemption principles. In reaction to this decision, the United States Congress enacted the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408, effective January 1, 1983, which essentially returned to the states the authority to determine whether military retired pay was to be treated as marital property and, if so, the distribution of it upon divorce in accordance with state law. A flood of cases attempted to re-open pre-McCarty divorce cases in order to assert rights to military retired pay. In response to this, the United States Congress amended 10 U.S.C. § 1408 to provide the authorization granted the states in that statute did not apply if a judgment of divorce, and other described judicial acts, was issued before June 25, 1981 (the date of the McCarty decision) and the divorce decree or other described judicial act did not treat, or reserve jurisdiction to treat, the military retired pay of the spouse as marital property subject to distribution. The Louisiana Supreme Court held that the proper interpretation of the amendatory language is that "10 U.S.C. § 1408(c)(1) precludes a community property partition of military retired pay in any case in which a final decree of divorce, dissolution, annulment, or legal separation is issued before June 25, 1981 and does not treat (or reserve jurisdiction to treat) any issues of military retirement." Schexnayder, 714 So. 2d at 684.


231. Id. at 956-57. In his first assignment of error, Mr. Brignac argued "that Mrs. Brignac executed a valid, voluntary transaction or compromise which relinquished any rights she might have had to his retirement benefits." Id. at 955-66. The court stated:

we are only left with the issue of whether the side agreement effected a valid transaction or compromise of Ms. Brignac's rights to Mr. Brignac's retirement benefits.

We conclude that the side agreement effected a valid compromise and Ms. Brignac waived any right that she may have had to a portion of Mr. Brignac's retirement benefits.

Id. at 956, 957.

232. The court stated:

Ms. Brignac admitted . . . that she had always been aware that Mr. Brignac had a retirement plan.

At no time, does Ms. Brignac contend that she was under the false impression that the plan was Mr. Brignac's separate property.

Id. at 957.
the subsequent partition of the retirement benefits. If she had believed that her husband’s PERS benefits were his separate property, it would have been error as to the law. However, a transaction may not be attacked on account of any error in law. If the SIDE AGREEMENT was a transaction or compromise, the inquiry should have been directed to the scope of the transaction and whether the release of the claims to the retirement benefits was within the intent of the parties in executing the agreement.

VI. CO-OWNERSHIP OF FORMER COMMUNITY PROPERTY

Resolving a longstanding conflict between the circuit courts of appeal, the supreme court in *McCarroll v. McCarroll* held that, absent an agreement of the spouses, a court may not retroactively award rent under Louisiana Revised Statutes 9:374(C) for the use and occupancy of the family residence pending

233. La. Civ. Code art. 3071 defines a transaction or compromise as follows:

A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

234. La. Civ. Code art. 3078 provides:

Transactions have, between the interested parties, a force equal to the authority of things adjudged. They can not be attacked on account of any error in law or any lesion. But an error in calculation may always be corrected.

See *Kozina v. Zeagler*, 646 So. 2d 1217 (La. App. 5th Cir. 1994).

235. La. Civ. Code art. 3073 provides:

Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them.

The renunciation, which is made therein to all rights, claims and pretensions, extends only to what relates to the differences on which the transaction arises.

The authority of the thing adjudged extends only to the matters the parties to the compromise intended to settle. See *Ortego v. State of Louisiana, Dep’t of Transp. and Dev.*, 689 So. 2d 1358 (La. 1997). See also *McCall v. Cameron Offshore Boats, Inc.*, 635 So. 2d 263 (La. App. 3d Cir. 1994); *Cutrer v. Illinois Cent. Gulf R.R. Co.*, 581 So. 2d 1013 (La. App. 1st Cir. 1991); *Cherrington v. Gardner*, 541 So. 2d 410 (La. App. 4th Cir. 1989).

236. 701 So. 2d 1280 (La. 1997).

237. La. R.S. 9:374(C) (Supp. 1999) provides:

C. A spouse who uses and occupies or is awarded by the court the use and occupancy of the family residence pending either the termination of the marriage or the partition of the community property in accordance with the provisions of R.S. 9:374(A) or (B) shall not be liable to the other spouse for rental for the use and occupancy, unless otherwise agreed by the spouses or ordered by the court.
either the termination of the marriage or the partition of community property. 238 If rent is to be awarded, it must be awarded at the time of the award of use and occupancy, 239 at which time the court must consider the statutory factors of the relative economic status of the spouses, the needs of the children, and award of occupancy on alimony and child support. 240 The decision is consistent with the well established principle that the exclusive occupancy by one owner of co-owned property does not create a rent claim in favor of the non-occupant co-owner in the absence of a demand from that co-owner for occupancy, which demand has been refused. 241 In this event, rent is owed only

238. McCarroll, 701 So. 2d at 1290.
239: The court stated:
   La.R.S.9:374, when read as a whole, contemplates that any award of rent shall be made in conjunction with the determination of occupancy and in light of the factors in La.R.S. 9:374(B).
Id. at 1290.
240. The statutory factors to be considered under both R.S. 9:374(A) and (B) are the following:
In these cases, the court shall inquire into the relative economic status of the spouses, including both community and separate property, and the needs of the children, if any, and shall award the use and occupancy of the family residence and the use of any community movables or immovables to the spouse in accordance with the best interest of the family. The court shall consider the granting of the occupancy of the family home and the use of community movables or immovables in awarding alimony or child support.
241. The court gave the following historical review and cogent reasons for its conclusion:
La. Civ. Code art. 2369.1 provides, in pertinent part:
   After termination of the community property regime, the provisions governing co-ownership apply to the former community property, unless otherwise provided by law or by juridical act.
   The use and management of a thing held in indivision is determined by agreement of all the co-owners. La. Civ. Code art. 801. A co-owner is entitled to use the thing held in indivision according to its destination, but he cannot prevent another co-owner from making such use of it. La.Civ.Code art. 802. Nevertheless, it is well established that a co-owner need not pay rent to another co-owner for his exclusive use of the co-owned property. In Juneau v. Laborde, 228 La. 410, 82 So.2d 693 (La.1955), this Court stated:
   This claim cannot be sanctioned, for defendant was a co-owner of the property and was entitled, as such, to occupy it without becoming liable to plaintiffs for rent. Becnel v. Becnel, 23 La.Ann 150; Balfour's Heirs v. Balfour, 33 La.Ann 297; Toler v. Bunch, 34 La.Ann. 997 and Perez v. Guitard, 14 Orleans App. 191. In determining the amount due and recoverable by a co-owner out of possession from his co-owner in possession, a clear distinction should be drawn between the personal occupancy, use and enjoyment of property by the possessor and the rents and revenues derived by him therefrom, either from a lease or by his own industry or exploitation. As to the latter, he must account to his co-owner for all rents and revenues he has received because, in obtaining these fruits, he acts not only for himself but also as the agent of his co-owner for the latter's just proportion.

   On the other hand, the co-owner who takes possession of the common property does not have to account to his coproprietor, because the right of occupancy is vested in him by virtue of his ownership. Article 494, Civil Code. This right of co-owners to possession of the property being equal and coextensive, neither becomes indebted to
from the date of the refusal of the demand for occupancy. In the case of the use and occupancy of the former family residence, it appears that those principles applicable to co-owners generally are modified by Louisiana Revised Statutes 9:374 (Supp. 1998), a comprehensive regulation of the use and occupancy of a particular specie of former community property, the family residence, and

the other for his personal occupancy and enjoyment, save, probably, that a co-owner, who has been deprived of the right of possession by reason of his co-owner's exclusive occupancy, may claim damages from the date upon which he has demanded occupancy and has been refused by the possessor. But, even in these instances, the co-owner in possession cannot be enjoined from occupying the property or cultivating it. The remedy of the co-owner out of possession is, as stated in Moreira v. Schwan, 113 La. 643, 37 So. 542, 543, "...by suit for a partition and settlement of accounts, or for a division of profits, if any."

Juneau, 82 So.2d at 695-96. (Footnotes omitted).

Under the principles enunciated in Juneau, a co-owner in exclusive possession may be liable for rent, but only beginning on the date another co-owner has demanded occupancy and has been refused. This underlying principle amply supports the requirement that for the assessment of rent under La.R.S. 9:374(C), there must be an agreement between the spouses or a court order for rent contemporaneous with the award of occupancy.

If the parties cannot reach an agreement, either spouse may petition the court for the occupancy of the family home under La.Civ.Code art. 105, and the determination of occupancy and rent is governed by La.R.S. 9:374. At the time occupancy is awarded under La.R.S. 9:374(B), the trial court has the opportunity to weigh the arguments of both spouses on the rent issue at a contradictory hearing. La.R.S. 9:374(B) provides that the trial court shall consider the relative economic status of the parties, the needs of the children, and the effect of the award of the occupancy on alimony and child support. La.R.S. 9:374, when read as a whole, contemplates that any award of rent shall be made in conjunction with the determination of occupancy and in light of the factors in La.R.S. 9:374(B).


242. McCarroll, 701 So. 2d at 1290. McCarroll was followed in Ecroyd v. Ecroyd, 713 So. 2d 638 (La. App. 3d Cir. 1998).

243. Typically, at the time of an award of use and occupancy during a summary proceeding for a determination of incidental matters, La. Civ. Code art. 105, the family residence is community property, not co-owned former community property, because a judgment of divorce has not been rendered terminating the community property regime retroactive to the date of filing of the petition in the action in which the judgment of divorce is rendered, La. Civ. Code art. 159. Of course, the community could have been terminated and a separation of property regime established under either Louisiana Civil Code article 2374(C) or (D), in which cases the spouses would be co-owners of former community property. Also, if a judgment of divorce is rendered, the property would be reclassified as co-owned former community property at some point, resulting in a spouse thereafter occupying the family residence for some period of time as the co-owner of former community property.

Not resolved by McCarroll is the issue of the award of rent when the family residence is the separate property of a spouse and its use and occupancy is awarded to the other spouse. The co-ownership principles would be inapplicable, and Louisiana Revised Statutes 9:374(C) expressly applies to sub-section (A) of Section 374. It appears that rent may be awarded in this instance, and if it is to be awarded, it must also be awarded at the time of the award of use and occupancy under the same public policy considerations considered in McCarroll:
the supreme court's clear ruling that if rent is to be assessed in this situation, there must be an agreement between the spouses or a court order for rent contemporaneous with the award of occupancy.

There is one situation in which the value of the occupancy of the family residence by a spouse is relevant in a community property partition proceeding. If the spouse occupying the family residence is the one who has been paying the installments due on a note which is a community obligation, secured by a mortgage on the community residence, with his separate funds during his occupancy, his reimbursement claim should be reduced in proportion to the value of his enjoyment, or occupancy, of the residence.\textsuperscript{244} \textit{Roque v. Tate}\textsuperscript{245} rejected such a claim. However, the court improperly focused on the heading of Louisiana Civil Code article 806, which is "Expenses of maintenance and management."\textsuperscript{246} It held that a "mortgage is not such an expense..."\textsuperscript{247}

Public policy also weighs heavily against the retroactive award of rent under La.R.S. 9:374(C). As is plainly illustrated by the case sub judice, when the community is not partitioned for many years, the retroactive assessment of rent is extremely prejudicial to the occupying spouse. Such retroactive assessment deprives the occupying spouse of the ability to make an informed and meaningful decision regarding his or her finances and housing budget. There is no corollary prejudice to the non-occupying spouse under this interpretation of the statute, since that spouse has the ability to invoke a court proceeding to determine occupancy and rent at any time. La.Civ.Code art. 105.

\textit{McCarroll}, 701 So. 2d at 1290.

\textsuperscript{244} La. Civ. Code art. 806 provides:

A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.

If the co-owner who incurred the expenses had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of his enjoyment.

Necessary expenses are defined in La. Civ. Code art. 527:

The evicted possessor, whether in good or in bad faith, is entitled to recover from the owner compensation for necessary expenses incurred for the preservation of the thing and for the discharge of private or public burdens. He is not entitled to recover expenses for ordinary maintenance or repairs.

\textsuperscript{245} 631 So. 2d 1385 (La. App. 5th Cir. 1994).

\textsuperscript{246} \textit{Id.} at 1386.

\textsuperscript{247} \textit{Id.} at 1386.

On appeal, Ms. Roque argues that while a spouse is entitled to reimbursement for separate funds used to pay a community obligation after the community has terminated (LSA-C.C. art. 2365), after termination, the laws of co-ownership apply (LSA-C.C. art. 2369.1). Her argument continues that, pursuant to LSA-C.C. art. 806, Mr. Tate's reimbursement for the mortgage payments should be reduced in proportion to the value of his enjoyment (i.e., he lived in the home "rent-free" while she paid rent elsewhere). Appellant's reliance on C.C. art. 806 is misplaced. Article 806, which addresses a co-owner's right to reimbursement for expenses paid on the co-owned property, provides:

A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners
The heading of this article is not the law. Additionally, the text of the article is broader than its heading. The article covers three distinct types of expenditures by the possessor co-owner, (1) necessary expenses, (2) expenses for ordinary maintenance and repairs, and (3) necessary management expenses paid to a third person. The first type of expense, necessary expenses, is defined in Louisiana Civil Code article 527 as expenses incurred for the preservation of the thing "and for the discharge of private or public burdens." A conventional mortgage is a private burden.

in proportion to their shares.

If the co-owner who incurred the expense had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of the enjoyment.

Under the provisions of this article, Ms. Roque argues that she should have been given an offset for the value of Mr. Tate's enjoyment of the property since he occupied it to her exclusion during the time in question. She contends the trial court erred in not giving her that offset. However, the heading of art. 806 is: "Expenses of maintenance and management." Under 806, a co-owner who has incurred necessary expenses or maintenance and management expenses is entitled to reimbursement from the other co-owners; except that if he who incurred these expenses had the enjoyment of the thing, the reimbursement is to be reduced in proportion to the value of his enjoyment. A mortgage is not such an expense, it is "a non-possessor right created over property to secure the performance of an obligation." LSA-C.C. art. 2378. Moreover, the Tate mortgage was not incurred by Mr. Tate, it was an obligation which attached against Mr. Tate and Ms. Roque (the community) at the moment of sale.

_id. at 1386.


Section 2 of that Act provides:

The headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.


250. See comment (b), Revision Comments—1990 to La. Civ. Code art. 806, which states:

(b) Under this provision, a co-owner is responsible to his co-owners for his share of necessary expenses. For the definition of such expenses, and their distinction from useful and luxurious expenses, see La. Civil Code art. 527 and 528 (Rev.1979), and 2314 (Repealed 1979; Yiannopoulos, Civil Law Property § 197 (2d ed.1980)[sic]).

251. Louisiana Civil Code article 527 defines necessary expenses as those expenses incurred for the preservation of the thing and for the discharge of private or public burdens. See also comment (b), Revision Comments—1979 to La. Civ. Code art. 527. Mortgage is an indivisible real right that burdens the entirety of the mortgaged property and that follows the property into whatever hands the property may pass. La. Civ. Code art. 3280. A mortgage is an accessory to the obligation that it secures. La. Civ. Code art. 3282. Mortgage is conventional, legal, or judicial, and with respect to the manner in which it burdens property, it is general or special. La. Civil. Code art. 3283. A general mortgage burdens all present and future property of the mortgagor. La. Civ. Code art. 3285. A special mortgage burdens only certain specified property of the mortgagor. La. Civ. Code art. 3285. Louisiana Civil Code article 3302 provides that judicial and legal mortgages burden all of the property of the obligor that is made susceptible of mortgage by Paragraphs 1 through 4 of article 3286 or that is expressly made subject to judicial or legal mortgage by other law. Louisiana Civil Code article 3306 provides that a judicial mortgage burdens the property of the judgment debtor only
If the spouse in possession is asserting a reimbursement claim for any of these types of expenditures described in Article 806 incurred by him, his claim should be reduced in proportion to the value of his enjoyment. This cannot be done at the time of the award of use and occupancy, because not all of those expenses generally have been incurred at this time, but is logically done in the partition proceedings when the occupant spouse asserts these reimbursement claims, as an offset or reduction of the reimbursement claims.\(^2\)

The case also disallowed the claim on the ground that Mr. Tate had not \textit{incurred} the mortgage.\(^3\) However, there is no requirement in Louisiana Civil Code articles 527 and 806 that the possessor spouse \textit{incur} the conventional mortgage, or private burden, affecting the property. He must have incurred the expense of \textit{discharging} the private burden.

One of the special rules regulating the co-ownership of former community property is that a spouse has a duty to preserve and to manage prudently former community property under his control in a manner consistent with the mode of use of the property immediately prior to termination of the community regime.\(^4\) This is an affirmative

\(^{252}\) A clear distinction should be observed between a rent claim asserted under Louisiana Revised Statutes 9:374(C) and the reduction of a reimbursement claim asserted under Louisiana Civil Code articles 2365 and 2367 by the application of Louisiana Civil Code article 806. The rent claim is an affirmative claim asserted against the occupier of the former family residence for the value of the use and occupancy. Louisiana Civil Code article 806 provides for the reduction of a reimbursement claim in the limited circumstances stated in that article. Both involve the value of the use of property. However, the rent claim must be asserted in connection with an application for use and occupancy. The reduction in a reimbursement claim by the value of the use and occupancy must of necessity be asserted in partition proceedings when reimbursement claims must be asserted. La. R.S. 9:2801 (Supp. 1999).

\(^{253}\) Roque v. Tate, 631 So. 2d 1385, 1386 (La. App. 5th Cir. 1994).

\(^{254}\) This obligation is imposed by La. Civ. Code art. 2369.3: A spouse has a duty to preserve and to manage prudently former community property under his control, including a former community enterprise, in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. He is answerable for any damage caused by his fault, default, or neglect.

A community enterprise is a business that is not a legal entity.

This duty is one of three duties imposed upon spouses with reference to the management of community property and co-owned former community property. During the existence of the legal regime, a spouse has a negative duty not to commit fraud or be in bad faith in the management of community property. La. Civ. Code art. 2354. This is a duty that continues during the existence of the legal regime. The next duty arises at the moment of the termination of the legal regime. A spouse owes an accounting to the other spouse for community property under his control at the termination of the legal regime. La. Civ. Code art. 2369. This duty focuses upon a moment in time. Comment (c), Comments—1995 to La. Civ. Code art. 2369.3. The duty to account is the duty to explain what happened to community property under the spouse's control at the moment of termination of the community. See Spaht & Hargrave, \textit{supra} note 19, at 425-31. That duty may be
duty.\textsuperscript{255} If he fails to perform this duty because of his fault, default, or neglect, he is liable for any resulting damages.\textsuperscript{256} In \textit{Gibson v. Gibson},\textsuperscript{257} the former husband withdrew all the community funds on deposit in a capital accumulation plan and a retirement plan with his previous employer, without the knowledge of his former wife and while they co-owned the funds as former community property.\textsuperscript{258} As a consequence, 20% of the funds were withheld for federal income taxes.\textsuperscript{259} Additionally, the former wife was deprived of the

fulfilled by producing the property or satisfactorily explaining the disposition of it. \textit{See In re Succession of Caraway}, 639 So. 2d 415 (La. App. 2d Cir. 1994). The third duty is the one described above, an affirmative duty imposed upon a spouse who has former community property under his control, to preserve and manage that property in a manner consistent with the mode of use of the property immediately prior to the termination of the legal regime. La. Civ. Code art. 2369.3.

It should be noted that this and the other special management rules governing the co-ownership of former community property contained in La. Civ. Code arts. 2369.2-2369.8 apply when the community property regime terminates for a cause other than death or judgment of declaration of death of a spouse, La. Civ. Code art. 2369.1. In these instances, these special management rules apply to former community property only until a partition of that property or the death or judgment of declaration of death of a spouse, La. Civ. Code art. 2369.1. If the community regime terminates because of the death or judgment of declaration of death of a spouse, the ordinary management rules of co-ownership contained in La. Civ. Code arts. 799-818 apply to this former community property.

A fourth duty may on occasion arise. If the legal regime has been terminated for a cause other than death or judgment of declaration of death of a spouse, and the parties have become co-owners of former community property (making the special management rules of La. Civ. Code arts. 2369.2-2369.8 applicable) and, thereafter, one of the spouses dies or there is a judgment of declaration of death of one of the spouses while the property remains unpartitioned, the special management rules of La. Civ. Code arts. 2369.2 through 2369.8 no longer are applicable, La. Civ. Code art. 2369.1, and the ordinary co-ownership management rules of La. Civ. Code arts. 799-818 thereafter regulate the co-ownership of the property. \textit{See} Dbrobnak v. Dbrobnak, 708 So. 2d 1162 (La. App. 1st Cir. 1998).

In \textit{McCarroll v. McCarroll}, 701 So. 2d 1280, 1282 n.3 (La. 1997), the court, in obiter dictum refers to "the fiduciary relationship between husband and wife" and states that "[f]ollowing from this fiduciary relationship there is a general duty between spouses to disclose community assets and their value," citing pre-1980 cases, listed in Spaht & Hargrave, \textit{supra} note 19, at 426 n.8. The \textit{McCarroll} community was terminated by a judgment of separation from bed and board rendered November 16, 1976. \textit{McCarroll}, 701 So. 2d at 1281. Therefore, their community was not governed by the Matrimonial Regimes Law, 1979 La. Acts No. 709, § 1, effective Jan. 1, 1980. \textit{See} Curlee v. Curlee, 567 So. 2d 1166 (La. App. 3d Cir. 1990). Thus, this dicta should not be applied to a case governed by the latter law. Spouses no longer stand in a fiduciary relationship with respect to community property. Under prior law, only the husband as head and master of the community owed a fiduciary duty to his wife with respect to community property. She did not owe a reciprocal fiduciary duty to him.

\textsuperscript{255} Comment (a), Comments—1995 to La. Civ. Code art. 2369.3 states, in part:

(a) This Article changes the law. First, it imposes on a spouse who has control of former community property an affirmative duty "to preserve and to manage" such property. In contrast, Civil Code Article 8800 (rev. 1990), applicable to ordinary co-owners, provides for a right but not a duty to act for the preservation of the property.

\textsuperscript{256} La. Civ. Code art. 2369.3.

\textsuperscript{257} 692 So. 2d 708 (La. App. 3d Cir. 1997).

\textsuperscript{258} Id. at 709.

\textsuperscript{259} Id. at 709.
option of a tax free rollover of these funds into an individual retirement account. The court correctly held that Louisiana Civil Code article 2369.3 applied rather than the Civil Code articles dealing with co-ownership of property generally. Article 2369.3 imposes an affirmative duty; Article 800, applicable to ordinary co-owners, provides for a right but does not impose a duty to preserve and manage the co-owned property. The court correctly held that the former husband had failed in his affirmative duty to preserve the funds, which were under his control, in a manner consistent with the mode of use of that property immediately prior to termination of the community funds, i.e. invested and earning income on a tax free basis. The damage sustained by the former wife was the tax liability which she would not have sustained had the funds not been withdrawn in this manner.

This duty imposed on a spouse by Louisiana Civil Code article 2369.3 terminates upon the partition of the former community property or upon the death or judgment of declaration of death of a spouse. Dbrobnak v. Dbrobnak involved the possession of former community property by a spouse after a partition of the property. The court correctly held that this duty imposed on the possessor spouse no longer applies after partition.

VII. SEPARATION OF PROPERTY REGIME

Under a separation of property regime, each spouse acting alone uses, enjoys, and disposes of his property without the consent or concurrence of the other spouse. In Toups v. Toups, a regime of separation of property existed between the spouses. After divorce, the former wife sued her former

260. Id. at 710.
261. La. Civ. Code art. 2369.1 provides:
   After termination of the community property regime, the provisions governing co-ownership apply to former community property, unless otherwise provided by law or by juridical act.
   When the community property regime terminates for a cause other than death or judgment of declaration of death of a spouse, the following Articles also apply to former community property until a partition, or the death or judgment of declaration of death of a spouse. These co-ownership rules are contained in Louisiana Civil Code articles 797-818.
265. 708 So. 2d 1162 (La. App. 1st Cir. 1998).
266. The dispute involved movable property allocated to the husband by the community property partition agreement which was in the possession of the wife, some of which was claimed to be missing. Id. at 1165.
267. La. Civ. Code art. 2371 provides:
   Under the regime of separation of property each spouse acting alone, uses, enjoys, and disposes of his property without the consent or concurrence of the other spouse.
268. 702 So. 2d 822 (La. App. 3d Cir. 1997).
husband for an accounting of the revenues from her business during the marriage,\(^{269}\) the management of which was assumed by her husband with her consent. She contended that a fiduciary duty was owed to her by him with respect to these funds.\(^ {270}\) The court correctly held that under a regime of separation of property, the spouses do not stand in a fiduciary relationship toward each other with respect to their respective separate properties.\(^ {271}\) The court noted that even in the legal regime of community of acquets and gains, the spouses are not fiduciaries in the management of community property.\(^ {272}\) They have the negative duty not to commit fraud or be in bad faith with reference to the management of community property.\(^ {273}\) They owe an accounting to each other only for community property under the control of each respective spouse at the termination of the community.\(^ {274}\)

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269. *Id.* at 823. The parties were married on November 16, 1974 and divorced on January 9, 1995. Two days before their marriage, they executed "a premarital contract" in which they renounced "the legal regime of the community of acquets and gains." *Id.* at 823.

270. *Id.* at 823.

271. La. Civ. Code art. 2371; *Toups*, 702 So. 2d at 824.

272. Pamela first contends that their marital relationship created a fiduciary duty upon Lawrence in the management of her separate funds. In support of this position, she relies upon jurisprudence and Civil Code articles governing the legal community property regime. We find no merit to this argument, which is based upon laws that have been repealed and, further, had no application to spouses separate in property. Pamela has cited jurisprudence concerning the fiduciary relationship that was created either by the husband's administration of community property as the "head and master" of the community under former La. Civ. Code art. 2404 or by the husband's management of the wife's separate property under former article 2385. The legislature repealed both articles in the 1979 revision of the matrimonial regimes law, effective January 1, 1980. Under the current scheme of equal management, the spouses are not fiduciaries in the management of community property, incurring liability only for fraud or bad faith, and an accounting is owed only for former community property under the control of one spouse at the termination of the community. La.Civ.Code arts. 2346, 2354, and 2369. See also Katherine Shaw Spaht, *Accounting Between Spouses Revisited*, 48 La.L.Rev. 371 (1987). Regardless, these articles govern only those spouses who have opted for the legal community regime. *Toups*, 702 So. 2d at 823-24.

273. La. Civ. Code art. 2354 provides: A spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property.

The writer describes the duty imposed upon a spouse by Louisiana Civil Code article 2354 as a negative duty not to commit fraud or be in bad faith in the management of the community property. This is to contrast it to the affirmative duty "to preserve and to manage" former community property "in a manner consistent with the mode of use of that property immediately prior to termination of the community regime" imposed upon the spouse who has control of that former community property during the period between termination of the legal regime and partition or other disposition of the co-owned former community property, or death or judgment of declaration of death of a spouse. La. Civ. Code art. 2369.1. La. Civ. Code art. 2369.3; Comment (a), Comments—1995 to La. Civ. Code art. 2369.3. See discussion of this and other duties with respect to the management of community property and former community property, *supra* note 254.

274. La. Civ. Code art. 2369 provides:
The issue in *Schulingkamp v. Schulingkamp* was whether or not the wife could assert in an action for partition instituted pursuant to Louisiana Revised Statutes 9:2801 a claim against her husband for personal injuries sustained by her as the result of spousal abuse. The wife claimed that Louisiana Revised Statutes 9:2801, entitled *Partition of community property and settlement of claims arising from matrimonial regimes and co-ownership of former community property*, “allows for all claims arising from the matrimonial regime [and] ... since her claim arose during the matrimonial regime,” she was entitled to assert it in the partition proceeding. The court held that the “claims” to which the statute alludes are “liquidated claims.”

A spouse owes an accounting to the other spouse for community property under his control at the termination of the community property regime.

The obligation to account prescribes in three years from the date of termination of the community property regime.

*In re Succession of Caraway*, 639 So. 2d 415, 419 (La. App. 2d Cir. 1994), explained this duty to account:


Although Louisiana Civil Code article 2369 has been misapplied by some earlier decisions, see Spaht & Hargrave, *supra* note 19, at 427-30, the duty imposed by this article arises at a moment in time, i.e., “the date of termination of the community.” Comment (c), Comments—1995 to La. Civ. Code art. 2369.3. This is in contrast to the continuous negative duty during the existence of the legal regime imposed by Louisiana Civil Code article 2354 on a spouse not to commit fraud or be in bad faith in the management of community property and the continuous affirmative duty imposed by Louisiana Civil Code article 2369.3 on a co-owner of former community property to preserve and manage that property which is under his control in a manner consistent with the mode of use of that property immediately prior to termination of the community regime, during the period between termination of the community regime and partition of the community property or the death or judgment of declaration of death of a spouse. See *supra* discussion at text accompanying notes 254-263 and 273.

275. 706 So. 2d 1005 (La. App. 1st Cir. 1997).

276. *Id.* at 1005.

277. Defendant contends the trial court erred in striking the supplemental detailed descriptive list. She maintains Revised Statute 9:2801, entitled “Partition of community property and settlement of claims arising from matrimonial regimes and co-ownership of former community property,” allows for *all claims* arising from the matrimonial regime. Since her claim arose during the matrimonial regime, she avers that Revised Statute 9:2801 sets forth rules for such an action sustained during the marriage.

*Id.* at 1006.

278. Contrary to defendant’s contention, the “claims” to which the statute alludes are “liquidated claims.” Black’s Law Dictionary defines “claim” as “the assertion of an existing right,” while a “liquidated claim” is defined as “a claim concerning an amount
The claims of the parties that may be asserted in a Louisiana Revised Statutes 9:2801 proceeding are those claims arising from the matrimonial regime of the spouses or from the co-ownership by the spouses of former community following termination of the matrimonial regime.279 A claim between the spouses that arises during a matrimonial regime does not necessarily arise from that matrimonial regime.280 The types of claims that arise from the legal regime, which are properly asserted in a community property partition action that has been agreed on by the parties or that can be precisely determined by operation of law or by the terms of the parties' agreement." Clearly 9:2801 is referring to a liquidated claim as "the settlement of the claims between the spouses arising . . . from the matrimonial regime . . . ."

Id. at 1006 (footnote omitted). The wife also relied upon Louisiana Civil Code article 2344, which provides that damages due to personal injuries sustained during the existence of the community by a spouse are separate property. The court held that this article refers to "liquidated damages":

Defendant also refers to Louisiana Civil Code article 2344, entitled "Offenses and quasi-offenses; damages as community or separate property." Defendant contends the compensation she should receive for the abuse she sustained is her own separate property based upon article 2344; therefore, reimbursement from plaintiff should come from his separate property or his share of the community property. However, the defendant's conclusions in this instance are incorrect for the same reason as stated above. The damages to which Civil Code article 2344 refers are liquidated damages. It is not compensation one "thinks" is owed to her/him; it is damages owed pursuant to a judgment or settlement.

Id. at 1006 (footnote omitted). Although Louisiana Code of Civil Procedure article 426 provides that an action to enforce an obligation is the property of the obligee, thus classifying a cause of action as property, the matrimonial regimes articles relating to damages due to personal injuries classify the award or judgment rather than the cause of action. See Spaht & Hargrave, supra note 19, at 93-94.

279. La. R.S. 9:2801 (Supp. 1999) provides, in part:

§ 2801. Partition of community property and settlement of claims arising from matrimonial regimes and co-ownership of former community property

When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising either from the matrimonial regime, or from the co-ownership of former community property following termination of the matrimonial regime, either spouse, as an incident of the action that would result in a termination of the matrimonial regime or thereafter, may institute a proceeding, which shall be conducted in accordance with the following rules:

(Emphasis supplied).

280. A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons. La. Civ. Code art. 2325. Unless a claim of one spouse against the other spouse arises out of that system of principles and rules, it may not be asserted in a Louisiana Revised Statutes 9:2801 partition proceeding. There are many types of claims that may arise between married persons during a matrimonial regime that do not arise from the regime. The redactors of Louisiana Revised Statutes 9:2801 carefully restricted the types of claims that could be asserted in the community property partition proceedings to those claims between spouses that arise from the matrimonial regime existing between them, or from their co-ownership of former community property. See, for a history of Louisiana Revised Statutes 9:2801, Katherine Shaw Spaht, Developments in the Law, 1981-1982: Matrimonial Regimes, 43 La. L. Rev. 513 (1982).
pursuant to Louisiana Revised Statutes 9:2801, include reimbursement claims, an accounting for community property under the control of a spouse at the termination of the community property regime, damages for fraud or bad faith in the management of community property, and claims arising from the co-ownership of former community property, such as a claim for damages for failure of a spouse to preserve and manage prudently former community property under his control in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. Nor is there any requirement that any of these claims be "a liquidated claim." When asserted, they are usually unliquidated and disputed. Although many examples could be given, a reimbursement claim based upon the increase in value of the separate property of a spouse due to the uncompensated or undercompensated labor or industry of a spouse is a good illustration of the contested and unliquidated nature of a reimbursement claim. If only liquidated claims could be asserted in a Louisiana Revised Statutes 9:2801 proceeding, the types of permitted claims would be seriously limited, and the purpose and goal of this statute, the litigation of these claims, the classification of assets and obligations and their allocation to the spouses, all in one proceeding, would be significantly undercut.

The court correctly disallowed the assertion of the wife's personal injury claim against her husband in the community property partition proceedings; the wife's claim did not arise from the matrimonial regime or from their co-ownership of former community property. The court's reasons are incorrect and, if followed, would do great damage to the well reasoned structure of Louisiana


A claim is liquidated when the debt is for an amount capable of ascertainment by mere calculation in accordance with accepted legal standards. Williamson v. Guice, 613 So. 2d 797 (La. App. 4th Cir.), writ denied, 617 So. 2d 937 (1993); American Bank v. Saxena, 553 So. 2d 836, 844 (La. 1989). See also Williams v. Louisiana Indem. Co. et al., 658 So. 2d 739 (La. App. 2d Cir. 1995).
288. The community property partition statute, La. R.S. 9:2801 (Supp. 1999), adopts the "aggregate theory" of partition, rather than the "item theory" that prevailed prior to its enactment. Under the "aggregate theory," all of the community assets and obligations and claims arising from the matrimonial regime or from the co-ownership of former community property following termination of the matrimonial regime are treated as an "aggregate" in one judicial proceeding by the allocation of assets and obligations and the settlement of the claims of the parties, with any unequal net distribution balanced by an equalizing payment. See Spaht & Hargrave, supra note 19, at 464.
Revised Statutes 9:2801. There is nothing in the Louisiana Civil Code articles governing matrimonial regimes or in Louisiana Revised Statutes 9:2801 that suggests that the claims of the parties that may be asserted in a community property partition proceeding are limited to liquidated claims. They are limited, but the limitation is that the claims between the spouses must be ones which arise from the matrimonial regime or from their co-ownership of former community property.