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Radcliffe v. Burger

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***RADCLIFFE V. BURGER: CHANGE OF MATRIMONIAL
REGIME AS A MEANS OF DEBT EVASION***

Jessica Brewer *

I. Background.....	175
II. Decision of the Court	177
III. Commentary.....	178
A. Post-Matrimonial Agreements	179
B. Absolute and Relative Nullity	179
C. Revocatory Action	181

Keywords: Louisiana, post-matrimonial agreement, revocatory action, separate regime, absolute nullity, relative nullity.

I. BACKGROUND

Is it fair that a husband with a multi-million-dollar judgment debt claim uses a matrimonial regime change to avoid payment?¹ As the number of Americans pursuing the age-old tradition of marriage continues to decline, it is important to take note of how modern laws, such as Louisiana’s restrictions on post-matrimonial agreements, may negatively affect the public’s view of marriage.² A Louisiana husband, in a marriage with a community property regime, found himself obligated to repay a multi-million dollar debt in *Radcliffe v. Burger*.³ In order to avoid the debt judgment, which was rendered in his name only, Ronald Burger quickly transferred all of his assets

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1. *Radcliffe* 10 L.L.C. v. *Burger*, 2016-0768 (La. 1/25/17); 219 So. 3d 296.

2. Christopher Kirt Ulfers, *Is Postmarital Agreement in Your Best Interest? Why Louisiana Civil Code Article 2329 Should Let You Decide*, 15 LA. L. REV. 1399 (2015).

3. *Radcliffe*, 219 So. 3d at 305.

into his wife's name before executing a post-matrimonial agreement which created a separate property regime in the couple's marriage.⁴ The couple received court approval to terminate their community property regime under Louisiana Civil Code article 2329.⁵ The post-matrimonial agreement effectively made Mr. Burger insolvent; the creditor could not seize the property because it legally belonged only to Mrs. Burger. In response, Radcliffe 10, LLC (the creditor) filed a revocatory action under Louisiana Civil Code article 2036 against judgment debtor Ronald Burger and his wife.⁶ Radcliffe sought to have the couple's post-matrimonial agreement, in which the Burgers' community property regime was terminated, declared null.

The post-matrimonial agreement proceedings and approval of the Burger's community property regime did not occur until *after* Radcliffe delivered a debt judgment of over 3.4 million dollars against Mr. Burger.⁷ In fact, the Burgers admitted to terminating the community property regime with the specific intent to evade the "multi-million dollar judgment rendered against Mr. Burger in favor of the plaintiff."⁸ In response, Radcliffe filed a motion for summary judgment in its revocatory action, arguing the Burgers' separate property regime approval was void "for failure to comply with the form requirements of art. 2329."⁹

Radcliffe argued the action was void because the Burgers failed to properly file the required joint action.¹⁰ The pertinent portion of Louisiana Civil Code article 2329 provides as follows:

Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and they understand the governing principles and rules. They may, however, subject themselves to

4. *Id.* at 296.

5. *Id.* at 298.

6. *Id.* at 297.

7. *Id.*

8. *Id.* at 305.

9. *Id.*

10. *Id.*

the legal regime by a matrimonial agreement at any time without court approval.¹¹

This article explicitly requires a joint petition by spouses to terminate a matrimonial regime, such as community property which is at issue in the immediate case. The trial court found the issue of the joint petition did not warrant a motion for summary judgment even though the Burgers' art. 2329 proceeding erroneously named Mrs. Burger as a defendant instead of a joint petitioner.¹²

During trial, Radcliffe renewed its request for summary judgment on the basis that the separate property judgment was a "nullity and the matrimonial agreement is void *ab initio* for failure to strictly comply with the requirements of art. 2329."¹³ The trial court found in favor of Radcliffe, revoked the agreement *ab initio*, and found the separate property regime null and void, having no legal effect. The Burgers appealed. On appeal, a panel of ten judges split "on the issue of whether the Burgers' failure to file a joint petition as required by La. C.C. art. 2329 resulted in an absolutely null or relatively null matrimonial agreement and judgment approving the matrimonial agreement."¹⁴ As a result, the Louisiana Supreme Court granted writ to determine that issue.

II. DECISION OF THE COURT

The Louisiana Supreme Court delivered two holdings in this case. First, "failure by the debtor and spouse to file [a] joint petition to terminate matrimonial agreement rendered agreement relatively null as opposed to absolutely null."¹⁵ Therefore, the creditors were unable to challenge the validity of the termination agreement. The

11. *Id.* at 299.

12. *Id.*

13. *Id.* at 298. *Ab initio* is Latin for "from the beginning." Therefore, Radcliffe argued that the Burgers' petition for a separate property regime was void from the beginning for failure to comply with the form requirements of Louisiana Civil Code art. 2329.

14. Radcliffe 10, L.L.C. v. Burger, 14-0347, p. 298 (La. App. 1 Cir. 3/28/16); 191 So. 3d 79.

15. *Id.* at 296.

court delivered this holding after reading Louisiana Civil Code articles 2031 and 2329 *in pari materia* to determine whether 2329 provided a “rule of public order” or if it was simply a “rule intended for the protection of private parties.”¹⁶ Here, the court reasoned that since this is the case, the action results in a relative nullity.¹⁷ Only one of the Burgers, as private parties in the termination agreement, can seek to declare it a nullity. Third parties, such as Radcliffe, cannot terminate the agreement on the basis of relative nullity. Under Louisiana Civil Code article 2032, a relative nullity can only be invoked by a party for whose interest the nullity was found.¹⁸

Instead, the Louisiana Supreme Court stated that a revocatory action, as governed by Louisiana Civil Code article 2036, was the proper means to attack the validity of the Burger’s revocatory action.¹⁹ However, Radcliffe failed to provide sufficient evidence to support granting a revocatory action at trial.²⁰

III. COMMENTARY

The commentary will provide an in-depth look at how the Burgers cleverly utilized a change of matrimonial regime to evade a \$3.4 million debt judgment under Louisiana Civil Code article 2329. An understanding of the distinction between absolute and relative nullities is also essential in understanding why Radcliffe was unable to recover in the case at issue despite a technical error in the Burgers’ paperwork. The last section of this essay discusses another means by which Radcliffe could have secured a remedy.

16. *Id.* at 300.

17. Under Louisiana Civil Code Article 2031, if the Burgers’ faulty joint petition was found in violation of a rule of public order, the action would result in an absolute nullity.

18. The Court held that, in this case, the only persons who could invoke the relative nullity would be one of the Burgers.

19. *Radcliffe*, 219 So. 3d at 303-304.

20. *Id.*

A. Post-Matrimonial Agreements

In Louisiana, under Louisiana Civil Code article 2334, a community property regime is the default matrimonial regime. Under article 2329, a couple may choose to modify or alter the community property regime either before or after entering into a marriage. A married couple may only modify their marriage arrangement after filing a “joint petition,” which is an amicable proceeding. The court is asked to verify that the modification requested “serves their best interests and that they understand the governing principles and rules.”²¹ The fact that the law requires the court to verify that the change does not sacrifice the interest of either spouse or both spouses explains the requirement for couples to file jointly. Arguably, the husband’s erroneous suit against his wife, rather than filing jointly *de facto*, served the same purpose.

Article 2329 effectively allows a court to determine what is best for parties in an intimate relationship, which may contradict the holding in *Radcliffe*, in which the court impliedly held marriage is a legal relationship others cannot encroach on. Additionally, though marriage is an intimate relationship between two persons, executing a patrimonial agreement after marriage interferes with the rights of third parties. For instance, in this case, moving from a community to a separation regime implies a partition of the community which may adversely affect the interests of the spouses’ creditors.

B. Absolute and Relative Nullity

Louisiana, like many other civil law jurisdictions around the world, distinguishes between absolute and relative nullity. In Louisiana, relative nullity is defined by Civil Code article 2031, and article 2030 delineates absolute nullity. Article 2031 explains that relative nullity exists when a contract “violates the rule intended for the protection of private parties.” Relative nullity may only be

21. *Id.* at 299.

invoked by the “persons for whose interest the ground of nullity was established”; a court may not declare a relative nullity on its own motion or a petition by a third party.²² In contrast, a contract is an absolute nullity when it “violates a rule of public order.” Where a nullity is absolute, it may be invoked by “any person or may be declared by the court on its initiative.”²³ There is a common misconception that an absolute nullity is more egregious than a relative nullity.²⁴ Jurisprudence even reinforces this erroneous idea.²⁵ But, in reality, the effects of either type of nullity is identical in Louisiana law.²⁶ The main distinction is whether a third party, such as a creditor, may or may not invoke the nullity.

Determining the permanency of the defect or problem which created the nullity is also quintessential in classifying a nullity as either relative or absolute.²⁷ Specifically, a relative nullity involves a defect that is temporary: “once the offending element ceases, the parties can redo the contract such that it has retroactive effect to when the contract was first executed. In other words, the parties can confirm it.”²⁸ In contrast, an absolute nullity occurs as the result of a “defect or invalidity [that] is permanent insofar as the offending transaction cannot be fixed in a way that gives it effect.”²⁹ When an absolute nullity occurs, the contract must be redone without the offending element in order to attain validity.³⁰ In other words, a contract that is absolutely null cannot be confirmed.

To summarize, the Radcliffe court rightly decided that the procedural error in the Burgers’ separate regime agreement was a

22. LA. CIV. CODE ANN. art. 2031 (2019).

23. *Id.* art. 2031.

24. *See* Ulfers, *supra* note 2, at 12.

25. *Id.*

26. *Id.* at 13.

27. *Id.* at 14.

28. *Id.*

29. Ronald J. Scalise Jr., *Rethinking the Doctrine of Nullity*, 74 LA. L. REV. 663, 693 (2014).

30. It is important to note that public order nullities are only one form of defective acts that result in absolute nullity. They fit the classic definition of an absolute nullity because they are rules of public order.

violation of a “rule intended for the protection of private parties” and is therefore a relative nullity in accordance with Louisiana Civil Code article 2031. The Burgers alone have the right to seek nullification or confirm the contract. The procedural requirement set by article 2039 is not a rule of public order; it simply aims at protecting the consent of both spouses. Therefore, Radcliffe is left without a valid argument to combat the validity of the separate regime agreement. It is important to remember that third-party interests, particularly those concerning security and credit, are at stake when couples change matrimonial regimes to the detriment of their creditors. However, for them to seek absolute nullity, a rule of public order must be violated, which does not seem to be the case. The lack of such a rule puts the public policy in peril, opening the door for couples to simply transfer all their debts to the more responsible (or solvent) as a means of avoiding large debt settlements. The civil law tradition, however, provides for another remedy in such circumstances, the revocatory action.

C. Revocatory Action

A revocatory action ultimately provides repayment to creditors for the “damage they have suffered by the fraud committed against them by the debtor.”³¹ This action allows a debtor to invalidate a fraudulent transfer of funds.³² Historically, this action is also known as a *Paulian action*.³³ In times of antiquity, a revocatory action provided a penalty equal to the harm caused within the penal system.³⁴ By bringing a Paulian action, creditors are allowed to regain possession of property “fraudulently alienated.”³⁵ Property is fraudulently alienated when it is moved or partitioned in such a manner as to injure the interest of a creditor. A revocatory action allows a court

31. MARCEL PLANIOL, 2 TREATISE ON THE CIVIL LAW § 327 (La. State Law Inst. trans., 11th ed. 1959).

32. *Id.*

33. *Id.*

34. PLANIOL, *supra* note 31, at 191.

35. *Id.*

to find a “remedy for a judgment creditor whose debtor has transferred all of his or her assets” by invalidating the transfer which made the debtor insolvent and therefore unable to pay his or her debts.³⁶ Louisiana courts have recognized revocatory actions are an appropriate remedy for creditors (such as Radcliffe) swindled by married couples hoping to evade debt collection by shuffling around assets subject to seizure.³⁷

In Louisiana, revocatory actions are governed by Louisiana Civil Code articles 2036 and 2037. A revocatory action brought under this article brings restitution. The creditor who brings the action is distinct from the other creditors pursuing the third party. In accordance with Louisiana Civil Code article 2043, bringing a revocatory action effectively nullifies the fraudulent act only “in the interest of the defrauded creditor and remains effective with all its consequences with regard to all other persons.”³⁸ The revocatory action brings about a nullity that is the “most direct and simple means of assuring the creditor the reparation to which he has a right.”³⁹

In the case at issue, Radcliffe brought the revocatory action against Mr. Burger in an attempt to get hold of his assets. The fraudulent act, according to Radcliffe, is the change of matrimonial regime: by abandoning the community regime and adopting a regime of separation, valuable community assets were shifted to Burger’s wife, thereby defeating the enforcement of the preexisting debt judgment. In such a case, the revocatory action allows third party creditors to step in and nullify the act, provided that the fraudulent act of failure to act “causes or increases the obligor’s insolvency.”⁴⁰

In *Radcliffe v. Burger*, the Louisiana Supreme Court recognized that the revocatory action was the appropriate remedy for the case

36. SUSAN KALINKA, JEFFRY W. KOONCE & PHILIP T. HACKNEY, *LOUISIANA CIVIL LAW TREATISE—LIMITED LIABILITY COMPANIES AND PARTNERSHIPS: A GUIDE TO BUSINESS AND TAX PLANNING* § 1:44 (4th ed., West 2019)

37. ANDREA CARROLL & RICHARD D. MORENO, *16 LOUISIANA CIVIL LAW TREATISE—MATRIMONIAL REGIMES* § 7:5 (4th ed., West 2019)

38. PLANIOL, *supra* note 31, at 191.

39. *Id.*

40. LA. CIV. CODE ANN. art. 2036 (2019).

at issue.⁴¹ However, the court denied the revocatory action requested by Radcliffe because of the narrow language utilized by the creditor. In fact, the court stated “the record is devoid of any evidence” to prove that the new marriage agreement “caused or increased Mr. Burger’s insolvency.”⁴² The proof of insolvency is the hot-button issue here. Proof of preexisting insolvency or of causation of insolvency is required by article 2036, and according to article 2037: “An obligor is insolvent when the total of his liabilities exceeds the total of his fairly appraised assets.” This holding serves as a warning: a plaintiff to a revocatory action risks a multi-million-dollar loss by coming to court without his opponent’s accounts and balance sheets—prove the figures so that the court can do the math.

41. *Radcliffe*, 219 So. 3d at 302.

42. *Id.*