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Community Property - Marital Portions - Effect of Separation Prior to Death

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Notes

COMMUNITY PROPERTY—MARITAL PORTION—EFFECT OF SEPARATION PRIOR TO DEATH—Plaintiff and wife separated after living together for only nine months. Nearly ten years later the wife died, bequeathing to her mother an estate valued at approximately $38,000. Plaintiff sued the legatee for a portion of the estate as provided by Article 2382 of the Civil Code.[1] *Held*, "the

1. "When the wife has not brought any dowry, or when what she brought as a dowry is inconsiderable with respect to the condition of her husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the marital portion; that is, the fourth of the succession in full property, if there be no children, and the same portion, in

marital fourth is not recoverable where the spouses were living separate and apart, with their marital relationship severed, at the time of and for a substantial period prior to the dissolution of the marriage by death, unless the separation be caused solely by the conduct and acts of the decedent." *Malone v. Cannon*, 41 So. (2d) 837 (La. 1949).[2]

The right to the marital portion is predicated on the principle that neither of the married parties who have lived together in the common enjoyment of wealth and of the position which it gives shall be suddenly reduced to want.[3] Thus, it is a personal right of the surviving spouse which can only be exercised by his heirs if the surviving spouse judicially demanded the marital portion before his death.[4] Article 2382 of the Civil Code[5] establishes three prerequisites to the existence of this right: (1) the wife must not have brought any dowry, or if she brought one it must be inconsiderable with respect to the condition of her husband;[6] (2) the deceased spouse must die "rich"; (3) the surviving spouse must be left in "necessitous circumstances." Since the court has consistently held that the terms "rich" and "necessitous circumstances" should be treated relatively and applied in a comparative manner,[7] each case is decided on its

usufruct only, when there are but three or a smaller number of children; and if there be more than three children, the surviving, whether husband or wife, shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife, who died first.

"Whenever, during the administration of any succession, it appears that the surviving spouse will be entitled to the marital portion above provided for, upon final liquidation of the estate of the deceased, the survivor in necessitous circumstances shall be entitled to demand and receive from the executor or administrator of such succession, a periodical allowance to be fixed by the court wherein the proceedings are pending. Such allowance shall be based upon the apparent amount of the marital portion invested at five per cent. per annum interest. And should the marital portion, as finally fixed, not yield the revenue equal to the allowance as fixed by the court, the surviving spouse shall be charged with, and there shall be deducted from the marital portion, the amount of such deficiency. The provisions of this article shall apply to successions pending and unsettled, as well as those hereafter opened." Art. 2382, La. Civil Code of 1870.

2. 41 So. (2d) 837, 845 (La. 1949). The case was remanded to the district court to receive evidence relating to the reason for the separation and living apart of the plaintiff and decedent.

3. Succession of Fortier, 3 La. Ann. 104 (1848).

4. "It is not a donation by the deceased; but one by the sovereign acting in the place of the unwilling, hindered, forgetful or ignorant defunct spouse." The spirit of the law and its purpose would be defeated were the heirs in this connection permitted to claim the right. Succession of Justus, 44 La. Ann. 721, 724, 11 So. 95, 96 (1892).

5. Art. 2382, La. Civil Code of 1870.

6. The author has been unable to find a case in which the existence of a dowry was the basis for denial of recovery.

7. Melancon's Widow v. His Executor, 6 La. 105 (1833); Foster v.

own facts. In deciding whether the surviving spouse was left in necessitous circumstances, the court has considered the possibility of alimony from a rich father[8] and the possibility of support by children,[9] but has refused to consider the ability of a young surviving spouse to make his own living.[10] A deceased spouse has been considered rich when he left an estate of only $2,000,[11] while a surviving spouse who had an estate of $1,800 has been considered in necessitous circumstances.[12] Since the article provides that the surviving spouse must be left in necessitous circumstances, all legacies granted to him must be deducted from the marital portion.[13]

Though the code does not so provide, early in the jurisprudence the courts read into Article 2382 the requirement that there should have been a common enjoyment of the wealth.[14] The court felt that this was the only way that the spirit of the law could be carried out, and stated that "However general may be the terms in which it [the marital portion article] may be expressed, it only extends to things or persons it appears the lawmaking power intended it to reach."[15] In the leading marital portion cases in which this principle was applied,[16] the court squeezed this requirement into the code article by stating that when the leavetaking took place long prior to the death, the deceased did not leave the survivor in necessitous circumstances.[17]

Ferguson, Tutor, 1 La. Ann. 262 (1846); Succession of E. H. Leppelman, 30 La. Ann. 468 (1878); Succession of Kunemann, 115 La. 603, 39 So. 702 (1905); Succession of Blackburn, 154 La. 618, 98 So. 43 (1923); More v. Succession of More, 7 So. (2d) 716 (La. App. 1942); Succession of Carter, 32 So. (2d) 44 (La. App. 1947). For a detailed comparison of cases, see Daggett, The Community Property System of Louisiana (1945) 96-97, and Comment (1943) 18 Tulane L. Rev. 301.

8. Succession of Leppelman, 30 La. Ann. 468 (1878).

9. Succession of Carter, 32 So. (2d) 44 (La. App. 1947).

10. Succession of Fortier, 3 La. Ann. 104 (1848).

11. Moore v. Succession of Moore, 7 So. (2d) 716 (La. App. 1942). The surviving spouse was sixty-eight years old, owned no property, and was without a means of livelihood.

12. Dupuy v. Dupuy, 52 La. Ann. 869, 27 So. 287 (1899). The deceased spouse left a $13,000 estate.

13. Ibid.

14. Armstrong v. Steeber, 3 La. Ann. 713 (1848).

15. Richard v. Lazard, 108 La. 540, 549, 32 So. 559, 563 (1902).

16. Armstrong v. Steeber, 3 La. Ann. 713 (1848); Pickens v. Gillam, 43 La. Ann. 350, 8 So. 928 (1891); Succession of Rogge, 30 La. Ann. 1220, 23 So. 933 (1898). The court has previously considered the marital portion article and widow's homestead article, Art. 3252, La. Civil Code of 1870, in pari materia. Thus it has also been applied to widow's homestead cases. Richard v. Lazard, 108 La. 540, 32 So. 559 (1902).

17. Pickens v. Gillam, 43 La. Ann. 350, 353, 8 So. 928, 929 (1891). "The article of our code is clear. 'Leaving the survivor in necessitous circumstances.'

"After these many years of unfriendly separation, the deceased did not

The court had strong moral justification for using this doctrine in *Armstrong v. Steeber*,[18] the first case in which it was applied, because the surviving wife had left the husband to live in concubinage with another man. However, only eight years later, when the facts of the case did not provide moral justification for the application of the common enjoyment of wealth doctrine, the court circumvented that doctrine and based its decision on the fault of the parties.[19] In that case the plaintiff wife had obtained a decree of separation from bed and board, but the husband died before the final decree for divorce was demanded. The court allowed recovery, stating that until the final divorce decree was granted, the plaintiff was still a "wife" within the meaning of the marital portion article and that the wife was free from fault because she was legally excused from cohabitation. Thus, the court again took the stand supported by moral justification. This case, however, did not overrule the doctrine previously established in the *Armstrong* case. In the next two marital portion cases in which this question was involved,[20] the facts were strikingly similar to those in the *Armstrong* case, and the court denied recovery by again applying the community enjoyment of wealth doctrine. This apparent conflict in the jurisprudence was reviewed by the court in *Richard v. Lazard*,[21] a widow's homestead case in which the court said that the widow's homestead article[22] and marital portion article were in pari materia, and the community enjoyment of wealth doctrine was upheld as being the established law in Louisiana; but the court rejected this decision in two subsequent marital portion cases. A literal interpretation of Article 2382 was used to allow recovery in *Succession of Pelloat*,[23] where the marriage had been secret and the spouses had not lived together as husband and wife, while in *Succession of Guillon*,[24] where the wife died nineteen days after the marriage, the court flatly rejected the community enjoyment of wealth doctrine and allowed the surviving spouse to recover.[25] The most

leave the survivor in necessitous circumstances. The leavetaking took place long prior to the death."

18. 3 La. Ann. 713 (1848).

19. Gee v. Thompson, 11 La. Ann. 657 (1856).

20. Pickens v. Gillam, 43 La. Ann. 350, 8 So. 928 (1891). The wife had obtained a separation from bed and board seventeen years prior to her death. Succession of Rogge, 50 La. Ann. 1220, 23 So. 933 (1898). The parties had been separated for eight years before the wife's death, during which time the wife had twice attempted to get a divorce.

21. Richard v. Lazard, 108 La. 540, 32 So. 559 (1902).

22. Art. 3250, La. Civil Code of 1870.

23. 127 La. 873, 54 So. 132 (1911).

24. 150 La. 587, 91 So. 53 (1922).

25. "However, a complete answer to this contention is that no such

recent case dealing with this problem, *Veillon v. Lafleur's Estate*,[26] involved another widow's homestead claim in which the court again held that the articles on marital portion and widow's homestead are in pari materia. The wife had deliberately abandoned her husband and lived separate and apart from him during the last four years of his life. In allowing recovery the court rejected the community enjoyment of property argument by stating that the article "makes no distinction between the faithful wife and the unfaithful wife."[27]

When the court in the principal case was confronted with the jurisprudence supporting a literal construction of the marital portion article, it distinguished the *Guillon* and *Pelloat* cases by stating that even though they unequivocally repudiated the common enjoyment doctrine, neither of them "either expressly or impliedly overrule(d) the former decisions insofar as they held that a surviving spouse could not recover where for a long continuous period prior to the death of the other there had been a living separate and apart, the experiencing of an abnormal marital relationship."[28] The court then disposed of the holding in the *Veillon* case by stating that though the decision was valid as it related to the widow's homestead article, it did not provide precedent for the marital portion article, since the two articles are not in pari materia. Thus, as a result of the decision in the principal case, the community enjoyment doctrine has been expressly repudiated, and when the specific requirements of the Code are met, the court will deny recovery to the plaintiff only where the death of one of the spouses was preceded by a long period of separation caused by the conduct of the surviving spouse.

As mentioned above, the court also decided that the widow's homestead article[29] and the marital portion article are not in

condition is attached by article 2382 of the Civil Code to the right of a necessitous husband or wife to claim the marital fourth." 150 La. 587, 593, 91 So. 53, 55.

26. Veillon v. Lafleur's Estate, 162 La. 214, 110 So. 326 (1926).

27. "Our own conclusion is that the law invoked by the plaintiff is clear and explicit. It attaches no qualifications and imposes no conditions upon the necessitous wife who seeks to avail herself of its beneficial provisions. It makes no distinction between the faithful wife and the unfaithful wife. The husband, who is the sole judge of his feelings and of his honor, is the one to do this by taking appropriate legal action to sever the matrimonial tie if he is dissatisfied therewith. If he does not choose to take such action during his lifetime, no one, after he is dead, ought to be permitted to question the status of his wife and to contest her preferential right to receive $1,000 out of her husband's estate. Veillon v. Lafleur's Estate, 162 La. 214, 222, 110 So. 326, 329.

28. Malone v. Cannon, 41 So (2d) 837, 842 (La. 1949).

29. Art. 3252, La. Civil Code of 1870: "Whenever the widow or minor children of a deceased person shall be left in necessitous circumstances,

pari materia. This was an express overruling of its previous decisions in *Richard v. Lazard*[30] and *Veillon v. Lafleur's Estate*,[31] but the author feels that the court was fully justified in reaching this decision. The term "necessitous circumstances" means something different in each article; it is relative in the marital portion article, but absolute in the widow's homestead article. Furthermore, in order for the wife to recover under the widow's homestead article, the husband need not die rich,[32] and her claim is preferential to the claims of creditors;[33] whereas, though provision is made for a periodical allowance during the pendency of the proceedings,[34] the surviving spouse cannot recover the marital portion until final settlement of the succession.[35] One is granted in the interest of society, while the other is granted in honor of the marriage. Thus, the widow's homestead, which is granted in the interest of society, does not apply to a surviving husband, because the legislature assumes that he is capable of taking care of himself; whereas, the marital portion, which is granted in honor of the marriage, treats the surviving husband and wife alike. Another distinction is that the marital portion is a certain percentage of the deceased's estate, but the widow's homestead cannot exceed $1,000. It is hoped that the court's decision on this point will not be disturbed.

Even though the decision in the present case finds support in some of the early jurisprudence, the question remains whether it is an equitable and just decision and one which is reinforced by strong public policy. In deciding that fault should be the basis for determining recovery in cases of this nature, the court

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and not possess in their own rights property to the amount of one thousand dollars, the widow or the legal representatives of the children, shall be entitled to demand and receive from the succession of the deceased husband or father, a sum which added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars, and which amount shall be paid in preference to all other debts, except those secured by the vendor's privilege on both movables and immovables, conventional mortgages, and expenses incurred in selling the property. The surviving widow shall have and enjoy the usufruct of the amount so received from her deceased husband's succession, during her widowhood, which amount shall afterwards vest in and belong to the children or other descendants of the deceased husband."

30. 108 La. 540, 32 So. 559 (1902).

31. 162 La. 214, 110 So. 326 (1928).

32. Art. 3252, La. Civil Code of 1870.

33. Succession of Justus, 44 La. Ann. 721, 725, 11 So. 95, 96 (1892); Succession of Tacon, 188 La. 510, 177 So. 590, 591 (1937); Succession of Kuntz, 179 So. 623 (La. App. 1938).

34. Art. 2382, La. Civil Code of 1870; Barrett v. Pierson, 163 La. 541, 112 So. 410 (1927).

35. Harrell v. Harrell, 17 La. 374 (1841); Duriaux v. Doiron, 9 Rob. 101 (La. 1844).

is seizing a complex administrative problem which can easily reap injustice. If a husband wilfully "deserts" his wife because she has been nagging him for years, who is at fault? Can it ever be said who is subjectively at fault when spouses separate? Apparently the court in the principal case acknowledged this problem, for it remanded the case to the district court to receive evidence as to fault. In many cases of separation the spouses decide by mutual consent that their personalities are incompatible. In such cases are they not saying that either both are at fault or neither is at fault? If the parties desire to terminate the marriage, a method of divorce which avoids the question of fault is clearly open to the spouses;[36] the trend of recent divorce legislation in this state is apparently directed towards allowing greater latitude in getting divorces without deciding the question of fault.[37] The author suggests that the legislature has pursued this policy because of a realization of the practical complexities in deciding a question of fault and in a desire to preserve the privacy of the marital relations. Thus, when the parties do not attempt to get a divorce after such a long period of separation, is it not possible that they hoped for reconciliation, or had personal reasons for not dissolving the marriage tie? Our whole divorce law appears to be predicated on this assumption.[38] Even when the court in a divorce proceeding inquires into the private relations of the spouses, the defendant spouse is at least served with notice of the proceedings and is given the opportunity to contest the evidence and submit some of his own. However, when the court inquires into the private relations of the parties after the death of one of the spouses, in effect there is a divorce proceeding without opportunity for both parties to be heard. By fostering inquiry into the marital relations, it appears that the present decision is transgressing on the basic civil law doctrines of sanctity of the marriage and privacy of the individual. Even

36. La. Act 430 of 1938, § 1 [Dart's Stats. (1939) § 2202], provides for the granting of a final divorce decree after a separation of two years. It is interpreted not to involve the question of what cause produced the voluntary separation or on whose fault the separation was brought about. North v. North, 164 La. 293, 113 So. 852 (1927).

37. La. Act 269 of 1916 provided for the granting of a divorce if the parties had been living separate and apart for seven years; La. Act 31 of 1932 reduced the period to four years; and La. Act 430 of 1938 [Dart's Stats. (1939) § 2202] further reduced it to two years.

38. Art. 139, La. Civil Code of 1870: "... except in the cases where the husband or wife may have been sentenced to an infamous punishment, or guilty of adultery, no divorce shall be granted unless a judgment of separation from bed and board shall have been rendered between the parties, and one year shall have expired from the date of the judgment of separation from bed and board and no reconciliation shall have taken place. . . ."

though the court finds some moral justification for its position in denying recovery to an unfaithful spouse, in view of the ample protection that is afforded the wealthy spouse through divorce procedure and the legislative policy of making divorce possible without considering the question of fault, the best approach is that taken in the *Veillon* case, wherein the court said, "It (widow's homestead article) makes no distinction between the faithful and unfaithful wife. The husband, who is the sole judge of his feelings and of his honor, is the one to do this by taking appropriate legal action to sever the matrimonial tie if he is dissatisfied wherewith."[39]

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39. Veillon v. Lafleur's Estate, 162 La. 214, 222, 110 So. 326, 329 (1926), discussed supra note 27.