

Creditors' Rights and the Community of Gains

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may create new difficulties with respect to section 677 of the Internal Revenue Code.⁴⁹ Section 677 (b) penalizes the settlor in situations where trust income is utilized to discharge his obligations by including and taxing such sums in the settlor's return. The court in *Brooke* discussed this issue and resolved it in favor of settlor-donor, finding that under Montana law the use of rental income was in fact for purposes other than *legally* enforceable support obligations of donor.⁵⁰

It can be seen that application of *Brooke* may result in inequitable taxpayer treatment depending upon idiosyncrasies of state law.⁵¹ This type of discrimination, which both Congress and the courts continually strive to eliminate, combined with the spectre of tax avoidance, bodes ill for reliance upon *Brooke*.

James R. Raborn

CREDITORS' RIGHTS AND THE COMMUNITY OF GAINS

Mr. Creech endorsed a promissory note given to his divorced wife by Capitol Mack, Inc. in payment for the purchase of stock she had acquired in the partition of the community of gains. Creech remarried and subsequently both Capitol Mack and Creech defaulted on this note. In a suit by Creech's first wife, the Louisiana supreme court overruled *United States Fidelity & Guaranty Co. v. Green*¹ and held that the husband's antenuptial creditor may enforce his right by execution against those assets of the husband forming part of the community of gains of the second marriage. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973).

At first glance, the court's decision is in apparent conflict with the literal language of Louisiana Civil Code article 2403:

In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

This article has been subjected to varying constructions for over a century. Prior to *Green*, virtually all the decisions indicated that the

49. See LA. CIV. CODE art. 227. The third factor used by the *Brooke* court in testing the gift-leaseback was "use of the donated property for the donor's benefit." *Brooke v. United States*, 468 F.2d 1155, 1158 (9th Cir. 1972).

50. 468 F.2d at 1158.

51. A primary example was the passage of an income splitting provision in 1948 to equalize tax treatment of spouses without community property regimes with those in states such as Louisiana where income splitting between spouses is accomplished by local law.

1. 252 La. 227, 210 So. 2d 328 (1968).

assets of the community were subject to seizure for satisfaction of the debts of the husband contracted before marriage.² The reasoning was that inasmuch as Civil Code article 2404³ empowers the husband to administer the community of gains as its "head and master" the assets thereof form part of his patrimony.

The confusion leading to the decision in *Green* stems from earlier attempts to classify the right of the wife during the existence of the community as one of ownership, while simultaneously recognizing the husband's powers of administration and control. As early as 1832, *Dixon v. Dixon's Executors*⁴ proclaimed the wife's right to one-half of the community to be enforceable only when the community is dissolved.⁵ The court did not speak of the wife having an interest in the community during its existence.⁶ In 1847 the decision of *Guice v. Lawrence*⁷ expressly elaborated on the nature of the wife's interest:⁸

The laws of Louisiana have never recognized a title in the wife

2. See, e.g., *Davis v. Compton*, 13 La. Ann. 396 (1858); *Landreneau v. Ceasar*, 153 So. 2d 145 (La. App. 3d Cir. 1963); *Stafford v. Sumrall*, 21 So. 2d 83 (La. App. 1st Cir. 1945); *Magnolia Petro. Co. v. Crigler*, 12 So. 2d 511 (La. App. 2d Cir. 1942); *First Nat. Bank v. Coreil*, 145 So. 395 (La. App. 1st Cir. 1933); *Favrot v. Paine & Bourgeois*, 118 So. 775 (La. App. 1st Cir. 1928); *Hill v. Abell*, 5 La. App. 497 (2d Cir. 1927).

3. LA. CIV. CODE art. 2404: "The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

"He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all title wherein there is no direct, material advantage to the donor.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud."

4. 4 La. 188 (1832).

5. *Id.* at 193-94: "As the head of the community he may dissipate it, or by bad management he may reduce the acquisitions; but if he does not, the right of the wife to the one-half is a legal right, and may be enforced not alone when the marriage is dissolved, but whenever the community ceases." See also *Theall v. Theall*, 7 La. 226 (1834).

6. *Id.* at 192: "But admitting that the wife's title to the property did not vest, until the community was dissolved, still her right to have a equal portion of such property acquired during coverture, as might be found at its dissolution, existed."

7. 2 La. Ann. 226 (1847).

8. "Fictitious" is not a correct word to use in speaking of the interest of the wife during marriage. See Pugh, *The Spanish Community of Gains in 1803: Sociedad De*

during marriage, to one-half of the acquets and gains. The rule of the Spanish law on that subject, is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. . . . But *soluto matrimonio*, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership.⁹

Perhaps the most often cited case construing article 2403 is *Davis v. Compton*,¹⁰ which likewise held that the property acquired during the marriage is subject to seizure and sale to satisfy a judgment obtained against the husband before marriage. The court reasoned that just as the husband could alienate the community assets without the consent of his wife, so could an antenuptial creditor of the husband seize the effects of the community to satisfy his claims.¹¹ Defining the wife's interest, the court concluded: "moreover, the wife has only an eventual interest in the community, and may never accept it."¹² Subsequent decisions followed *Davis*, recognizing the wife's right to one-half at the dissolution of the community of gains.¹³

This seemingly settled jurisprudence construing Civil Code articles 2403 and 2404 was placed in jeopardy in 1926. In *Phillips v. Phillips*,¹⁴ the Louisiana supreme court defined the wife's interest in the community assets:

The wife's half-interest in the community property is not a mere expectancy during the marriage; it is not transmitted to her by or in consequence of a dissolution of the community. The title for half of the community property is *vested* in the wife the moment it is acquired by the community or by the spouses jointly, even

Gananciales, 30 LA. L. REV. 1, 12 (1969): "In the Spanish concept the wife 'had' (Spanish '*ayan*' from the Latin '*habere*') the *gananciales* in the sense of owning and possessing them; but she did not 'hold' (Spanish '*tiene*' from the Latin '*tenere*') them. The husband, who was said 'to have and to hold' the *gananciales*, was empowered to act in regard to them. He was described as '*in actu*' (in control) as well as '*in habitu*' (in present interest). The wife was only '*in habitu*' or '*in habitu et in creditu*' (in present interest as creditor) in regard to the *bienes gananciales*, but not less a co-owner." (Citations omitted.)

9. *Guice v. Lawrence*, 2 La. Ann. 226, 228 (1847). See also *Glenn v. Elam*, 3 La. Ann. 611 (1848) (the husband's separate estate is responsible to the community upon its dissolution for his debts which have been paid out of the funds of the community).

10. 13 La. Ann. 396 (1858).

11. *Id.*

12. *Id.*

13. *Melady v. Bonnegent*, 142 La. 534, 77 So. 143 (1917); *Bister v. Menge*, 21 La. Ann. 216 (1869).

14. 160 La. 813, 107 So. 584 (1926).

though it be acquired in the name of only one of them.¹⁵

This definition given the wife's interest in *Phillips* destroys the intended meaning of article 2404. Furthermore, the statement that the wife has a presently "vested" one-half interest in the community is in direct conflict with her right under Civil Code article 2410 to renounce the debts as well as the assets of the community of gains at its dissolution; no one may renounce his own debts.

In 1954 *Fazzio v. Krieger*¹⁶ held that the obligation of a subsequently remarried husband to pay alimony to his former wife "is an obligation imposed by law and is clearly not a debt within the meaning of Article 2403 of the Civil Code"¹⁷ Although the court was able to avoid a decision based on article 2403, in dictum, *Phillips* was reaffirmed; the court stated that only the husband's half interest in the community assets is subject to seizure for the debts he incurred before marriage.¹⁸ The court did mention, however, that "there is authority in the jurisprudence of this state to the effect that the property of the community is liable to seizure for the debts of the husband contracted before marriage, notwithstanding the provisions of Article 2403."¹⁹ The court indicated that article 2403 must be read in conjunction with article 2404 and cited earlier court decisions.²⁰

The supreme court in *United States Fidelity & Guaranty Co. v. Green*²¹ relied on *Phillips*, holding that a husband's antenuptial creditor may not enforce his right by execution against those assets forming part of the community of gains. The decision was supported by a literal application of the last phrase of article 2403. However, as Justice Barham stated correctly in *Creech*, this article deals only with the parties to the contract of marriage and has no application to third parties.²² Immediately, *Green* was noted with disfavor as an erroneous application of article 2403.²³

15. *Id.* at 825-26, 107 So. at 588. (Emphasis added.)

16. 226 La. 511, 76 So. 2d 713 (1954).

17. *Id.* at 522, 76 So. 2d at 716.

18. *Id.* at 523, 76 So. 2d at 717.

19. *Id.* at 522, 76 So. 2d at 717.

20. *Id.*, citing, *Davis v. Compton*, 13 La. Ann. 396 (1858); *Glenn v. Elam*, 3 La. Ann. 611 (1848); *Guice v. Lawrence*, 2 La. Ann. 226 (1847).

21. 252 La. 227, 210 So. 2d 328 (1968).

22. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 503-04 (La. 1973).

23. See *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Matrimonial Regimes*, 30 LA. L. REV. 219, 221 (1970): "So far as third parties are concerned, the nature of the wife's interest *vis-a-vis* her husband during the regime is irrelevant. What is relevant to them is that the husband has control over the community assets to such a degree that third persons may for most purposes treat them as if his in their entirety." See also Note, 29 LA. L. REV. 409 (1969); Note, 43 TUL. L. REV. 376 (1969).

The *Creech* decision indicates that this criticism was well received. Justice Barham, speaking for the court,²⁴ held that article 2403 regulates only the rights between the spouses, the community of gains being no more than a contract between them which renders the community a part of the husband's patrimony until its dissolution. Thus Justice Barham was able to state that "third parties necessarily view the husband's patrimony as including the liabilities and assets of the community"²⁵ and also that:

We thus finally conclude that since the community of gains is a part of the husband's patrimony, it is subject to creditor's rights, Civil Code Articles 3182²⁶ and 3183,²⁷ however, the husband must account for the enrichment of his separate estate by the discharge of antenuptial debts upon the dissolution of the community.²⁸

The court specifically overruled *Green* and overruled and modified *Phillips*²⁹ and *Fazzio*³⁰ to the extent that their reasoning was in conflict with *Creech*.

The source of Louisiana's law of community of gains is Spanish.³¹ Article 2403 can be traced "almost verbatim" to the *Fuero Real*.³² The problem of defining the interests of the husband and wife during the existence of the community can be settled by reference to Febrero and other early Spanish commentators, who distinguish the rights of the parties during the marriage from the rights that exist at the termination of the matrimonial regime.³³ During the existence of the community, the husband serves as "head and master" under Civil Code article 2404. In the absence of a marriage contract, article 2403 oper-

24. This was a 6-1 decision with Justice Summers dissenting.

25. *Creech v. Capital Mack, Inc.*, 287 So. 2d 497, 508 (La. 1973).

26. LA. CIV. CODE art. 3182: "Whoever has bound himself personally is obliged to fulfill his engagements out of all his property movable and immovable, present and future."

27. LA. CIV. CODE art. 3183: "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference."

28. *Creech v. Capital Mack, Inc.*, 287 So. 2d 497, 510 (La. 1973).

29. The court particularly modified the statement in *Phillips* that *Guice* and its progeny are not the law for holding the community liable to the rights of the antenuptial creditors of the husband. *Id.* at 510.

30. *Id. Fazzio* was overruled to the extent that it "limits the husband's antenuptial creditors' claim to the husband's one half interest in the community"

31. Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 5 (1959); Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1 (1969).

32. *Creech v. Capital Mack, Inc.*, 287 So. 2d 497, 506 (La. 1973).

33. *Id.*

ates as a rule of suppletive law to give content to the marriage contract that the spouses are deemed to consent to tacitly.³⁴

In discussing article 2403, it must be noted that Febrero was writing for notaries who needed help in succession proceedings involving the distribution of the community of gains upon the dissolution of a marriage by death. Febrero was not writing about the interests of husband and wife during the existence of the community, but rather of their rights at its dissolution.³⁵ Article 2403 should be read to do no more than give the wife the right to be reimbursed by her husband, at the dissolution of the community of gains, for his antenuptial debts that were satisfied from the community assets. Article 2403 serves as an accounting procedure for paying debts and reimbursing one of the spouses for community assets used to pay the other's separate debts during marriage.

A literal construction of article 2403 would destroy the meaning and intent of the more specific pronouncements of article 2404. Under this article, the husband serves as the "head and master" of the community and administers it as if it were his own separate property.³⁶ Consequently, third persons view the husband's patrimony as including the assets and liabilities of the community.³⁷ This is likewise true in France and Spain.³⁸

Article 2403 states that "the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund" However, this article was never intended to be applied literally so that, as between the spouses, *all* debts incurred during marriage would have to be discharged from

34. LA. CIV. CODE art. 2399: "Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary." In order to appreciate the contractual character of this regime "super-induced" by marriage in the absence of an express marriage contract, it is essential to note that the entire subject is treated under Title VI of Book III of the Civil Code, a title on the marriage contract; the first of the several titles on particular contracts.

35. Creech v. Capitol Mack, Inc., 287 So. 2d 497, 506 (La. 1973).

36. Pugh, *The Spanish Community of Gains in 1803: Sociedad De Gananciales*, 30 LA. L. REV. 1, 12 (1969): "Whereas the wife owned equally with her husband, he, as 'business manager' of the partnership, actually administered the community of gains. For this reason the husband of ancient Spain and the *sociedad* were identical in the eyes of all third persons, even as they are today in Spain." (Citations omitted.)

37. Note, 29 LA. L. REV. 409, 413 (1969): "Manresa, a highly respected twentieth century commentator, states that during the marriage the assets of the community are regarded as though they were a part of the husband's patrimony. As to third persons, the husband and the community are one."

38. Creech v. Capitol Mack, Inc., 287 So. 2d 497, 509 n.12 (La. 1973) (citing and explaining articles 1408 and 1410 of the Spanish *Código Civil* and articles 1409 and 1410 of the French *Code Civil*).

community funds. For example, if the wife enters into a contract concerning her own separate property during the existence of the community, this is her separate obligation. Her creditors could not demand execution against assets of the community of gains. A second example is that of a husband accepting, during the existence of the community of gains, a succession in which the liabilities exceed the assets.³⁹ The inherited liabilities would be separate to him. The accepting husband's succession creditors could obtain execution against any assets in his patrimony, including those of the community but then the wife would be entitled to half the value of the seized community assets on termination of the regime. To apply article 2403 literally would be contrary to the principle evident in Civil Code articles 2404 and 2408,⁴⁰ namely, that an obligation will be classified as a *community debt* only if: (1) it is properly incurred by the husband during marriage; and (2) it is incurred in a matter pertaining to the common concerns of the spouses.⁴¹

It likewise must be remembered that the husband's position as "head and master" is administrative. While the community of gains exists, it is improper to speak of true "ownership" in either the husband or the wife. Although the husband has administrative control of the entire community, his eventual rights depend on the election of the wife.⁴² The wife has three alternatives upon the dissolution of the community of gains: (1) she may renounce her share of the community of gains, in which case the husband retains all the assets and remains liable for all debts to be paid from community funds; (2) the wife may accept, entitling husband and wife to an immediate partition of the community and obligating the wife to pay half the community debts; or, (3) the wife may accept her share of the community with benefit of inventory, limiting her liability to her share of the community debts that can be satisfied out of her share of the community assets.⁴³

39. Although accepting a succession is not technically a contract, it would be considered as one under Louisiana Civil Code article 2292.

40. LA. CIV. CODE art. 2408: "When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it is proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade."

41. R. PASCAL, LOUISIANA FAMILY LAW COURSE Ch. 6.6, at 78 (1973).

42. LA. CIV. CODE art. 2410: "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains."

43. R. PASCAL, LOUISIANA FAMILY LAW COURSE Ch. 6.7, at 78-79 (1973).

The husband's administrative duties as "head and master" have many similarities to the duties of a trustee under the Louisiana Trust Code,⁴⁴ although there is by no means a direct analogy. The community of gains could be considered similar to a trust for both spouses, with the husband serving as trustee.⁴⁵ Certainly the husband has greater freedom of action than a trustee, but the wife is not without substantial protection against acts deliberately to her prejudice, and she need never suffer personal liability because of the husband's acts:

The wife has an acquired right to sue for a separation of property during the marriage in case of mismanagement, an acquired right to accept or renounce the community upon its dissolution, an acquired right to accept the community with benefit of inventory upon dissolution, an acquired right to sue the husband or his heirs for an alienation made in fraud, and an acquired right to demand an accounting for enrichment of the husband's separate and paraphernal estate from the community of gains.⁴⁶

The Civil Code provides a plan of order between the husband and the wife under which the spouses agree to pool certain of their assets and certain liabilities incurred by the husband in their common interest. Upon dissolution of the community, the wife is given several alternatives whereby she may benefit from their gains during marriage without risking the loss of more than half of the community assets. This benefit she would lose if she either "owned" an interest in the combined assets and liabilities or participated in its management. The *Creech* decision properly defines the wife's and the husband's relationship in the community of gains thereby preserving the matrimonial régime as envisioned in the Civil Code.

Gerald E. Songy

CHILD CUSTODY: PREFERENCE TO THE MOTHER

The granting of custody of minor children pursuant to a judicial separation or divorce is governed by Civil Code articles 146 and 157. In provisional proceedings prior to a judgment of separation or divorce, if custody is contested, article 146 provides that preference will be given the mother.¹ However, according to article 157, once a judg-

44. LA. R.S. 9:2061-2128 (1950).

45. *Id.*; LA. R.S. 9:1781 (1950): "A trustee is a person to whom title to the trust property is transferred to be administered by him as a fiduciary."

46. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 508 (La. 1973).

1. LA. CIV. CODE art. 146: "If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and unde-