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MATRIMONIAL REGIMES

Robert A. Pascal*

COMMUNITY OF GAINS ALWAYS CONTRACTED,
NEVER IMPOSED BY LAW

Dictum in *Williams v. Williams*¹ states that "[t]he community of . . . gains is imposed . . . by operation of law absent a contrary stipulation in a marriage contract. La. Civil Code arts. 2329, 2332, 2399 (1870)." If for no other reason, this dictum would be erroneous under Louisiana Revised Statutes 9:264, added by Act 693 of 1975, which speaks of "the conclusive presumption of law that spouses who have not entered into a marriage contract before marriage did contract tacitly the community of gains."

This legislation of 1975, however, merely confirms what has been true since 1825. Before 1825 the community of gains was a "necessary consequence" of marriage and hence "superinduced of right" or imposed by law.² The Digest of 1808, consistently, did not permit modification or exclusion of the community of gains and contained no articles on a separation of property by marriage contract. The Civil Code of 1825 introduced these changes.³ The new possibility of altering or excluding the community of gains rendered the laws on the subject *suppletive* rather than *imperative* and, of logical necessity, converted the community regime from one imposed by law to one which the spouses, as persons presumed to know the law, tacitly contracted in the absence of stipulations to the contrary. The language of articles 2332 and 2399, according to which the community is "imposed by law" or "superinduced of right" (*i.e.*, as a matter of law) in the absence of a stipulation to the contrary, must be understood to signify no more than that the "imposition" or "superinduction" is *by suppletive law*, the very function of which is to supply the rights and obligations which persons may well be presumed to have intended to accept when they have not contracted expressly on a subject.⁴

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1. 331 So. 2d 438 (La. 1976).

2. La. Digest of 1808, arts. 10 & 65, pp. 320 & 336.

3. See La. Civ. Code arts. 2312, 2394-98, and 2639 (1825), now found as LA. CIV. CODE arts. 2332, 2392-96 and 2399.

4. This understanding of the essentially contractual nature of the "legal" regime has predominated in French legal opinion since the decision in the case of the spouses Ganey, by the Parlement of Paris, in 1525. See II BATIFFOL, DROIT INTERNA-

The point is of immense practical importance. Inasmuch as the "legal" community is *contracted, not imposed by law*, changes in the law pertaining to the "legal" community cannot be made effective for persons already married unless the law gives them the right to agree to the changes and they do agree to them mutually in the manner provided by law. Heretofore, however, no Louisiana legislation amending the legal regime has ever offered persons already under it the right to agree to the changes made by the amendment, and the general law forbids the alteration of matrimonial regimes by convention.⁵ An equally important consequence of the contractual nature of the "legal" community is that it can have *direct* consequences only between the spouses themselves. Third persons may have rights and obligations against and toward the spouses as individuals, but not against a "community." It is not an entity, but only a contract between husband and wife.⁶

ALIMONY FOR HUSBAND'S RELATIVES

*Connell v. Connell*⁷ presented the question whether the husband must account to the wife, on dissolution of the community of gains, for one-half the community funds expended by him to pay alimony to his first wife and to children of the first marriage. All justices agreed he was not obliged to account in any way. The majority properly characterized the alimentary obligations as legal obligations arising during marriage.⁸ Next, however, the majority noted the literal language of article 2403, that "the debts contracted during the marriage. . . must be acquitted out of the common fund," and concluded from this that no accounting was due the wife.

The writer agrees that, if there is a community of gains between the spouses, the legislation *ought to* provide that the alimentary obligations of

TIONAL PRIVÉ, n° 618 (5th ed. 1971). Some contrary analyses are mentioned by Batiffol, *supra* at n° 619, but the reasons on which they are based are not relevant to the usual situation.

5. LA. CIV. CODE art. 2329 provides the general rule. Two exceptions not relevant here are contained in Civil Code articles 155 and 2329.

6. Pascal, *Updating Louisiana's Community of Gains*, 49 TUL L. REV. 555, 555-57 (1975).

7. 331 So. 2d 4 (La. 1976).

8. One justice characterized the obligation as an antenuptial legal obligation, but argued an exception to article 2403's rule "rationalized on the basis that the State occupies a status unlike other creditors." *Id.* at 8, 9. The writer submits that the State is not a "creditor" under the alimony laws. The alimony laws are of public concern, therefore imperative laws rather than suppletive laws, but the State cannot be considered a "creditor" under them. Only the person to whom alimony is owed is a "creditor" in this context.

each spouse are obligations of the husband so far as third persons are concerned, but payable, as between husband and wife, from the community fund and therefore without any obligation to account. But this solution cannot be admitted under article 2403. In the context of other articles of the Civil Code, article 2403 must be restricted to obligations not only incurred during the marriage, but pertaining to a matter of common concern to the spouses. Article 2403 itself, for example, affirms that antenuptial debts should be paid out of the separate funds of the obliged spouse, and it is suggested here that the rule is so because antenuptial obligations are not a matter of common concern. Article 2408 also evidences the same principle in requiring the spouse whose separate assets have been improved or augmented with community assets or energies to reimburse the other spouse one-half the value of the improvements or augmentations. Finally, it may be observed that it is extremely doubtful the justices would have judged the husband not obliged to account for one-half the community funds used by him to discharge debts he had incurred during marriage by accepting an insolvent succession. Yet a literal construction of article 2403 would require this result. In the context of these observations, therefore, the meaning of article 2403 may not be considered free from doubt and the article should be construed in the light of the principles underlying the community of gains that are ascertainable from all the texts on the subject. Article 2403, then, must be construed as requiring, as between the spouses, the payment from community funds of only those obligations incurred during the marriage that relate to matters of common concern to them.⁹

HUSBAND'S LIABILITY FOR WIFE'S PURCHASES ON HER SEPARATE ACCOUNT

The decision in *McCary's Shreve City Jewelers, Inc. v. Saucier*¹⁰ cannot be approved. A wife not living with her husband, but not separated from bed and board, sought to purchase a diamond from a jeweler and to have him mount it in her husband's class ring, all with a view to making the husband a surprise donation. Fully aware of the facts, the jeweler agreed to charge her alone for the diamond and its mounting. The diamond was supplied, the work done, and the wife made the surprise donation of the improved ring to her husband. Later the jeweler demanded payment from the husband, and the husband did cause a corporation of which he was president to pay a small amount toward the total cost of the diamond and mounting. On these facts the court gave judgment for the jeweler, reasoning

9. Pascal, *supra* note 6, at 558-61.

10. 318 So. 2d 671 (La. App. 2d Cir. 1975).

(1) that the debt had been contracted “for the benefit of the husband,” (2) that, therefore, it could be ratified by him, and (3) that he did ratify it both by his failure to repudiate his wife’s transaction and his payment of part of the price.

There is serious error in the reasoning. The wife had not entered into a contract on her husband’s account as principal, but on her own account, for her own benefit, that is to say, to make her husband a donation. There was no transaction, therefore, which the husband could repudiate and none which he could ratify. One may not repudiate a contract to which he is not a party. Nor may one ratify a contract to which he was not made a party by his own action or by that of one representing him as mandatary or *negotiorum gestor*. Hence neither the husband’s acceptance of the ring,¹¹ nor his failure to repudiate the contract, nor his payment of part of his wife’s debt could render him liable personally for her debt. He could have assumed her debt, but the assumption of another’s debt may not be proved by parol,¹² and no writing to that effect appears to have been in evidence.

The reader who might observe that the matter is not one of matrimonial regimes law would be correct, but it is discussed here because the bench and bar frequently mistakenly consider it a part of that subject. It is not matrimonial regimes law, however, not simply because our matrimonial regimes laws mention nothing about one spouse’s liability for the debts of the other, but also because Louisiana matrimonial regimes, being purely contractual,¹³ cannot give third persons rights against the spouses individually or collectively. In some legislations spouses are made liable to third persons for each other’s debts, but there is no rule of this kind in Louisiana legislation. Were there any legislation to this effect it would belong either in the general law on obligations or, better, in that on marriage.

LIABILITY OF ONE SPOUSE FOR THE DELICTS OF THE OTHER

There is no legislation on marriage, on matrimonial regimes, or on delictual obligations which renders either spouse, as spouse, liable for the delicts of the other. This absence of legislation hardly is an omission through inadvertence, for the Civil Code does detail the liabilities of parents, tutors, curators, teachers, and employers for the acts of those under

11. It is to be noted that since the wife appropriated the husband’s ring for her own purpose, and since the value of the diamond (presumably) was greater than that of the ring in its original condition, the improved ring belonged to the wife until she donated it to the husband. L.A. CIV. CODE arts. 521-23.

12. *Id.* art. 2278(3).

13. See the text at notes 1-6, *supra*.

their charge. There is no reason, nevertheless, why either spouse should not be liable to third persons for the delict of the other committed while acting as his or her "employee" or "servant." Here the general law should apply. The fact remains, however, that there can be no justification under the present legislation for holding one spouse liable personally for the delict of the other committed while an employee of a third person. This, in effect, is what was decided in *Walker v. Fontenot*.¹⁴

The legislation on the community of gains does not contain any provision clearly including the delicts of a spouse under obligations to be shared by them.¹⁵ Spanish law even now is to the effect that the delictual obligation of each spouse remains his separate obligation.¹⁶ Certainly there are instances in which the unintentional delicts of one spouse *should be* considered obligations to be shared by the spouses between themselves,¹⁷ but there is no specific legislation on this point, and certainly none which would warrant the liability of either spouse to third persons for the delicts of the other acting otherwise than as his employee or servant. The result in *Walker v. Fontenot*, therefore, must be considered correct under the legislation.

PRODUCTS OF INDUSTRY OR LABOR

Article 2402 of the Civil Code states clearly enough that the product of the industry or labor of each spouse is a community asset. It is not difficult to understand that the principle underlying the rule is that each spouse contributes his or her labor during the regime to the common fund. Construing the article in the light of its principle, there can be no doubt that payments received before the regime's inception or after its termination, but for services performed or to be performed during its existence, are com-

14. 329 So. 2d 762 (La. App. 1st Cir. 1976).

15. Under Civil Code articles 131 and 1786 construed together the husband is liable personally to third persons for the *commercial contracts* of his wife who is a *public merchant with his permission* if there is a community regime between them, but the articles do not impose liability on the husband for the wife's delicts committed in that capacity.

16. Spanish Civ. Code art. 1410 (1889). See also IX MANRESA, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL (5th ed. rev. 1950).

17. It may be argued that, *as between the spouses*, the liability for injury or damage to third persons caused *negligently* (but not intentionally) by one of the spouses while attending to a matter of common concern to them, or incurred vicariously by a spouse by reason of the act of a third person for whom he or she is responsible in a matter of common concern, should be a common obligation if there is a community regime between them. This interspousal sharing of obligations so incurred, however, should not imply direct liability of the non-acting spouse toward the third person suffering the injury or damage.

munity assets, and that sums received during the regime, but for services performed before its inception or after its dissolution, are separate assets. The all-important factor is whether the revenue has been generated by industry or labor performed or expended during the regime. For this reason the case of *Due v. Due*¹⁸ presented a false problem. The attorney spouse's services were rendered during and after the termination of the community of gains pursuant to a contingent fee contract entered into during the regime. Apparently the non-attorney spouse contended the entire fee should be considered a community asset inasmuch as the contract therefor had been entered into during marriage, whereas apparently the attorney spouse contended that, inasmuch as the fee was not payable unless and until the client's cause had been won and that event had not occurred until after termination of the regime, the entire fee was his separate property. The court reached the correct result, remanding the case for allocation to the community assets that portion of the fee corresponding to the services rendered before dissolution of the regime, but only after employing much more elaborate reasoning than the issue warranted.

The decision in *West v. Ortego*¹⁹ also may be considered in the context of the rule that the products of the industry and labor of the spouses become community assets. The case involved the allocation of sums received after dissolution of the community of gains, but for damages occasioned by an injury suffered during its existence. Properly overruling *Chambers v. Chambers*²⁰ on the point, the supreme court judged that portion of the total award which had been given for loss of earnings subsequent to the dissolution of the community regime to be the separate property of the injured husband. The decision does not cover all problems connected with dissolution of the community of gains after the husband's injury, however, and legislative attention must be addressed to the situation's manifold inequities.

RECOVERY OF MEDICAL EXPENSES

In *Charles v. Sewerage and Water Board of New Orleans*,²¹ a wife living separate and apart from her husband for over forty years was allowed to sue for and recover medical expenses incurred as a result of a personal injury. The court treated the disposition as a "judicially allowed exception" to the rule of article 686 of the Code of Civil Procedure, under which the

18. 331 So. 2d 858 (La. App. 1st Cir. 1976).

19. 325 So. 2d 242 (La. 1975).

20. 259 La. 246, 249 So. 2d 896 (1971).

21. 331 So. 2d 216 (La. App. 4th Cir. 1976).

husband is the proper party plaintiff in suits to enforce "a right of the marital community," citing a previous decision. The writer concurs in the result, but submits that article 686 was not involved at all. Whether a right is a "community right" is an issue which can arise only between the spouses, not between the spouses and third persons. This is so because, as already mentioned in this *Symposium*,²² the community is a contract between spouses specifying the manner in which they shall share their assets and liabilities and, as such, it can have direct effects between the spouses alone. The third party creditor or debtor may ask *which spouse* is his debtor or creditor, but not whether the debt or credit is a "community" or separate obligation or right. Even if as between the husband and wife the husband should pay all or part of the wife's medical expenses, that fact in itself would not render the husband liable to the suppliers of the medical services. The husband must have contracted them either personally or through a mandatary or *negotiorum gestor* acting in his name, or the suppliers of the services themselves must have acted justifiably as his gestor in rendering the services. None of these factors appears present in *Charles*. Not even the customary tacit mandate of the husband to wife to contract for ordinary needs of the wife and family come into play here, for that tacit mandate cannot reasonably be said to extend to a wife living separate and apart, especially in an instance in which she has income which she is entitled to keep as her separate property. The wife in *Charles*, then, appears to have been the only party obliged for the cost of the medical services and the only party entitled to sue to be indemnified for them.

What has been said above does not in any way deny that under the laws *on marriage*, and more particularly articles 119 and 120 of the Civil Code, the husband is obliged to support his wife. But these articles prescribe obligations of the husband toward his wife, not obligations of the husband toward third persons. These obligations arising under the law of marriage, moreover, are *subsidiary* to the obligations of the spouses to contribute to the expenses of the marriage, which include the medical expenses of each spouse, in accordance with the terms of their marriage contract;²³ and these obligations too are interspousal and have no direct bearing on the liability of either spouse to third persons for such expenses. The wife, therefore, was the proper party plaintiff to sue for and recover her medical expenses.

Whether the wife had a right to be reimbursed part of these medical expenses by her husband cannot be determined on the basis of the facts

22. See text at notes 5 & 6, *supra*.

23. LA. CIV. CODE arts. 2389, 2395, and 2435.

recited in the opinion. It may be pointed out, however, that if there is no stipulation on the subject in an express marriage contract and the wife has not brought a dowry, then she must contribute to the expenses of the marriage in proportion to her and her husband's incomes, but never more than half of her own.²⁴

ACCOUNTING PROBLEMS

The sources of difficulty

Louisiana cases dealing with indemnification for community energies or assets used for the separate benefit of one spouse or of a third person, and those dealing with indemnification for the use of separate assets for a matter of common or community concern, never have been very satisfactory to anyone. The primary underlying reason is the inadequacy of the legislation itself. There are only three Civil Code articles on the subject: article 2403 on the payment of debts, article 2408 on the improvement or amelioration of separate assets with community funds, and article 2404 insofar as it permits the husband to make donations of certain community assets, or any under certain circumstances, as long as he does not do so with the intent to defraud his wife. None of these articles is easy to construe or apply, and they leave many gaps.

Already in this *Symposium* there has been occasion to recall the inconsistency of the literal, apparent meaning of article 2403 of the Civil Code with the principles of the community of gains and the necessity of

24. LA. CIV. CODE art. 2389 provides: "If all the property of the wife be paraphernal, and she have reserved to herself the administration of it, she ought to bear a proportion of the marriage charges, equal, if need be, to one half her income." This article does not mention the earnings of the wife because, when it was adopted in 1808, the community of gains was a necessary part of every marriage contract and all earnings of the wife entered the community. La. Digest of 1808, arts. 10 & 63. The only way in which the wife could have income, therefore, was as revenue of paraphernalia. That the principle, however, is that the wife contributes to the marriage expenses (or charges) from all her income, even her earnings, where they are her separate property, cannot be denied. Thus Civil Code article 2395, in the articles on separation of property, declares the wife contributes to the marriage expenses to the amount of one half her income in the absence of a contrary stipulation in an express marriage contract. Usually under the community of gains the wife's earnings become the husband's income by entering the common fund, but since 1912, Civil Code article 2334 has provided that the earnings of the wife living separate and apart from her husband are her separate property. The wife in *Charles* was living separate and apart from her husband, was employed, therefore enjoyed separate income, and therefore was obliged to share the marriage charges with her husband in the proportion decreed by article 2389.

construing that article, as it was in *Creech v. Capitol Mack, Inc.*²⁵ in a manner consistent with those principles. Because the community assets are part of the husband's patrimony (that is, because they are assets under his control, whatever the respective "interests" of the spouses in them), he may use them to pay his separate as well as community obligations, and even his wife's (necessarily separate) obligations if he wishes, and his creditors may obtain execution against the community assets to satisfy any obligation incurred by him before or during the regime; but inasmuch as the wife has no right to control community assets (whatever her "interest" in them) they do not form part of her patrimony, she may not dispose of them, and her creditors cannot obtain execution against them for her obligations.²⁶ Article 2408 has its limitations. Its terms foresee only "increases" and "improvements" to (already acquired) separate assets of one of the spouses. It does not mention acquisitions of separate assets with community funds, probably because acquisitions with community funds were always understood to be community assets, but it also neglects the problem of assets acquired partially with community funds and partially with separate funds. It is true that under words of article 2402 of the Civil Code superceded since 1912 even acquisitions with separate funds were community assets, but the Civil Code has never contained a provision specifically providing for an accounting in that case. Now that article 2402 has been superceded in part by article 2334 as amended since 1912, things acquired with separate funds are separate assets, but there is yet no article regulating the acquisition of a thing partially with separate assets and partially with community assets or energies. Finally, the husband's authority under article 2404 to donate movables by particular title to anyone without an accounting is limited only by the provision of the same article giving the wife or her heirs the right to demand from (the husband or) his heirs half the value of that disposed of by him "by fraud, to injure his wife." Not only is the fraudulent intent difficult to prove, but absent fraudulent intent there is no limit to the extent the husband may donate community movables by particular title.

The provisions and gaps in the legislation being what they are, it is no

25. 287 So. 2d 497 (La. 1973).

26. An exception was made by LA. R.S. 9:3584 (Supp. 1975). The married woman has no right to spend her earnings, though they are community funds. The woman may, of course, obligate herself personally before or after marriage. If she does so, but does not satisfy her creditor, he may obtain execution against any of her separate assets and also, by this legislation, against her *earnings* even though they are community assets. This legislation, therefore, gives the wife's creditor a security right to be exercised against her earnings; but if her earnings are seized by her creditor she will have to account to her husband for the amount on termination of the regime.

wonder that accounting demands often have received solutions which do not satisfy anyone. Some of the accounting decisions of the past year fit in that category. They will be examined in the light of the remarks made above.

Life insurance

Article 2408 of the Civil Code was applied in *T.L. James & Co. v. Montgomery*²⁷ to reach the result that no compensation was owed by the husband for premiums paid on his separately owned term life policy. The reasoning seems to have been that, inasmuch as a term life policy never has a cash surrender value, it cannot be said to have been "improved" or "augmented" by the use of community funds. The same line of reasoning was used in *Connell v. Connell*²⁸ in which, on separation from bed and board, the husband was allowed to recover one-half of that portion of the cash surrender value of a life policy, considered the separate property of the wife because it had been issued to her before marriage, deemed attributable to the payment of premiums with community funds and one-half of the full cash surrender value of a life policy issued the wife and considered a community asset because it had been issued to her during marriage.

As admitted in *Connell*,²⁹ the manner of dealing with such questions has not been uniform. The real question, however, is not whether previous decisions on the subject have been uniform, but whether article 2408 is applicable at all to the issues. From the language of article 2408 itself it seems that what is contemplated is an "increase" or "improvement" to a separate asset such as land or even a movable of permanent value, perhaps a jewel improved by cutting or mounting or a family portrait improved by being placed in a suitable frame. There it seems fitting that the rule should provide for an accounting of half the value of the "increases" or "augmentations" remaining at the end of the regime and appraised as of that time. The community funds expended are to be treated as community investments, if you will, rather than as loans, so as to avoid the owner spouse's having to pay the full cost of an improvement which has disappeared or decreased in value and yet oblige him to reimburse the other spouse on a scale commensurate with an increase in value attributable to the original cost. Fair as the rule may be, then, for the restricted kinds of cases mentioned, it does not seem at all appropriate when applied to premiums paid on insurance policies the proceeds of which will not be community assets, whether or not they may have a cash surrender value at any time.

27. 332 So. 2d 834 (La. 1976).

28. 331 So. 2d 4 (La. 1976).

29. *Id.* at 6, 7.

The problem admittedly is not without difficulty and it is to be hoped that the revision of the Civil Code now in progress through the efforts of the Louisiana State Law Institute will produce rules of sufficient detail to do justice in the particular situations which may arise. Some thoughts on the subject in keeping with the rules as they are now and with the principles underlying them nevertheless may be ventured.

The first notion demanding attention is that the husband is free to make donations of community movables, without having to account therefor, if he makes them without intent to defraud his wife of her eventual interest in the community assets. Whether the policy is a separate asset or a community asset, therefore, is irrelevant. There should be no accounting for premiums paid on a policy issued to the husband before or after marriage, whether term or otherwise, if the proceeds or avails are received by anyone other than the husband, unless it can be shown that the intent was to defraud the wife. In the latter instance the wife or her heirs should be allowed, at the end of the regime, to recover from (the husband or) his heirs in accordance with the rule of article 2404. If the husband or his heirs receive the proceeds or avails, however, then it must be asked whether the wife consented to his use of the community funds for his own benefit. In the latter case she very properly can be considered to have made him a donation and no indemnification should be due her. If, on the other hand, the wife has not consented, then the husband may not be allowed to use community funds for his selfish benefit. The most basic principle underlying the community of gains is that all advantages derived from the industry and assets of the spouses should be shared by them. Articles 2406 and 2408 not properly covering the situation, this principle must be implemented in an equitable manner under the authority of article 21 of the Civil Code. If the policy was taken out during marriage as well as paid for with community funds, the avails or proceeds may be deemed to come to him or form part of his succession as community assets, a conclusion already reached by the jurisprudence.³⁰ If the policy was acquired before marriage, but the premiums paid in part with community funds, then indemnifying the wife for one-half the premiums paid with community funds would not seem to be adequate. It would be consistent with the basic principle mentioned and the equity demanded by article 21 that the wife be allowed to recover the largest of the following amounts: one-half the premiums paid with community funds, or one-half that portion of the cash surrender value or proceeds paid to the husband or his succession that corresponds to that fraction of the total premiums which were paid with

30. See Comment, *Insurance and the Community*, 25 LA. L. REV. 492, 499-501 (1965), and the cases cited therein.

community funds. It is true that under LA. R.S. 22:647 the cash surrender value paid the husband during his life or the proceeds paid to his succession on his death could not be executed against to satisfy the wife's claim, but there is no reason why other assets of the husband or his heirs could not be reached by her.

Premiums paid on life policies issued the wife before or after marriage, however, must be treated differently. Contrary to the jurisprudence, such policies are always separate assets of the wife, not community assets, for the wife cannot acquire a community asset through the expenditure of community funds. This is so because since 1912 an asset is not a community asset simply because it has been acquired during marriage. Under all amendments to article 2334 since 1912 it is necessary that the funds used be community funds and under article 2404 only the husband lawfully may expend community funds. If the wife uses community funds without the husband's consent, then she has misappropriated them to her own use, but the policy she purchases with them is hers alone. If she uses community funds with her husband's consent to purchase a policy in her own name, then it must be assumed the husband has made her a donation of the premiums and again the policy is hers alone. Finally if the husband purchases insurance placing the policy in his wife's name the transaction once more is a donative act and the policy is her separate property. For the same reason all premiums paid by the husband or with his consent on policies issued the wife must be considered donations to her not requiring any accounting. On the other hand premiums paid by the wife on her policies with misappropriated community funds should give rise to the same solutions given above for instances in which the husband uses community funds to pay premiums on policies payable to him or his succession. There seems to be no reason why they should be treated differently.

What has been said above is based entirely on the present legislation and its underlying principles as the writer appreciates them to be. Were he to recommend changes in the legislation, he would suggest that all premiums paid on insurance policies for the benefit of the spouses or their dependents be considered expenses of the marriage for which no accounting should ever be due between the spouses. On the other hand, if insurance is made payable to other persons, it would seem that the amount of premiums paid or of the cash surrender value or proceeds realized, whichever is greater, should be treated as unwarranted expenditures of community funds for which compensation should be given the non-consenting spouse.

Profit sharing and retirement plans

The most significant aspect of *T. L. James & Co. v. Montgom-*

ery,³¹ however, was its effort to provide a sort of *arrêt de règlement* on the subject of employee profit sharing and retirement plans. The two main conclusions reached in the opinion on rehearing authored by Justice Tate may be restated as follows:

1. Employee profit sharing and retirement plan benefits reflect *earnings*; hence that portion of any benefit corresponding to earnings of an employee while married and living under the community of gains is a community asset.
2. The employee's designation, on plan forms, of a "beneficiary" to receive plan benefits on the death of the employee is an effective *contractual designation* of a third party recipient of plan benefits subject to the claims of (a) a surviving spouse under the community of gains [or other laws] and (b) forced heirs.

The writer long has urged that under the rules of the Louisiana community of gains as they stand now such benefits are community assets. Justice Tate noted this in his opinion and the writer hastens to add that he has not changed his mind about it. There is a point, however, perhaps minor, about which some comment must be made. Justice Tate states that "the value of the right to share proportionately in the fund . . . falls into the community [of that marriage] during which the *contribution* is made." As pointed out earlier,³² sums representing earnings fall into the community if they were *earned during* the regime. If an employee married during a certain year, for example, and contributions were made at the end of the year for services rendered during the whole year, that year's contribution should be proportionately a separate asset and a community asset.

There is no need for the writer to discuss in detail the court's approval of the "contractual designation" of a beneficiary on death, for another of his colleagues is doing so.³³ For present purposes, at least, the writer assumes the correctness of this view—one based on the legislative authorization for such designations *implicit* in various statutes³⁴—and also as-

31. 332 So. 2d 834 (La. 1976).

32. See text preceding note 18, *supra*.

33. See *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421, 435 (1977).

34. See 332 So. 2d at 854, 855 (in which Justice Tate cites and discusses the implications of LA. R.S. 23:638 (1966) and 47:2404 C (1972)). This part of Justice Tate's opinion deserves special recognition as an example of the manner in which what is implicit in newer legislation should be understood to affect what is stated differently in older legislation. Codes and collections of statutes cannot be amended each legislative session to reflect perfectly the implications of new legislation. This kind of revision can be made only periodically. In the meantime, the scholar and the

sumes that the "contractual designation" is available to the wife as well as the husband employee even though their regime is that of the community of gains. These assumptions being made, however, it may be observed that a surviving spouse hardly has any right to demand any portion of the benefit from a "contractually designated" death beneficiary if he or she can receive adequate value for his or her one-half interest in the community assets (including the death benefit) by accepting other community assets in the partition. The surviving spouse, in other words, should not be deemed to have a right to the particular community asset disposed of through the "contractual designation," but, as in other instances, only to one-half the total of the community assets.³⁵ In the same way, assuming again that the "contractual designation" should be treated as if it were a donation so far as forced heirs are concerned, the forced heir should be required to abide by the rules on the order in which donations may be reduced in seeking to enforce his right to a legitime. Any other solutions would be too much at variance with the general law.

Improvements to separate property

One of the situations presented in *Palama v. Palama*³⁶ involved the right of the spouses as a result of (a) the expenditure of \$15,000 in community assets to improve the separate land of the husband, (b) the increase in the value of the improvements to \$25,000, (c) the loss of the improvements through fire, and (d) the recovery by the husband of \$25,000 in insurance proceeds in indemnification of the loss. The effect of the judgment was to give each spouse \$12,500, the correct amount, but the reasoning of the court hardly conforms to the legislation.

The court reasoned that the use of \$15,000 in community funds to construct the improvements entitled each spouse to half that amount from the insurance proceeds as his portion of "the community interest in the separate property" of the husband, not by reason of article 2408, but by reason of the advancement(?) or use(?) of community funds. Then the court treated the difference between the amount of the community funds so used (\$15,000) and the value of the improvements at the time of the fire (\$25,000), or \$10,000, as an "increase . . . due to community efforts"

scholarly judge must be depended upon to note what has happened and to construe the law accordingly.

35. Thus the wife whose husband has alienated a community asset with the intent to defraud her has no right against his transferee, who becomes owner, but only a right to damages from him or his heirs. LA. CIV. CODE art. 2404.

36. 323 So. 2d 823 (La. App. 4th Cir. 1975).

which the spouses should share under the rule of article 2408. It is submitted that the correct reasoning would have been that the improvements belonged to the husband, that the insurance proceeds (\$25,000) therefore belonged to the husband, that the value of the improvements at the time of the dissolution of the regime was precisely the amount of the insurance proceeds representing the burned improvements (\$25,000), and therefore that the husband, as owner of the proceeds representing the value of the improvements, owed half their amount to the wife under the rule of article 2408.

Implicit in the court's reasoning was a misunderstanding of the meaning of article 2408. Under that article,³⁷ as long as an "improvement" to a separate asset is made through the expenditure of the spouses' energies or common funds, the owner of the separate asset owes the other spouse one-half the value of the improvement at the moment of the dissolution of the regime, whether that value is greater or less than the value of the energies or funds originally expended. The article does say that "no reward" (remuneration) is due if the increase in the value of one spouse's separate asset is attributable "only to the ordinary course of things, to the rise in the value of property, or to the chances of trade," but this statement must be understood to apply to increases in the value of property *not* improved through the expenditure of common energies or funds. The key word is "only." Once the improvement is made, the value of the improvement at the time of dissolution, whether more or less than the value of the original expenditure, is the basis of the accounting.

Improvements to community assets

There is no rule in the Civil Code expressly covering improvements to community assets with separate funds. Article 2408 treats the converse situation only. There is a gap in the legislation, therefore, and it must be filled by invoking equity under the authority of article 21 of the Civil Code. In seeking equity here, it seems most reasonable to apply the same kind of rule provided for by article 2408. The rule for restitution, therefore, should be that the spouse whose separate assets were used for the improvement should be given one half the value of those improvements at the dissolution

37. 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 be 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.

of the regime. *Palama v. Palama*,³⁸ however, based restitution on the amount of separate assets used to improve a community asset without inquiring into the value of the improvement attributable to the expenditure as it stood at the time of the dissolution of the regime. A similar solution was reached in *Emerson v. Emerson*,³⁹ but there the error was compounded by treating the wife as entitled to “paraphernalia” “delivered to her husband [and] used for his benefit or for the benefit of the community.” Civil Code article 2391 and other legislation do allow the wife to recover paraphernalia in his hands, but this was not such a case. The funds had been placed in a joint account and apparently used with her consent to make alterations to the family house, a community asset. Here a rule similar to that in article 2408 is more appropriate.⁴⁰

Administration and fruits of the wife's paraphernalia

Under article 2386 of the Civil Code, before its amendment in 1944, the fruits of the wife's paraphernalia were community assets unless she administered the paraphernalia *alone*. Under the 1944 amendment to the article, however, the fruits of the wife's paraphernalia are community assets unless she has recorded a declaration “that she reserves all of such fruits for her own separate use and benefit and her intention to administer such [paraphernal] property separately and alone.” The majority opinion in *Guilott v. Guilott*⁴¹ construes the amended article to mean that, without the recorded declaration, the fruits of the wife's paraphernalia are community assets. Apparently counsel—and certainly a dissenting judge—argued that the fruits of paraphernalia could be the wife's separate assets, in spite of her failure to record the declaration, if she *in fact* administered the paraphernalia herself, thus treating the recordation of the declaration as no more than *one way* in which the wife might prove her separate administration of the paraphernalia. The writer submits that the amended article could not be clearer on the necessity of the recordation of the declaration if the fruits of paraphernalia are not to be considered community assets.

The dissenting opinion in *Guilott*, nevertheless, compels one to ask whether the wife has any right to administer her paraphernalia, and therefore, any right to demand the possession of those assets from her husband, if she has not recorded the declaration mentioned in article 2386.

38. 323 So. 2d 823 (La. App. 4th Cir. 1975).

39. 322 So. 2d 347 (La. App. 2d Cir. 1975).

40. A similar misapplication of art. 2391 is to be found in *Guilott v. Guilott*, 326 So. 2d 551 (La. App. 3d Cir. 1976).

41. *Id.*

Certainly there is room for doubt, but the writer submits that the wife should not be deemed to have the right to demand possession of her paraphernalia unless she has the right to retain its fruits. The whole tenor of the articles in the Civil Code on matrimonial regimes is that the fruits of assets belong to him or her who administers them,⁴² and that, there being a community of gains, the fruits of assets administered by the husband are community assets.⁴³ Adherence to this plan would require that assets producing fruits which are to be considered community assets should be subject to the husband's administration, and therefore that the wife's paraphernalia should not be demandable by her during marriage unless and until she has recorded the declaration mentioned by article 2386.

A third point mentioned in *Guilott*—though probably not relevant to the facts in the case—needs to be considered. It is the position assumed in *Slater v. Culpepper*,⁴⁴ that the amendment to article 2386 in 1944 is applicable, so far as fruits of paraphernalia realized after 1944 are concerned, even to community regimes contracted before the amendment. Once more it is affirmed that the community of gains is *contracted* by the spouses and therefore that its terms cannot be altered by legislation so as to affect spouses already under the regime.⁴⁵ It may be possible, nevertheless, to view the particular change made in article 2386 by the legislation of 1944 as a change in a rule relating to the manner of proving the separate or community character of the fruits of paraphernalia, rather than a change in the substantive rights of the spouses under the regime, for now as before 1944 the wife has the right to administer her paraphernal assets and then to keep their fruits. All that has been changed is that she must record the proper declaration in order to exercise her substantive right.

42. LA. CIV. CODE arts. 2386, 2388, 2396, and 2402.

43. *Id.* art. 2402. Under the article the fruits "of all the effects of which the husband has the administration and enjoyment, either of right or in fact," are community assets.

44. 223 La. 1071, 99 So. 2d 348 (1957).

45. See text at notes 1-6, *supra*.