Louisiana Law Review

Volume 37 | Number 5
Summer 1977

The Classification of Contingent Fee Contracts as Community or Separate Property

Kenneth L. Hickman

Regardless of how one interprets and rationalizes the supreme court's methodology in arriving at its decision, the fact is that the court was determined to protect the third party purchasers in this case. The result is correct. This is so even if one considers the public policy favoring the rights of heirs and society's strong interest in not allowing persons to pauperize themselves.[49] Reliability of the public records is an overriding concern. Since the transfer involved was a simulated sale, the third person was neither put on notice of the possibility of a donation *omnium bonorum* nor of the revocation rights of the heirs arising therefrom. An unwary third party should not be penalized for the hidden intentions of others. Again, title security and merchantability dictate this result.

The uncertainty that shrouds this area of the law makes it necessary that more definitive rules be enacted. The legislature should act to circumvent inevitable court battles over whose rights should prevail in specific public records disputes. The lawmakers must move to elevate and solidify the function of public records in transactions affecting immovables.[50]

Patrick Wise Gray

THE CLASSIFICATION OF CONTINGENT FEE CONTRACTS AS COMMUNITY OR SEPARATE PROPERTY

During the existence of the community, the attorney-husband contracted to supply his services on a contingent fee basis. After the marriage was dissolved and the community voluntarily partitioned, his wife sued to rescind the settlement, claiming that the omitted contingent fee contracts

49. This societal protection against paupers is the basis of article 1497. Therefore, anyone with a sufficient duty of support of the donor should be able to annul the donation. It is also inconsistent that heirs can annul the donation when the donor is dead and the need for protection no longer exists. *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421, 426 (1977); Comment, 6 LA. L. REV. 98 (1944).

50. One possible change would be to protect positive reliance. For instance, the Germans have what is called a "constitutive" system. Recordation produces self-supporting rights not based on the chain of title. The French system, by comparison, is similar to Louisiana's in that it does not create rights but is merely "declarative" of them. See Kozolchyk, *The Mexican Land Registry: A Critical Evaluation*, 12 ARIZ. L. REV. 308 (1970), for a comparative analysis of various systems. A "constitutive" system, coupled with a requirement that the rights of heirs and spouses be recorded, would make for a more reliable public records system in Louisiana.

were assets to be included in the inventory of the community. The trial court disagreed and sustained the husband's objection to the discovery of information concerning the contracts, but, on the wife's application for a supervisory writ, the First Circuit Court of Appeal reversed.[1] The husband was granted certiorari on his contention that the contracts were his separate property because they had not vested at the time of the community's dissolution. In a unanimous decision, the Louisiana Supreme Court *held* an attorney's interest in a pending contingent fee contract, which originates during the marriage, is a patrimonial asset and, therefore, "forms part of the community insofar as its value is based upon the attorney's services performed during the marriage."[2] *Due v. Due*, 342 So. 2d 161 (La. 1977).

The Louisiana concept of property includes, in a narrow sense, all rights "to the exclusive use and enjoyment of corporeal things susceptible of appropriation";[3] more broadly, "property" extends to all patrimonial rights—those susceptible of pecuniary evaluation, such as real or obligatory rights.[4] While rights to both corporeal and incorporeal things clearly fit within the definition of "property," some confusion has arisen with regard to the nature of rights created by obligations subject to suspensive or resolutory conditions.

Several types of conditional rights have already received statutory or judicial treatment. Under the Civil Code, causes of action, though conditional, are considered as property;[5] however, the Code does not classify other conditional rights, leaving the courts with the task of determining whether or not other such rights are property. Louisiana courts have found life insurance policies to be property;[6] however, because life insurance is

1. Due v. Due, 331 So. 2d 858 (La. App. 1st Cir. 1976).

2. 342 So. 2d 161, 165-66 (La. 1977).

3. 1 A. YIANNOPOULOS, PROPERTY § 1 in 2 LOUISIANA CIVIL LAW TREATISE 1, 2 (1967) [hereinafter cited as YIANNOPOULOS]. Property is narrowly defined at common law to mean the "legal relations between persons with respect to [corporeals or incorporeals]" and broadly defined to "include any relationship having an exchange value." RESTATEMENT OF PROPERTY, introductory note at 3-4 (1936). Under Louisiana's framework, property in the narrow sense does not include incorporeal rights.

4. YIANNOPOULOS, *supra* note 3, § 75 at 217. "Patrimony may be defined . . . in Louisiana law as a coherent mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs." *Id*, § 77 at 223. The concept of patrimony was developed by Aubry and Rau from the French equivalent of Louisiana Civil Code articles 3182 and 3183. *Id.*, § 74 at 213.

5. LA. CIV. CODE art. 2315. *See* LA. CODE CIV. P. art. 426; LA. R.S. 13: 3864 (1950).

6. *See, e.g.*, Succession of Verneuille, 120 La. 605, 45 So. 520 (1908); *In re* Moseman, 38 La. Ann. 219 (1886).

sui generis,[7] the classification of other conditional rights can hardly be based upon an analogy to the classification of insurance. Although courts in several states have found the potential right to collect under automobile insurance policies to be property,[8] and thus a basis for quasi in rem jurisdiction, the Louisiana Court of Appeal for the Third Circuit has disagreed.[9] The classification of employee benefit plans arose in the 1956 Louisiana Supreme Court decision of *Messersmith v. Messersmith*,[10] a case involving the partition of a community. The court found that upon the date of the dissolution of the community, the interest in the plan had "no value as a tangible asset,"[11] and was contingent upon a future event.[12] Nevertheless, the majority decided that it was an "incorporeal, movable thing"[13] and that "irrespective of its value or lack thereof, it is an asset to be inventoried. . . ."[14]

An attorney's contingent fee contract is analogous to deferred compensation plans in that the obligation is aleatory[15] and subject to a suspensive condition;[16] however, it is different in that it is revocable at the will of

7. Sizeler v. Sizeler, 170 La. 128, 127 So. 388 (1930); Mutual Life Ins. Co. v. Thomas, 170 So. 2d 895 (La. App. 4th Cir. 1965); Ticker v. Metropolitan Life Ins. Co., 11 Orl. App. 55 (La. App. Orl. Cir. 1914).

8. Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); Turner v. Evers, 31 Cal. App. 3d 11, 107 Cal. Rptr. 390 (1973); Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

9. Grinnel v. Garrett, 295 So. 2d 496 (La. App. 3d Cir. 1974).

10. 229 La. 495, 86 So. 2d 169 (1956).

11. *Id.* at 510, 86 So. 2d at 174. The plan was a group annuity certificate which, at the date of dissolution, had no cash or loan value.

12. *Id.* at 512, 86 So. 2d at 174. The certificate would become payable only if the employee resigned, retired or died.

13. *Id.* at 511, 86 So. 2d at 174. The court cited Louisiana Civil Code article 460 as authority for the proposition that obligations are incorporeals; articles 470 and 475 to show that incorporeal things are classified according to their objects and that if the objects are not immovables, the rights are movables; and article 870 to prove that ownership is "acquired by inheritance . . . by the effect of obligations, and by the operation of law."

14. *Id.* at 510, 86 So. 2d at 174.

15. "A contract is aleatory or hazardous, when the performance of that which is one of its objects, depends on an uncertain event. . . ." LA. CIV. CODE art. 1776. *See also* LA. CIV. CODE art. 2982. The object of the contingent fee contract, the payment of the fee, depends on a settlement or a favorable judgment.

16. "Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition. . . ." LA. CIV. CODE art. 2021. A successful recovery for the client is the uncertain event in a contingent fee contract. Because the recovery is the uncertain event which makes the contract both aleatory and conditional, the contingent fee contract, like the insurance policy, is classified as a wager. *See* 1 S.

the client due to the mandate relationship between the attorney and client.[17] In 1944, a federal district court sitting in Louisiana ruled that contingent fee contracts are not property.[18] Focusing on the "conjectural value" of a contingent fee,[19] the court determined that "[u]ntil judgment . . . [there is no] vested interest or right, representing any degree of title in fee. . . ."[20] Thus the court refused to find that any property rights exist under such a contract until final judgment.

Under Louisiana's community property regime, property owned by married persons is classified as separate or community. Separate property is described with some detail in the first portion of Louisiana Civil Code article 2334, while, in a later paragraph, community property is defined as the residual.[21] Civil Code article 2402 further defines community property, *inter alia*, as the "produce of the reciprocal industry and labor of both husband and wife."

In analyzing whether a particular asset is separate or community, the time and mode of acquisition are determinative factors.[22] This framework causes little difficulty if the acquisition is entirely accomplished either before, during or after the marriage. When, however, the acquisitive process spans a change in the marital status, the courts are faced with the problem of determining the time at which the asset is to be classified.

Three theories have evolved to deal with this problem: inception of right, time of vesting, and pro rata.[23] The inception of right method

---

LITVINOFF, OBLIGATIONS § 108 in 6 LOUISIANA CIVIL LAW TREATISE 191, 192 (1969). Since the contingent fee contract is legislatively authorized, it is legally enforceable. *But see* LA. CIV. CODE arts. 2983 & 2984.

17. LA. CIV. CODE art. 3028 provides in part that "[T]he principal may revoke his power of attorney, whenever he thinks proper. . . ." LA. R.S. 37:218 (1950), *as amended* by La. Acts 1970, No. 595, § 1 allows the attorney and client to contract that "neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. . . ." Nevertheless, the client has the absolute right to dismiss the attorney. *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Professional Responsibility*, 35 LA. L. REV. 420, 423 (1975).

18. Land v. Acadian Prod. Corp., 57 F. Supp. 338 (W.D. La. 1944), *rev'd on other grounds*, 153 F.2d 151 (5th Cir. 1946).

19. *Id.* at 351-52.

20. *Id.* at 351.

21. LA. CIV. CODE art. 2334 provides in part: "Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared." This paragraph often is referred to as the omnibus clause.

22. W. REPPY, W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES: A COMPARATIVE STUDY BY CASES, MATERIALS AND PROBLEMS 103 (1975) [hereinafter cited as REPPY & DEFUNIAK].

23. *Id.* at 220-21.

classifies the entire asset according to the marital status existing at the initiation of the acquisitive process, while the time of vesting test focuses on the moment title passes, or the moment the right to the title vests. The pro rata theory classifies the asset as partially community and partially separate property, depending on what portion was earned during the existence of the community and what part was acquired while the spouse was single.

Louisiana courts have generally followed the time of vesting theory[24] in cases involving the acquisition of an immovable over a period of time, and have held that no rights to the property arise until title passes.[25] Thus immovable assets acquired partly during the existence of the community and partly when the spouse was single, have been classified as entirely separate or community property, depending on the marital status of the parties when title ultimately vested. In cases involving movables, the results have not been so consistent. Although the early federal case discussed above involving a contingent fee contract seemed to apply the time of vesting theory,[26] recent Louisiana appellate court decisions concerning employee deferred compensation plans have appeared to follow the inception of right approach by classifying the employee spouse's rights in the plan earned during the marriage as community property.[27] In these

24. Louisiana courts have not adopted the labels of inception of right, time of vesting or pro rata, but do reach similar results.

25. *Acquisitive prescription*: In *Crouch v. Richardson*, 158 La. 822, 104 So. 728 (1925), the court focused on the time title vested, reasoning that the possession was precarious and therefore, the inchoate title could be defeated at any time until the end of 30 years, the time of vesting. *Homestead*: Early cases held that the fulfillment of the requirements of the Homestead Act had a "retroactive effect to the moment of the birth of the conditional right. . . ." Crochet v. McCamant, 116 La. 1, 7, 40 So. 474, 476 (1905) (inception of right). *Crochet*, however, was overruled by *Doucet v. Fontenot*, 165 La. 458, 115 So. 655 (1928), and the courts began classifying the property at the time title passed, reasoning that federal law required such a result. *E.g.*, Brewer v. Hill, 178 La. 533, 152 So. 75 (1933); Smith v. Anacoco Lumber Co., 157 La. 466, 102 So. 574 (1924). *Contract to Buy*: When considering immovables, Louisiana courts have held that the act of sale transfers the title, and until then, real property is not acquired by the community; *e.g.*, Wampler v. Wampler, 239 La. 315, 118 So. 2d 423 (1960); Kendall v. Kendall, 174 La. 148, 140 So. 6 (1932). With contracts to buy movables, however, the problem does not arise since title vests immediately upon the sale.

26. Land v. Acadian Prod. Corp., 57 F. Supp. 338 (W.D. La. 1944), *rev'd on other grounds*, 153 F.2d 151 (5th Cir. 1946). The court refused to apply the retroactive effect of a realized suspensive condition reasoning that "[t]he reopening of the community after settlement is impractical." 57 F. Supp. at 352.

27. *E.g.*, Lynch v. Lawrence, 293 So. 2d 598 (La. App. 4th Cir.), *cert. denied*, 295 So. 2d 809 (application by plaintiff), 295 So. 2d 814 (application by

cases, however, the non-employee spouse has received only an one-half interest in the value of the plan *at the date of dissolution*.[28] In *T.L. James & Co. v. Montgomery*,[29] however, the Louisiana Supreme Court seemed to follow the pro rata theory and found that each contribution made during the community entitles the non-employee spouse to the "right to share pro rata in the *proceeds* ultimately payable from the funds. . . ."[30]

Similar problems are presented in cases involving classification of money judgments awarded in personal injury actions. Although the cause of action itself may be classified as either separate or community, the portion of the recovery representing lost earnings has been classified, independently of the cause of action, as partially separate and partially community property.[31] Thus, it appears that while the cause of action is

---

defendant) (La. 1974); Langlinais v. David, 289 So. 2d 343 (La. App. 3d Cir. 1974); Laffitte v. Laffitte, 253 So. 2d 120 (La. App. 2d Cir. 1971); Laffitte v. Laffitte, 232 So. 2d 92 (La. App. 2d Cir. 1970).

28. In *Laffitte v. Laffitte*, 253 So. 2d 120 (La. App. 2d Cir. 1971), the wife demanded payment for her interest in the pension plan before the husband began receiving his pension payments. The court, however, held that she had no greater rights to the fund than her former husband and, thus, she was not entitled to any of the fund until the husband began receiving the payments. In *Langlinais v. David*, 289 So. 2d 343 (La. App. 3d Cir. 1974), the court ordered the husband, who had begun receiving payments prior to final judgment, to pay the wife her total share without any provision for periodic payments. More recently in *Lynch v. Lawrence*, 293 So. 2d 598 (La. App. 4th Cir.), *cert. denied*, 295 So. 2d 809 (application by plaintiff), 295 So. 2d 814 (application by defendant) (La. 1974), the husband was not required to pay until he began receiving his monthly pension payments. The court determined the proportion of each pension payment which was to be paid to the wife until her community interest was fully satisfied.

29. 332 So. 2d 834, 849-58 (La. 1976) (on rehearing).

30. *Id.* at 851 (emphasis added).

31. Where the husband was injured while still married, the courts have "made two awards for damages: one to the community of acquets and gains for damages accrued as of the time of the dissolution of the commmunity; and, one to the husband for damages incurred after the termination of the community of acquets and gains." Alfred v. Alfred, 237 So. 2d 94, 95 (La. App. 3d Cir.), *cert. granted*, 256 La. 847, 239 So. 2d 356 (1970) (apparently settled prior to argument). *See also* Talley v. Employers Mut. Liab. Ins. Co., 181 So. 2d 784 (La. App. 4th Cir. 1965), *cert. denied*, 248 La. 785, 181 So. 2d 783 (1966). In *West v. Ortego*, 325 So. 2d 242 (La. 1975), a workmen's compensation action arose before the dissolution of the marriage. The court determined that the settlement money and the cause of action were not necessarily identical and resorted to equity to classify the money as separate or community property, according to whether the damages were pre- or post-dissolution losses. *See* Note, 36 LA. L. REV. 1029 (1976). *Contra*, Broussard v. Broussard, 340 So. 2d 1309 (La. 1977), where the cause of action arose before the marriage, but the settlement included damages for loss of future earnings. The court, however, held that all of the monies were separate property, reasoning that at the time of the

classified according to the inception of right theory, the classification of the recovery may result in a pro rata apportionment.

In *Due v. Due*,[32] the Louisiana Supreme Court considered for the first time whether a contingent fee contract is capable of being classified as a community asset when the contract is partially performed during the community and partially after its dissolution.[33] The court concluded that the rights under the contract were patrimonial assets capable of forming part of the community to the extent that the services were performed during the existence of the marriage. But before reaching that issue, the court had to determine whether a contingent fee contract, prior to the realization of its suspensive condition, could be classified as property susceptible of being termed either separate or community.

The court determined that a contingent fee contract is a patrimonial asset, and thus property, basing its decision on the premises that the contract is an enforceable right and that it has value. Writing for the majority, Justice Tate adopted Planiol's conclusion that "as long as the [suspensive] condition is still pending . . . the simple possibility of the realization of the condition, nevertheless, constitutes a chance which is already considered an asset or liability."[34] After concluding that the aleatory and mandatary nature of the contract did not make the "chance" any less an asset, the court found that the rights under the contract had pecuniary value because even if the attorney is dismissed or dies before completion of the pending litigation, he is still compensated. Additionally, the court noted that these contracts are treated as assets when law partnerships are dissolved.

Although the possibility of a *quantum meruit*[35] recovery seemingly

accident, the wife had not contributed anything to the community since it had not been formed.

32. 342 So. 2d 161 (La. 1977).

33. The results under the *Due* court's analysis would not appear to be different if the contract was acquired before the marriage and performed during the marriage. The value of the attorney's services performed prior to the marriage should be his separate property, while the labor performed during the community would give rise to a community asset.

34. 342 So. 2d at 164. Under Planiol's analysis it is important to find that the chance constitutes a presently existing asset because "[t]he right dependent on the happening of a [suspensive] condition . . . has as yet no existence." 1 M. PLANIOL, CIVIL LAW TREATISE pt. 1, no. 319 at 215-16 (12th ed. La. St. L. Inst. transl. 1959). However, LA. CIV. CODE art. 2028, which has no corresponding article in the Code Napoléon, provides that there is a presently existing right although "its exercise is . . . suspended."

35. Although the cases cited by the court used the term *quantum meruit*, the *Due* court avoided the use of the term which was recently criticized by the

was a partial basis for finding that a contingent fee contract has value, the court failed to explain that the circumstances giving rise to a non-contractual[36] recovery are also uncertain events. Admittedly, when the attorney dies[37] or is dismissed, the lawyer will receive some compensation, but this is comparable to observing that the contingent fee contract has value after a successful judgment is obtained. The court should have instead only considered the value of the contract before any of these uncertain events occurs because it is also possible that the attorney will lose the suit and earn nothing. Thus, until the attorney wins, loses, dies or is dismissed, the actual value of the rights under the contingent fee contract ranges from zero to a portion of the ultimate recovery.

Prior to a settlement or a judgment, a contingent fee contract may, however, be assigned a value. Civil Code article 2041[38] provides for a retroactive effect to conditional obligations, such as contingent fee contracts, when the condition is realized. Thus, the contractual rights are always worth a specific pecuniary value as of the date of the contract even though that value is not known until the condition is fulfilled. The court, however, did not discuss this possibility[39] but focused on the fact that when law partnerships are dissolved, attorneys often agree on a value for the contingent fee contract based on "informed estimates as to the prospective recovery or settlement value of each case, the chances of loss, and the amount of work involved before and after the dissolution or withdrawal."[40] When the dissolution has not been so amicable, at least

Louisiana Supreme Court as a common law import. Oil Purchasers, Inc. v. Kuehling, 334 So. 2d 420 (La. 1976).

36. Upon the occurrence of such circumstances as the death or the dismissal of the attorney, the contingent fee contract is at an end. *E.g.*, Wright v. Fontana, 290 So. 2d 449 (La. App. 2d Cir. 1974); Kramer v. Graham, 272 So. 2d 716 (La. App. 3d Cir. 1973). The attorney cannot possibly recover under the contract, because he can never fulfill the condition.

37. Although there are no Louisiana cases on point, it appears that the client eventually must recover on his claim before the heirs can receive the deceased lawyer's compensation. *See* Annot., 33 A.L.R. 3d 1375 (1970). When the attorney is dismissed, he does not need to wait until the client eventually recovers before he can sue for his services rendered. Kramer v. Graham, 272 So. 2d 716 (La. App. 3d Cir. 1973).

38. LA. CIV. CODE art. 2041 provides in part that: "The condition being complied with, has a retrospective effect to the day that the engagement was contracted. . . ."

39. Under this analysis, the obligation already would have a value when the community was dissolved, and therefore would be property, but the final settlement of the community would have to remain open until the attorney-spouse either won or lost the case so the value could be determined.

40. 340 So. 2d 1309 at n.5 (La.1977).

one court did not look to the prospective value of the contract but held that the lawyer owed the partnership only the *quantum meruit* value of work actually performed.[41] Regardless of the manner of valuation, there is little doubt that the contract, even before the end of the litigation, does have value and is, therefore, a partrimonial asset.[42]

By applying such a broad definition of property, the court has expanded the concept of property in Louisiana. Under the *Due* court's analysis, whenever an asset is acquired over a period of time, the conditional rights can be classified as property. For instance, in the area of acquisitive prescription, the rights gained through adverse possession could have value, as would be demonstrated by a possessor who sells his rights under a non-warranty deed.[43] A similar analysis is applicable to rights in pension plans, even before vesting occurs, because once an employee begins to work, his employer agrees to provide him with a retirement pension if he continues to work for the requisite number of years.[44] Additionally, if the rights under a contingent obligation are property, the *Due* definition could allow a plaintiff to attach a potential

41. Trice v. Simon, 233 So. 2d 609 (La. App. 2d Cir. 1970).

42. *See* Commissioner v. King, 69 F.2d 639 (5th Cir. 1934) (attorney had won the case, but it was on appeal when the community was dissolved; court found that the fee was community property by using the inception of right approach). Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946) (attorney had lost the case but had secured a new trial when the opposition obtained a hearing in the California Supreme Court; while awaiting the outcome of the supreme court's decision concerning the validity of the grant of re-trial, the community was dissolved; the divorce court found the pending contingent fee contract to be property and classified it under the pro rata theory as partially community and partially separate property).

43. The prescriptive rights of the vendor are valuable when the vendee must tack his possession onto the possession of his author in title. LA.CIV. CODE arts. 3493, 3494. The possessor or homesteader would have rights to the land, contingent upon remaining on the land for a certain number of years. Since all of the years of possessing or homesteading (industry and labor) are necessary for the acquisition of the land, the *Due* analysis (see the text at notes 48-56, *infra* and note 25, *supra*) would seem to classify a portion of the land represented by the years which occur during the marriage as community property, while the remainder, representing the years of possession elapsing outside the marriage, would be separate property. In cases involving civil possession, the court may reach a different conclusion in that this method of possession may not be classified as industry and labor.

44. Since the employee may never receive a pension right, perhaps the court should grant the wife an interest only when and if the employee receives his pension benefit. Otherwise he will have paid or will owe one-half the value of the fund which he may not take with him should he terminate his employment. This will tend to lock him into his present job in order to receive the benefits he was deemed to have acquired. REPPY & DEFUNIAK, *supra* note 22, at 98. See note 51, *infra*.

obligation of indemnity under an insurance policy as property for a quasi in rem action.[45] Finally, the attorney's right to the fee under the contingent fee contract may now be susceptible of seizure by his creditors.[46]

After determining the rights under the contingent fee contract to be property, the court considered the issue of whether the contractual rights should be classified as community or separate property. Since the contract was acquired during the community by the attorney's labor, it would seem that the contractual rights were *totally* community property, especially if the retroactive effect of the realized suspensive condition is recognized. Of course, as an equitable result, it is as equally undesirable to classify the entire value of the contract as community property as it would be to classify it as completely separate. The court, therefore, apparently reasoned that the essence of the contract was the attorney's services rendered, and determined that each unit of labor performed gave rise to a valuable right of potential recovery. By applying Civil Code articles 2334 and 2402, the court reached a decision in accordance with the basic principles of the community of gains and found that the community asset consisted of only those contractual interests whose value is based upon the attorney's "services performed during the marriage."[47]

Unfortunately, the court did not provide much guidance to aid the lower court in determining the value of the attorney's services; but it did mention two methods of valuation when discussing the time at which the wife could obtain her share. One method, similar to the pro rata theory, gives the wife the right to share in the proceeds only when the fee is collected,[48] while the other gives her a "share of the estimated value of the

45. This result is contrary to the findings of the *Grinnel* court (see the text at note 9, *supra*) insofar as that court considered the property issue. *Cf.* LA. CODE CIV. P. art. 5251(13). "'Property' includes all classes of property recognized under the laws of this state: movable or immovable, corporeal or incorporeal."

46. Because of the mandate relationship between the attorney and the client, the courts could find that the rights are not subject to seizure or that the contractual rights are "strictly personal" and therefore "cannot be exercised by third persons." YIANNOPOULOS, *supra* note 3, § 78 at 227-29.

47. 342 So. 2d at 166. The contingent fee includes not only the reasonable value of the attorney's services, but also includes compensation for undertaking the risk of receiving nothing if he loses the case. F.MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 28 (1964). The compensation for undertaking the risk, however, seems to be inextricably interwoven with the attorney's labor, because he has not really risked anything until he has worked. Thus, it would seem that the value of the attorney's services should include the value of his work plus the payment for incurring the risk of not receiving a fee.

48. 342 So. 2d at 166.

community interest [in the fee] at the date of its dissolution."[49] Since the latter method seems to assume the contract already has a certain value, the wife would receive money even though the attorney could eventually lose the suit and, therefore, receive nothing.[50] This problem is avoided by the first method of valuation, which allows the wife to share only when and if the husband earns the fee.[51] The disadvantages of this method, however, include the delay in reaching a final settlement of the community and the difficulties presented in determining the apportionment. The court must develop a fraction which represents the value of the attorney's work during the marriage as the numerator and the value of his work during the entire suit as the denominator.

One means to determine the fraction in the "share in the proceeds" method, would be to use the number of hours expended as an indication of the value of the attorney's work. Although admittedly arbitrary, it would have the advantage of easy application.[52] Perhaps the number of hours could be treated as a rebuttable presumption of the value of the attorney's work modified upon actual proof. Another method would be to determine the reasonable fee an attorney would charge for the work done prior to the dissolution of the community as the numerator and the reasonable fee a lawyer would charge to handle the entire suit as the denominator.[53] The reasonable value would be detemined not simply by the number of hours, but also by the quality of each hour worked and the effect each hour had on the ultimate recovery.[54] Once the fraction is determined, the value of the rights which represent community property would be calculated by the product of the fraction and the fee.

Whether the court follows the "right to share in the proceeds" method, seeks to determine the estimated value at the time of the dissolu-

49. *Id.*

50. For possible effects of this method on non-vested pension plans, see note 44, *supra*.

51. The wife should be protected from the possibility of having her rights defeated in the event the husband withdraws without good cause. Since he would never receive the fee, the contract would produce no asset classifiable as community property and the wife would not obtain her share. Perhaps article 2404 could be interpreted to protect the non-attorney spouse's interest in the community property. The same reasoning would apply to other situations where assets are acquired over a span of time, such as pension plans.

52. Although some attorneys may not keep records of hours worked, reconstructing the number of hours expended may be easier than determining both what the attorney did and the value of the work performed as of a particular date.

53. This was the procedure followed by the appellate court. Due v. Due, 331 So. 2d 858, 861 (La. App. 1st Cir. 1976).

54. *See* Smith v. Westside Transit Lines, Inc., 313 So. 2d 371 (La. App. 4th Cir. 1975).

tion, or uses some other method, it should also consider the unreimbursed expenses incurred by the attorney in handling the lawsuit. Under the limited prior jurisprudence,[55] the courts would classify expenses as community or separate, depending on the marital status at the time the expenses were incurred. Since all of the expenses are necessary to obtain any recovery, the post-dissolution expenses benefit the contractual interest which is classified as a community asset, as well as the interest classified as a separate asset; and the same would be true of pre-dissolution expenses. Thus the expenses should be distributed in a manner which would reflect the portions of the contractual rights which are community assets and those which are classified as separate. In determining the value of the right, the expenses incurred are taken into account under the "estimated value at the time of dissolution" method, but to achieve the same result under the "sharing the proceeds" theory, the court must deduct the expenses from the fee before multiplying by the fraction.[56] Even if the attorney does not recover, the expenses should be apportioned, since they were necessary to retain the chance of a recovery. As a practical matter, however, in the case of no recovery where the expenses are moderate, it may be preferable to follow the prior jurisprudence and classify the expenses according to the marital status, rather than incurring the expense and inconvenience of determining the proportional value of the attorney's services just for the purpose of dividing expenses.

One final problem in finding that the pending contingent fee contract creates property rights which form a part of the community is the possible effect on the attorney's work product. It is contrary to ethical considerations to withdraw from a lawsuit absent compelling circumstances,[57] and the fact that the attorney will receive less money is not a valid reason to withdraw from the suit.[58] Realistically, however, since the suit is now worth less to the lawyer, he could, even if subconsciously, place less emphasis on it and could concentrate on suits acquired after the dissolution of the community. Thus, while the spouse's interest may be protected, it may be at the expense of the client's lawsuit.

---

55. Land v. Acadian Prod. Corp., 57 F. Supp. 338, 351 (W.D. La. 1944), *rev'd on other grounds*, 153 F. 2d 151 (5th Cir. 1946); Due v. Due, 331 So. 2d 858, 859 (La. App. 1st Cir. 1976).

56. This mathematical computation is simpler than multiplying the fraction times the expenses and subtracting that result from the product of the fraction times the fee. The results are the same because the fraction representing the portion of the expenses is the same as the one developed for the industry and labor.

57. LA. CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 2-32 (found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XVI; LA. R.S. 37, ch. 4 app.) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

58. *See* CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 2-110(C).

Due v. Due continues a recent trend in the recognition of pro rata apportionment as a means of determining the classification of assets acquired over a period of time which spans a change in the marital relation. Unfortunately the Civil Code does not seem to contemplate the division of a single asset into both community and separate property, even though the instances requiring such an apportionment are becoming increasingly prevalent. The Louisiana legislature, in its current reevaluation of the community property system, should consider providing a statutory framework to alleviate this problem. Not only should the method of classification be examined, but the legislature should also develop a means by which the working spouse may be protected from paying the non-working spouse one half of the community assets before he receives the compensation. The legislature should also prevent the working spouse, after the community is dissolved, from being able to divest himself, and therefore the community, of the asset in fraud of his former spouse's rights. Until this framework is achieved, the courts will be forced to rely on a strained interpretation of the law in order to achieve the Code's underlying principles.

Kenneth L. Hickman

ALDINGER V. HOWARD: A POSSIBLE PROBLEM FOR PENDENT PARTIES?

A county employee was dismissed from her job by the defendant, the Spokane County treasurer, and filed suit in United States District Court claiming, under the Civil Rights Act of 1871, 42 U.S.C. § 1983,[1] that the discharge violated her substantive constitutional rights under the first, ninth, and fourteenth amendments. Federal jurisdiction for this claim was based on 28 U.S.C. § 1343(3).[2] Plaintiff further asserted a claim under

1. 42 U.S.C. § 1983 (1970): "Every person who, under color of any statute, ordinance, regulation, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. 28 U.S.C. § 1343(3) (1970): "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance,