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INTERIM STUDY YEAR

*Katherine S. Spaht**

Pursuant to House Concurrent Resolution 232,¹ the Advisory Committee recommended certain amendments to Act 627 at a hearing of the Joint Legislative Subcommittee on September 6, 1978. Each suggested amendment was adopted by the Joint Legislative Subcommittee and presumably will be submitted in bill form during the 1979 legislative session. In preparing amendments to the Act, the Committee took the position that only essential changes should be suggested, and very

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1. THEREFORE, BE IT RESOLVED by the House of Representatives of the Legislature of Louisiana, the Senate thereof concurring, that the joint legislative subcommittee and the advisory committee created by Senate Concurrent Resolution No. 54 of the 1977 Regular Session of the Legislature are continued through the last day of the 1979 Regular Session for the purpose of further studying the equal management concept and coordinating efforts to draft such additional legislation as may be necessary to properly and orderly implement the concept of equal management of the community of acquets and gains and all of the laws related thereto. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 4th Reg. Sess. at 2638 (1978) [hereinafter cited as OFFICIAL SENATE JOURNAL].

BE IT FURTHER RESOLVED the advisory committee shall be directed to submit to the Louisiana Law Institute all of its recommendations and proposed changes in the law which it deems necessary and appropriate to fully implement House Bill No. 1569 allowing sufficient time for the Louisiana Law Institute to review such recommendations and proposals and to recommend them to the joint subcommittee. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 4th Reg. Sess. at 2998 (1978) [hereinafter cited as OFFICIAL HOUSE JOURNAL].

In accordance with an additional directive of Resolution 232, the Louisiana Bar Association has scheduled seven seminars throughout the state to acquaint members of the bar with recent developments in community property law. Even though the seminar presentations will briefly discuss recent jurisprudence, the area of concentration will be Act 627. The resolution provides:

BE IT FURTHER RESOLVED that the Louisiana State Bar Association is encouraged to conduct public meetings, conferences, or seminars for the purpose of disseminating [sic] information relative to the provisions of House Bill No. 1569, receiving recommendations or proposals with respect thereto from the judiciary, lawyers, and other members of the public, and transmitting such recommendations or proposals to the Louisiana Law Institute and the joint subcommittee on or before February 1, 1979. OFFICIAL SENATE JOURNAL, *supra*, at 2638.

few amendments were proposed involving language changes not considered essential.

However, there were some important changes in language and organization. In Act 627 the legal regime is entitled the "community of gains." The Advisory Committee recommended that the name be changed to "community of acquets and gains,"² because the latter designation is more familiar to members of the legal profession. The presumption that property possessed by either spouse during a community regime is community was moved from section 2838 to section 2837, which divides property of the spouses under the legal community regime into separate or community.³ Additionally, in order to clarify the second paragraph of section 2840, which classifies

2. The Committee recommendation is as follows, with the new language indicated in brackets. LA. R.S. 9:2832 (Supp. 1978): "The community of gains [acquets and gains] established in Part II of this Chapter shall be the matrimonial regime to which the spouses shall be subject in the absence of a contract adopting a matrimonial regime of their choice which they are at liberty to enter into subject to the limitations contained in this Title and other laws."

LA. R.S. 9:2836 (Supp. 1978): "Unless contractually excluded, limited or modified, the community of gains [acquets and gains] established by this Part shall be operative in every marriage between spouses domiciled in this state."

3. LA. R.S. 9:2838 (Supp. 1978) presently provides:

Each spouse owns a present undivided one-half interest in the community property. The community property comprises:

- (1) Things acquired during the legal regime through effort, skill, or industry of either spouse;
- (2) Things acquired with community assets;
- (3) Things acquired with separate and community assets unless classified as separate in R.S. 9:2839. When things so acquired are classified as community property, reimbursement is due from community assets for the amount of the separate investment;
- (4) Things donated or bequeathed to the spouses jointly;
- (5) Fruits and revenues of community property;
- (6) Fruits and revenues of separate property except as otherwise provided in R.S. 9:2839;
- (7) Damages awarded for loss of or injury to a community asset;
- (8) All other things not classified as separate property by other provisions of this Part.

Property possessed by either spouse during the community regime is presumed to be community property, but neither spouse shall be precluded from proving its separate character.

The Advisory Committee's proposed amended version of § 2837 is as follows, with the added language indicated in brackets: "The property of married persons is either community or separate. [Property possessed by either spouse during the community regime is presumed to be community property, but neither spouse shall be precluded from proving its separate character.]"

the portion of a tort award compensating for lost earnings,⁴ the Advisory Committee proposed the following amendment: "If the community regime is subsequently dissolved, other than by the death of the injured spouse, the portion of the recovery or award attributable to loss of earnings that would have accrued after dissolution of the community regime shall then be determined to be the separate property of the injured spouse." The language clarification expresses the intent of the legislators to establish pro-rata rules for characterizing loss of earnings if the community is dissolved other than by death.⁵

According to the Act, a declaration in an act of acquisition that the property is acquired with separate funds prevents such declaration from being controverted to the prejudice of third persons. Because the ultimate effect of this provision will involve reliance by third persons on the power of a spouse to manage separate property,⁶ the Advisory Committee was of the

4. LA. R.S. 9:2840 (Supp. 1978) presently provides:

When an offense or quasi offense is committed against the person of a spouse during the existence of the community regime, the recovery or award for the damages sustained is the separate property of the injured spouse; but the portion thereof that is attributable to compensation for the expenses incurred as a result of the injury during the existence of the regime, or in compensation for the loss of community earnings, is community property.

The portion of the recovery or award attributable to the loss of community earnings shall be determined, as between the spouses, upon the dissolution of the community regime.

5. The proposed change is modeled after the pro-rata rule used in *West v. Ortego*, 325 So. 2d 242 (La. 1975).

6. According to LA. R.S. 9:2839 (Supp. 1978), separate property comprises:

(2) [t]hings acquired by the spouse with separate assets, including those acquired in exchange for separate assets. The declaration in the act of acquisition that the things are acquired with the separate assets of the acquiring spouse may be controverted by the other spouse or by their creditors, but without prejudice to the rights of third persons.

LA. R.S. 9:2842 (Supp. 1978) presently provides: "Each spouse acting alone may manage, control and dispose of his or her separate property and, except as otherwise provided by law, each spouse, acting alone may manage, control and dispose of community property."

The suggested amendment by the Advisory Committee to section 2842 reads as follows:

Each spouse acting alone may manage, control and dispose of his or her separate property. The declaration in the act of acquisition that the things are acquired with the separate assets of the acquiring spouse may be controverted by the other spouse or by creditors, but without prejudice to the rights of third persons.

opinion that it belonged in the section on management of property rather than that on classification. Therefore, the provision was moved from section 2839(2) to section 2842.

Another significant example of language clarification is the Advisory Committee's recommended amendment to section 2843. The last paragraph of that section makes it possible for one spouse to confer upon the other the irrevocable right to alienate, encumber, or lease a community immovable or business—two transactions ordinarily requiring concurrence. Since a mandate or power of attorney is revocable⁷ unless it is coupled with an interest,⁸ the legislature felt compelled to create a new method whereby one spouse, in either of these two transactions, could obtain the irrevocable consent of the other to act alone. Yet, the language in Act 627 left questions unanswered as to the effect upon the spouse who confers such a right. Should the "right" be considered a peculiar type of power of attorney, the spouse conferring the "right" would be a party to the transaction as a principal, thus binding his or her separate property. On the other hand, should the "right" be construed as a "waiver," the spouse conferring the "right" would not be considered a party to the contract. The Joint Legislative Subcommittee chose the "waiver" theory, thus relieving the spouse granting the waiver from personal responsibility.⁹

Each spouse, acting alone may manage, control and dispose of community property, except as otherwise provided by law.

7. LA. CIV. CODE arts. 3027, 3028, 3029.

8. See, e.g., *Marchand v. Gulf Refining Co. of Louisiana*, 187 La. 1002, 175 So. 647 (1937).

9. The suggested amendment of the Advisory Committee to section 2843 reads as follows: "A spouse may expressly and irrevocably waive the necessity of concurrence to the alienation, encumbrance, or lease of a community immovable or a community business or all or substantially all of the assets of a community business."

In proposed comments drafted by the Advisory Committee for presentation to the Legislative Subcommittee in March, 1979, this provision is explained:

(c) A spouse may expressly waive the necessity of concurrence in the alienation, encumbrance or lease of a particular community immovable or a particular community business or all, or substantially all, of the assets of that business. A waiver may be irrevocable although no consideration is given. It may be for a specified period of time, or until the happening of a certain or uncertain event. The granting of a waiver, unlike the granting of a power of attorney or mandate, will not obligate the spouse granting it as a party to the transaction. Consequently, any resulting obligation may not be satisfied from the separate property of the spouse waiving the necessity of concurrence. See Section 2841.

Two changes were made concerning dissolution. Section 2850 was amended to provide specifically that the spouse who expressly and unconditionally accepts the community is entitled to one-half of the assets.¹⁰ In addition, the provisions concerning reimbursement upon dissolution, sections 2852-2854, were amended. Subsections 2852(E)-2852(G)¹¹ were placed in a separate section,¹² thus necessitating a renumbering of sections 2853 and 2854. The reorganization makes it clear that the rights to reimbursement contemplated by the three sections apply whether or not there is an administration of the community.¹³

In addition to the power given to the Advisory Committee to propose changes, under the provisions of House Concurrent Resolution 232, the Louisiana State Law Institute is again in-

10. The Committee recommendation is as follows, with the new language indicated in brackets. LA. R.S. 9:2850 (Supp. 1978): "A spouse who accepts the community expressly and unconditionally upon the dissolution thereof is [entitled to one-half of the assets and is] personally obligated for one-half the outstanding obligations incurred by the other spouse for the common interest of the spouses."

11. LA. R.S. 9:2852 (Supp. 1978) provides in part:

E. If community property has been used to satisfy a separate obligation of one of the spouses, that spouse shall reimburse the other spouse, or his or her heirs, upon dissolution of the community, for one-half of the community property so used.

F. If the separate property of one spouse has been used to satisfy an obligation incurred for the common interest of the spouses, the spouse whose property has been used, or his or her heirs, shall be reimbursed for one-half of such property if there are community assets from which reimbursement can be made. However, if separate property of one spouse has been used to satisfy an obligation incurred for the ordinary and customary expenses of the marriage or for the support, maintenance and education of their children, in keeping with the economic condition of the community regime, the spouse whose property has been used, or his or her heirs, shall be reimbursed by the other spouse for one-half of such property.

G. Separate obligations include obligations incurred prior to the establishment of the community regime, obligations resulting from intentional torts, and obligations incurred for the benefit of the community or of the family. All other obligations incurred by a spouse during the existence of the community regime are presumed to have been incurred for the common interests of the spouses. Alimentary obligations imposed by law on a spouse shall be deemed to have been incurred during the existence of the community regime for the common interests of the spouses.

12. LA. R.S. 9:2853.

13. The relevant provisions concerning administration of the community are found in LA. R.S. 9:2851-52(A-D) (Supp. 1978).

volved with matrimonial regime law reform.¹⁴ A special ad hoc committee appointed by the Executive Committee of the Institute has been considering the provisions of Act 627 and suggestions for its amendment in 1979. Serving on the Ad Hoc Committee are A. N. Yiannopoulos, reporter; F. A. Little, Jr., chairman; Eavelyn Brooks; Thomas A. Casey; Sidney Champagne; Sharon Abels Cooper; William E. Crawford; Robert Curry; J. Michael Cutshaw; Kerry M. Massari; William M. Meyers; Joseph Onebane; LeDoux Provosty, Jr.; Cecil E. Ramey, Jr.; Frank Simoneaux; Wedon T. Smith; and Charles Snyder.

Sixty days before the 1979 Legislature convenes, the Law Institute is directed to report to the Joint Legislative Subcommittee its recommendations for amendments to Act 627. The Law Institute can be expected to redraft the substance of the Act passed at the 1978 session for inclusion in the Civil Code. Furthermore, expected suggestions for amendments include restrictions on the right to contract a matrimonial regime at any time during marriage; elimination of the concurrence requirement for the alienation, encumbrance or lease of community furniture or furnishings; and restrictions on the ability of either spouse to bind the community property for an obligation. During hearings in March and April, the Joint Legislative Subcommittee will decide whether or not to approve the Law

14. House Concurrent Resolution 232 provides:

BE IT FURTHER RESOLVED that the Louisiana Law Institute is authorized and directed to review the provisions of House Bill No. 1569, the statutes and codes of the state of Louisiana and to make such recommendations, proposals, and codifications as it deems necessary to achieve the policy objectives set forth in House Bill No. 1569 by the Legislature and to review proposed legislation which may be prepared pursuant to this resolution for the purpose of assuring that such proposed legislation utilizes the style and semantics appropriate for inclusion in the Civil Code and the statutes. OFFICIAL SENATE JOURNAL, *supra* note 1, at 2638.

BE IT FURTHER RESOLVED that the Law Institute is authorized and directed to submit a proposal which would vest the spouses with unlimited right to contract with each other, a proposal which would vest the spouses with the right to contract with each other in specified instances, and a proposal which would prohibit all contracts between spouses. OFFICIAL HOUSE JOURNAL, *supra* note 1, at 2998.

BE IT FURTHER RESOLVED that the Louisiana Law Institute shall report all recommendations, proposals, and codifications to the joint subcommittee at least thirty days prior to the convening of the 1979 Regular Session of the Legislature. OFFICIAL SENATE JOURNAL, *supra* note 1, at 2638.

Institute's recommended amendments. Expectations are that amendments to Act 627 in 1979 will not be significant, except possibly in the area of right to contract. However, by the commencement of the 1980 session of the Louisiana Legislature, further amendments may be necessary to solve specific problems brought to light by a practical experience with "equal management." Only time will tell.

