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# Private Law: Matrimonial Regimes

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# MATRIMONIAL REGIMES

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## CONSTITUTIONALITY OF COMMUNITY OF GAINS PROVISIONS

*Corpus Christi Parish Credit Union v. Martin*[1] held constitutional the provisions of articles 2404 and 2334 of the Civil Code insofar as they confer control of community assets on the husband. Mr. Martin mortgaged the home in which the couple were living, a community asset standing in his and her names, against the opposition of Mrs. Martin communicated forcefully both to him and the mortgagee. At the time of the transaction article 2402 as limited by article 2334 permitted the husband to do so against the opposition of his wife.[2] Mrs. Martin, however, alleged that the articles violated the equal protection clause of the fourteenth amendment of the United States Constitution. The majority opinion, by Justice Dixon with Justices Sanders, Summers, and Marcus concurring, reasoned that Mrs. Martin had not alleged a case under the equal protection clause because (1) she had not complained she had been denied equal right to mortgage the immovable and (2) she might have prevented her husband from mortgaging the immovable by declaring it their "family home" under Revised Statutes 9:2801-04.[3] The minority, Justices Tate, Calogero, and Dennis, declared articles 2404 and 2334 "obviously" unconstitutional because of their "arbitrariness" in preferring the husband to the wife in the control of community assets, an "arbitrariness" not removed by the right of the wife to take affirmative measures that would render it impossible for the husband to act without her consent.

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1. 358 So. 2d 295 (La. 1978).

2. 1976 La. Acts, No. 679, amended article 2334 to provide that community immovables in the names of husband and wife could be leased, mortgaged, or sold only with the wife's written consent.

3. The majority opinion fails to mention that article 2334 itself gave the wife the right to prevent the husband from leasing, mortgaging, or selling without her written consent *any* community immovable standing in both their names by filing properly an authentic declaration to that effect.

Neither the majority nor the minority opinion mentioned the most important factor of all: there can be no question of "equal protection" where the parties are free to determine the order between them (their rights and obligations) by contract. The mere fact that Mr. and Mrs. Martin did not enter into an express marriage contract means only that they, being presumed to know the law, must be presumed to have accepted, or contracted tacitly, the terms of the community of gains set out in the suppletive law. This very clearly has been the Civilian tradition since 1525. This is the clear implication of article 2807, which declares the community to result from a contract. This is the precise statement of Revised Statutes 9:264, enacted in 1975 in conformity with the traditional understanding.[4] Where persons marry without entering into an express marriage contract because they consciously accept the terms of the community of gains expounded in the suppletive law, they contract it tacitly by their inaction. Where they refrain from entering into an express marriage contract because they are willing to accept whatever regime the suppletive laws on the subject expound, they contract the community of gains tacitly. Where they fail to enter into an express marriage contract because they are ignorant in fact of their right to do so, their ignorance cannot excuse them for they must be presumed to know the basic structure of the order of society. To excuse them is to invite chaos. Even here, then, they must be presumed to have contracted tacitly the community of gains.[5]

An even more fundamental point, however, is the fact that the controversy itself and the majority and minority opinions presupposed a false premise, that the wife "owns" a half interest in the community of gains before her acceptance of it on dissolution of the regime. Under the community of gains cer-

4. LA. R.S. 9:264 (Supp. 1975) reads in part: "This summary [of the matrimonial regime laws of this state] shall emphasize . . . the conclusive presumption of law that spouses who have not entered into a marriage contract before marriage did contract tacitly the community of gains . . . ."

5. 1978 La. Acts, No. 627, § 9, attempts to apply a new matrimonial regime law to parties already married on the effective date of the act if they have not entered into an express marriage contract. Because the matrimonial regime of such spouses is contractual, as explained in the text, the new law cannot be applied to them, if either spouse objects, without violating the obligations of contract.

tain assets of the spouses are classified as common or community assets from the moment of their acquisition, but this is only by way of identificaton of the things that will be considered part of the mass of which she will have the right to take half on dissolution of the regime if she will assume personal liability for half the husband's outstanding debts in matters of common concern to the spouses. Up until that time the wife has the right to be protected against the husband's acts in fraud of her right to demand half the community assets on dissolution of the regime, but those assets themselves form part of the husband's patrimony, not hers. The supreme court itself had recognized this in 1973 in *Creech v. Capitol Mack, Inc.*,[6] overruling previous erroneous jurisprudence on the point. The matter may be more complicated now since the 1976 enactment of article 2398, the provisions of which declare that "each spouse owns a present one-half share in the community property" subject to management by the husband,[7] but this legislation was not in effect at the time of the marriage of the Martins or even, for that matter, at the time Mr. Martin mortgaged the immovable.

In order to appraise the minority opinion on its merits one would have to assume, as did the justices, that (1) the community of gains is imposed by law on spouses who marry without entering into an express marriage contract and (2) that under this regime the wife owns a present interest in the community assets. Even then, however, in the writer's opinion, there would be no *arbitrariness* in giving control of community assets to the husband. It may be true that present public opinion—right or wrong—indicates that this most reasonable delineation of authority in the family cannot be honored without causing internal friction in some marriages. The writer believes this state of affairs to exist and that the suppletive law on the community of gains should be changed to give the wife control of assets acquired through her efforts and of the revenues they produce.[8] But even retention of the present rule hardly can be

6. 287 So. 2d 497 (La. 1973).

7. 1976 La. Acts, No. 444.

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

considered "arbitrary" and a violation of the equal protection clause.[9] The matter addresses itself to the attention of the legislature, not to the judiciary.

### THE JUDICIALLY IMPOSED "DOUBLE DECLARATION"

In *Phillips v. Nereaux*[10] the "double declaration" of acquisition *with* separate funds and *for* separate purposes, imposed by the judiciary for decades on the husband who would acquire an immovable as a separate asset, once more was attacked as being without legislative basis or sound reason. This time the judges agreed in a meticulously written opinion, but then refused to decree accordingly because they deemed the long legislative silence to indicate legislative approval. Then the judges found the legislation-by-silence-rule gender based and therefore in violation of the equal protection clauses of the Louisiana and United States Constitutions; but once more they refused to decree according to their reasoned judgment, this time because they deemed the Louisiana Supreme Court to have ruled the "double declaration requirement" constitutional by refusing to review a previous decision in which the issue had been raised.[11] The writer long has taught that the "requirement" has no basis in legislation, asserts it has never been accepted popularly as custom must be, but is of the opinion it would not violate the equal protection clauses if it were law.[12] More serious, however, is the unjustifiable subservience of the court of appeal to the Louisiana Supreme Court, a matter that has been discussed in another portion of this Symposium.[13]

9. *See* Bullock v. Edwards, 403 F. Supp. 913 (E. D. La. 1975) (Rubin, J.).

10. 357 So. 2d 813 (La. App. 1st Cir. 1978).

11. Barnett v. Barnett, 339 So. 2d 495 (La. App. 2d Cir.), *cert. denied*, 341 So. 2d 1127 (La. 1977).

12. The reasoning of the writer in appraisal of *Corpus Christi Credit Union v. Martin* is applicable to this issue in *Phillips v. Nereaux*. See notes 4-9, *supra*, and accompanying text.

13. *See* Pascal, *Law in General*, 39 LA. L. REV. (1979).

### DAMAGES FOR PERSONAL INJURIES

In *Hall v. Hall*[14] the husband had been injured during marriage and had recovered during marriage damages for losses accrued and to accrue. Ten days after checks in payment of all damages had been issued to him the wife sued for divorce and in time divorce ensued. The wife then sought a declaratory judgment on whether the damages recovered should be characterized as separate or as community assets. The trial court divided the damages, attributing a portion to the period following divorce and accordingly characterizing that portion as the separate asset of the husband. The court of appeal characterized all damages received as community assets, deeming the now well known solution in *West v. Ortego*[15] to be restricted to situations in which the *payment* of damages is received after dissolution of the community of gains. The decision is inconsistent with the *principle* in *West v. Ortego* and is not saved by the observation that article 2334 characterizes as community assets all things acquired during marriage that the law has not labeled separate assets. Were the general statements of article 2334 to be applied literally and without reference to the spirit manifested by the laws on the community of gains as a whole strange results would follow. Receipt during marriage of fees, commissions, and salaries earned before marriage, and sums recovered during marriage for damages to separate assets, for example, would have to be classified as community assets. *West v. Ortego* and previous recent decisions dealing with the general problem of characterizing awards resulting from personal injury during marriage simply recognized what article 2 of the Civil Code observes, that laws "generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs." These cases judged the facts not to be covered by the general rules in article 2334, and therefore invoked article 21 of the Civil Code to do justice by applying "natural law and reason." The court of appeal should have done the same in *Hall.*

14. 349 So. 2d 1349 (La. App. 4th Cir. 1977).
15. 325 So. 2d 242 (La. 1975).

### REIMBURSEMENT OF HUSBAND FOR ALIMONY PENDING SUIT

Frequently the wife is without income pending a suit for separation or for divorce and the husband is ordered to pay her alimony. If the suit proceeds to judgment of divorce or separation and there has been a community of gains between the spouses, then, the community being appreciable and the wife accepting, the wife may be considered retrospectively to have had sufficient "means" for her maintenance pending suit, and therefore enriched without legal cause at the expense of the husband. In such instances the husband must be reimbursed. If he has paid the alimony out of separate funds he should be repaid the whole by the wife. If he has paid out of community funds, however, as usually will have been the case, he should be reimbursed half the amount by the wife, for in retrospect only half the alimony received by her was from funds belonging to the husband. The decision in *Girondella v. Girondella,*[16] however, failed to take these considerations into account and ruled that the husband could not claim a reimbursement because the obligation was his under the legislation.

### EMPLOYEE BENEFITS

The writer approves completely of the Louisiana Supreme Court decision in *Sims v. Sims*[17] as a construction of existing law. Following the reasoning announced clearly in *T. L. James v. Montgomery,*[18] the court *in effect* treated the employer's contributions as well as those by the employee as community contributions to the retirement plan; and then the court declared the retirement benefits of the employee spouse under the plan to be community assets *when paid,* whether during the community's existence or after its dissolution, to the extent that they are attributable to the funds contributed to the retirement plan during the existence of the community in question.[19] The court denied that a value could be placed on retire-

16. 347 So. 2d 938 (La. App. 4th Cir. 1977).

17. 358 So. 2d 919 (La. 1978).

18. 332 So. 2d 834 (La. 1976).

19. The court noted that *Langlinais v. David,* 289 So. 2d 343 (La. App. 3d Cir. 1974), is inconsistent with its present decision. There the court had awarded the wife

ment benefits payable only in the future—though it admitted the spouses or ex-spouses might compromise on this point—and accordingly denied that either spouse might demand a partition of the right to such future benefits. These solutions are in complete harmony with the rules on the community of gains as they exist now. The writer is inclined to believe that pension benefits, though purchased with community funds, *should be regarded* as belonging to the employee spouse, but they may not be so regarded under the existing legislation.

A decision distinguishable from *Sims* is that in *La Caze v. Tennessee Life Insurance Co.*[20] Here the spouses were separated from bed and board as of August 13, 1975, and the employee husband ceased being able to work and claimed disability benefits. The wife claimed the payments were community assets and claimed one-half of them as paid. The concurring opinion of Judge Watson gives a reason for denying the wife's claim that seems eminently just. The disability insurance exists to compensate the employee when he no longer can work and in the instant case the employee had ceased working only after the dissolution of the community of gains, a time at which the community no longer was entitled to the product of his energies. It may be added that when the community is dissolved during a period for which the disability insurance premium was paid with employer or employee contributions that are "community contributions" under *Sims,* above, then the nonemployee spouse might be reimbursed one-half the amount that in retrospect is seen to have been paid for the time following dissolution of the community of gains, by way of recovery for enrichment without cause. This amount, however, does not appear to have been claimed in *La Caze.*

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one-half the amount the employee husband had contributed from community funds received as remuneration. *Jarred v. Jarred,* 355 So. 2d 566 (La. App. 3d Cir. 1978), is inconsistent with *Sims* for the same reason.

20. 346 So. 2d 1280 (La. App. 3d Cir. 1977).