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INTERSPOUSAL CONTRACTS

Introduction

The matrimonial regimes revision permits husbands and wives to enter into enforceable agreements between themselves on an almost unlimited scale. Civil Code article 1790¹ was amended to delete the general interspousal incapacity.² Provisions which limited interspousal sales³ and which banned reciprocal donations between spouses in the same act⁴ were repealed,⁵ and Civil Code article 2329 was amended to allow spouses to enter into matrimonial agreements during, as well as before, marriage. To allow enforcement of these new agreements, the general procedural bar to interspousal suits was also removed.⁶

Under the prior law, spouses generally could not contract with each other, nor could they enter into matrimonial agreements after

1. LA. CIV. CODE art. 1790. Prior to January 1, 1980, article 1790 read:

Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as husband and wife, tutor and ward, whose contracts with each other are forbidden; or in relation to the subject of the contract, such as purchases, by the administrator, of any part of the estate which is committed to his charge, and the incapacity of the wife, even with the assent of the husband, to alienate her dotal property, or to become security for his debts. These take place only in the cases specially provided by law, under different titles of this Code.

Even though the language of Civil Code article 1790 refers to special, rather than general incapacities of persons, Louisiana courts interpreted the article as forbidding all contracts between spouses except where specially authorized by law. See *Ward v. Ward*, 339 So. 2d 839, 841 (La. 1976). See also Bilbe, "Management" of Community Assets Under Act 627, 39 LA. L. REV. 409, 436 (1979); Pascal, *Louisiana's 1978 Matrimonial Regimes Legislation*, 53 TUL. L. REV. 105, 130 (1978); Riley, *Analysis of the 1980 Revision of the Matrimonial Regimes Law of Louisiana*, 26 LOY. L. REV. 453, 460 (1980).

2. 1979 La. Acts, No. 711, § 1.

3. See LA. CIV. CODE art. 2446 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 2).

4. See LA. CIV. CODE art. 1751 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 2).

5. 1979 La. Acts, No. 709, § 2.

6. LA. R.S. 9:291 (1950 & Supp. 1979 & 1980). This new statute allows spouses to sue each other for all causes of action arising out of their contracts, as well as for all causes of action arising out of the new matrimonial regimes legislation. Although not explicit in the language, the legislation clearly did not intend to take away any right a spouse might have had under the old law to sue the other spouse. *Id.*, comments (b) & (c).

marriage.⁷ An exception allowed spouses to make donations to one another⁸ that were irrevocable⁹ and that were not considered prohibited matrimonial agreements.¹⁰ These donations could be used to change the character of marital property already acquired and commonly were used to make community property the separate property of the donee spouse.

The comments to the new matrimonial regime articles indicate that husbands and wives now will be able to engage in a wider variety of contracts—to sell or lease property to each other, to enter into compromise agreements, and to employ each other.¹¹ These articles pose new problems, and already some disagreement exists as to which types of contracts are allowed.¹² The object of this note is to provide a method of analysis by which these potential interspousal contracts can be examined.

Definition

Though the phrase "interspousal contracts" is not found in the Louisiana Civil Code, it refers to that class of contracts between spouses which cannot be considered "matrimonial agreements," the latter being defined in Civil Code article 2328. This division of contracts into two groups is not based upon the time of contract formation, since matrimonial agreements can be formed after as well as before marriage.¹³ However, couples may enter into binding

7. LA. CIV. CODE art. 2329 (as it appeared prior to its amendment by 1979 La. Acts, No. 709, § 1; 1980 La. Acts, No. 565, § 1). See note 2, *supra*.

8. LA. CIV. CODE art. 1746 states that, "One of the married couple may, either by marriage contract or during the marriage, give to the other, in full property, all that he or she might give to a stranger."

9. Although these donations were considered valid, the jurisprudence under Civil Code article 1749 consistently had found that these donations are revocable by the donor at any time. *McIntyre v. Winnsboro State Bank & Trust Co.*, 213 La. 914, 35 So. 2d 852 (1948); *Cousin v. Saint Tammany Bank & Trust Co.*, 146 La. 393, 83 So. 685 (1920). This situation was reversed by LA. R.S. 9:2351 in 1950, however, and since then, donations between spouses have been irrevocable as a general rule, unless the donation was made by notarial act and revocation was expressly reserved.

10. See, e.g., *Succession of Byrnes*, 206 La. 1026, 20 So. 2d 301 (1945).

11. See LA. CIV. CODE art. 2329, comment (a):

Spouses are free to contract with each other during marriage as to all matters that are not prohibited by public policy. For example, they may sell or lease property to one another; they may enter into a compromise agreement; they may even employ each other.

12. See, e.g., *Bartke, The Reform of the Community Property System of Louisiana*, 54 TUL. L. REV. 294, 302-04 (1979); *Pascal, supra* note 2, at 130.

13. LA. CIV. CODE art. 2329.

matrimonial agreements after marriage only with judicial approval.¹⁴ Such approval is not required for "interspousal contracts."

Determining which contracts require judicial approval is an extremely important consideration for spouses who contract with one another.¹⁵ Even though a cautious lawyer will advise his client to obtain judicial approval whenever any uncertainty exists as to whether a contract is a matrimonial agreement, guidelines can be drawn to aid in reaching this decision.¹⁶

Because interspousal contracts consist of all contracts which are not matrimonial agreements, it is important to define matrimonial agreements. Matrimonial agreements are defined as contracts "establishing a regime of separation of property or modifying or terminating the legal regime."¹⁷ A contract establishing a regime of separation of property between spouses is one which excludes the legal regime of community of acquets and gains.¹⁸ And, more generally, "[a] matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons."¹⁹ Arguably, one rule does not make up a system. A regime consists of a system, and a system contemplates a methodic arrangement of rules. Since judicial approval is required for a matrimonial agreement that alters a matrimonial regime,²⁰ a contract which does not modify the *system* arguably will not require judicial approval.

The matrimonial regime governs the "ownership and management" of the property of married persons.²¹ Since the provisions of the regime or system will act prospectively to govern the property

14. LA. CIV. CODE art. 2329. The terms "marriage contract" and "matrimonial agreement" are used interchangeably in the matrimonial regimes revisions, although under the Louisiana Civil Code of 1870, a matrimonial agreement was merely a species of marriage contract. See LA. CIV. CODE art. 2328, comment (c).

15. See Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 88 (1979), for a discussion of the judicial approval requirement.

16. Because of the lack of clear delineation of which contracts will require court approval, it will be difficult for an attorney advising a client concerning this issue. However, court approval should not in any fashion injure an otherwise valid interspousal contract which in truth did not require the judicial imprimatur. Court approval will certainly be burdensome and perhaps costly, even though the legislature has not yet adopted a proper procedure for obtaining this approval.

17. LA. CIV. CODE art. 2328.

18. LA. CIV. CODE art. 2370.

19. LA. CIV. CODE art. 2325.

20. LA. CIV. CODE art. 2329.

21. LA. CIV. CODE art. 2325.

to be acquired by spouses in the future, matrimonial agreements contemplate an ongoing regulation of property as it comes into existence. The rules of the regime will determine which spouse will own and manage future property at the very moment it becomes present property. When the property comes into existence, it will be categorized as separate or community property.²² Furthermore, the rules of the regime will determine how that property will be managed (whether the spouses will enjoy equal, joint, or exclusive management over the property in question).

The special character of matrimonial agreements which allows the classification of property as it comes into existence distinguishes matrimonial agreements from interspousal contracts. In contrast to matrimonial agreements, interspousal contracts can be used by spouses to change the classification of property once it has been classified by means of the matrimonial regime. It is this future effect of matrimonial agreements which arguably should trigger the special requirement of judicial approval for agreements which modify or terminate the regime during marriage.²³

If the foregoing analysis is used to determine whether a sale of property between spouses requires judicial approval, the inquiry should focus on whether a single sale of property will modify or terminate the *system* of rules which govern the ownership and management of property of married persons prospectively. The sale certainly will change the ownership of the object of the sale from one spouse to the other, and along with ownership passes control or management over that thing which is the object of the sale.²⁴ However, a difference exists between modifying the ownership and management of property and modifying a system of rules governing that ownership and management. In the former instance, the system will remain unchanged. The matrimonial regime will still classify future property in the same manner as it comes into existence. The sale of

22. If the spouses are under the legal regime of acquets and gains, then their property is classified as community and separate property through the operation of Civil Code articles 2338-2341. See Note, *Classification of Incorporal Movables*, 42 LA. L. REV. 744 (1982).

23. See, e.g., LA. CIV. CODE article 2336, as amended by 1981 La. Acts, No. 921, § 1, which allows the spouses voluntarily to partition the community without court approval. This article allows the spouses to convert all of their community property into separate property without court approval. The only major difference between this partition and a matrimonial agreement entered into with court approval to establish a separation of property regime is that the *partition* affects only the property *owned* by the spouses at the time of the partition. The matrimonial agreement, unless it also contained a partition agreement, would not affect the property presently owned by the spouses, but only the property they acquired after the effective date of the agreement.

24. LA. CIV. CODE arts. 477 & 2439.

property between spouses, thus, should not require judicial approval.

Another illustration is that of a wife contracting to provide housekeeping services to her husband. This contract of employment between the husband and wife would not affect or modify the system any more than would a sale of property between them. The husband, under the legal regime, would pay for his wife's services out of his separate or community property. Under the legal regime, the money the wife receives for her services would become community.²⁵ Even if the ownership and management of the money changed, as would be true if the husband paid out of his separate property, the *system* of rules governing ownership and management would remain unaffected.

An examination of the matrimonial regimes legislation reveals little as to legislative intent regarding distinctions between matrimonial agreements and interspousal contracts. However, the purpose of the judicial approval requirement for matrimonial agreements may provide some assistance. This safeguard probably was intended to protect the interests of the less worldly spouse and to prevent that spouse from entering into disadvantageous agreements which he or she does not fully understand.²⁶ Yet, at the same time, the Civil Code has always allowed donations of property between spouses.²⁷ Nor is judicial approval required for the spouses to agree to alienate community assets,²⁸ to donate community property,²⁹ to alienate the movable assets of a community enterprise,³⁰ or voluntarily to partition the community.³¹ Under the new legislation, these types of transactions—in contrast to matrimonial agreements—have something in common which allow them to be perfected without judicial approval. In every one of these cases, spouses are dealing with previously acquired assets. These assets are classified as community or separate property prior to the concurrence by the spouse or the decision by a single spouse to alienate the property. The spouses are able to know the extent of the asset they are alienating, and the effect the transfer will have on their property.

25. Any property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse is classified as community property. LA. CIV. CODE art. 2338. See note 24, *supra*.

26. See Spaht & Samuel, *supra* note 15, at 88.

27. See note 9, *supra*.

28. See LA. CIV. CODE art. 2347.

29. See LA. CIV. CODE art. 2349.

30. See LA. CIV. CODE art. 2350.

31. LA. CIV. CODE art. 2336, as amended by 1981 La. Acts, No. 921, § 1.

A matrimonial agreement is different, however. It acts to classify property and to create civil effects at the precise moment the property is acquired; it acts upon property to be acquired in the future by the spouses. When spouses enter into matrimonial agreements, they probably will have very little idea as to the effect of future acquisitions on their personal patrimonies. It is this uncertainty, at least in part, as to the future effect on the property of the spouses which justifies the requirement for judicial approval of matrimonial agreements.³²

Uncertainty, however, could not be the only factor involved, since couples are free to enter into matrimonial agreements prior to their marriage without the approval of the judiciary.³³ The effects of a premarital matrimonial agreement are fully as uncertain as those of a post-marital agreement. Perhaps lack of perspective caused by the closeness of the marital arrangement itself—combined with the possible dominance of one of the spouses as well as the future effects of the agreement—creates a situation in which judicial protection of the interests of the spouses should be required.

The legislature clearly did not intend to subject all contracts between spouses to the requirement of judicial approval. If it had, stronger language than that found in Civil Code article 2329 certainly would have been used. By eliminating the general incapacities to contract between spouses, an intent to allow at least some interspousal contracts is ascertainable, and an intent to limit the judicial approval requirement to a small class of contracts also can be found.³⁴ The requirement of judicial approval, if the hypothesized legislative purpose behind that requirement is valid,³⁵ should be restricted to only those agreements between spouses that affect the classification of future property. This approach is consistent with the elimination of the general interspousal incapacities by the legislature, and also is in keeping with the trend to eliminate unnecessary legislative protections for the wife, who in modern times is generally as well educated and sophisticated in the ways of the business world as is the husband. The requirement of judicial approval found in Civil Code article 2329, therefore, should be strictly construed and limited in application to only those contracts between spouses which modify the *system* of rules governing the ownership

32. See note 23, *supra*. See also Spaht & Samuel, *supra* note 15, at 88.

33. "Spouses may enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy." LA. CIV. CODE art. 2329. The special requirement of judicial approval is triggered only by a post-marital matrimonial agreement. *Id.*

34. See notes 1-6, *supra*, and accompanying text.

35. See Spaht & Samuel, *supra* note 15, at 88.

and management of marital property which has the future effect of classifying marital property as it comes into existence.

Transmutation Agreements

"Transmutation" is a term used to describe arrangements between spouses which change the character of property from separate to community or vice-versa.³⁶ In a sense, any agreement between spouses dealing with their marital property can have the effect of changing the character of that property. For example, a partnership agreement between spouses might cause the character of some of the marital property to change.³⁷ The term "transmutation agreement" here refers to those agreements which have the change of the character of marital property, either from community to separate or separate to community, as their principal motive. Other community property jurisdictions allow transmutation as a general rule,³⁸ and there is little doubt that such agreements are allowed in Louisiana.

Historically, interspousal transmutation agreements had three major obstacles. Civil Code article 1790 contained a general prohibition against interspousal contracts.³⁹ This prohibition has now been removed. Civil Code article 2446 had limited sales between spouses to three specified instances.⁴⁰ This article has now been repealed.⁴¹ Spouses had no procedural mechanism to enforce interspousal contracts.⁴² This also was changed by the new revisions.⁴³ The new revisions also repealed article 1751,⁴⁴ so that reciprocal donations be-

36. See W. REPPY & W. DEFUNIAK, *COMMUNITY PROPERTY IN THE UNITED STATES* 421 (1975).

37. Partnership agreements are discussed more fully in text at note 73, *infra*.

38. For example, "[i]n California, transmutation is dangerously easy. One spouse may refer to his or her separate property as 'ours' a few times, and lo and behold, it is." See W. REPPY & W. DEFUNIAK, *supra* note 36, at 421.

39. See note 1, *supra*.

40. LA. CIV. CODE art. 2446 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 2).

41. 1978 La. Acts, No. 627, § 5; 1979 La. Acts, No. 709, § 2.

42. LA. R.S. 9:291 (1950) (as it appeared prior to its amendment by 1979 La. Acts, No. 711, § 2). Under this old provision a married woman could only sue her spouse for separation of property, restitution and enjoyment of her paraphernal property, separation from bed and board, or a divorce.

43. 1978 La. Acts, No. 627, § 4 and 1979 La. Acts, No. 711, § 2, amended LA. R.S. 9:291 (1950) to allow spouses to sue each other for actions arising out of contract or the provisions of Title VI, Book III of the Civil Code. The amendments did not affect the direct action statute, LA. R.S. 22:655 (1950 & Supp. 1958 & 1962), nor was it intended to take away any other possible suits between spouses that the prior provision allowed. LA. R.S. 9:291 (1950 & Supp. 1978 & 1979), comments (b) & (c).

44. See 1978 La. Acts, No. 627, § 5; 1979 La. Acts, No. 709, § 2.

tween spouses in the same act are no longer specifically disallowed. Thus, the provisions of the law which historically have prohibited spouses from entering into transmutation agreements have all been altered or repealed so that they no longer restrict the contractual freedom of Louisiana spouses.

Donations, of course, have long been used as a means of changing the classification of property from community to separate. Donations between spouses have always been allowed under Civil Code article 1746, which was not changed under the new revisions.⁴⁵ Also, article 1751, which had prohibited reciprocal donations between spouses, was repealed.⁴⁶ Civil Code article 2343 provides for the effect of a donation by a spouse of his undivided interest in a thing forming part of the community. Thus, Louisiana spouses have more freedom to donate property to each other than they possessed before.

Civil Code article 2343.1, which was added in 1981, provides for the effects of a transfer of separate property of one spouse into community property by onerous or gratuitous transfer.⁴⁷ This article manifests a legislative intent that spouses should be free to enter into agreements which effect a transfer of their separate property into community property. The comments to this article state explicitly that a spouse may convey to the other spouse a thing that forms part of his separate property with the stipulation that the thing shall become part of the community.⁴⁸ Thus, Civil Code article 2343.1 indicates that interspousal transmutation agreements will be allowed under the new regime.

Civil Code article 2336 allows spouses during the existence of the community property regime to partition the community in whole or in part, without court approval.⁴⁹ When this partition is perfected, the things that each spouse acquires are separate property. Article 2336 is the only Code article which affirmatively authorizes an interspousal contract other than a donation.

It is difficult to imagine that the legislature did not intend to allow transmutation agreements by the revision of these provisions

45. See note 9, *supra*.

46. 1979 La. Acts, No. 709, § 2.

47. Comment (a) to this article states that it was enacted to clarify the law. Prior to the passage of this article much uncertainty existed as to the civil effects of a transfer of separate to community property.

48. LA. CIV. CODE art. 2343.1, comment (b), *added by* 1981 La. Acts, No. 921, § 1.

49. This provision for partition without judicial approval was added by 1981 La. Acts, No. 921. Prior to this amendment, article 2336 provided only for a judicial partition prior to the end of the regime.

limiting interspousal contracts. Agreements between spouses to sell, donate, or exchange their separate or community property to each other are the simplest types of enforceable agreements into which spouses can enter. The comments to Civil Code article 2329 state that spouses are free to sell or lease property to each other, to enter into compromise agreements, or to employ each other.⁵⁰ Such transactions may result in a transmutation of property. After examining the textual provisions, the rejection of the prohibition against interspousal contracts, and the policy of the legislature behind the removal of these prohibitions, no other conclusion can be reached but that interspousal transmutation agreements are now allowable under the new matrimonial regimes revisions.

Transmutation agreements, by definition, act to change the character of previously classified property from separate to community or from community to separate.⁵¹ They do not affect property yet to be acquired. Because they affect only present property, they should be considered interspousal contracts which do not require judicial approval. This argument is further supported by the recent revision of Civil Code article 2336 which allows spouses voluntarily to partition the community property without court approval.⁵² This amendment specifically allows at least one situation in which previously acquired property may be reclassified by the spouses without court approval, and probably reflects a general legislative policy that any transmutation agreement should be considered an interspousal contract which does not require judicial approval.

A discussion of the possible effects of transmutation agreements can be accomplished through an examination of the codal provisions of the legal regime. Civil Code article 2343 regulates donations by a spouse to his mate of his interest in the community.⁵³ This donation simultaneously transforms both the donor and the donee's interest in a thing forming part of the community into the separate property of the donee spouse, unless the act of donation provides otherwise. Civil Code article 2343 is not clear as to what constitutes "a thing." "Thing" conceivably could include either individual identifiable

50. LA. CIV. CODE art. 2329, comment (a).

51. See note 36, *supra*.

52. LA. CIV. CODE art. 2336, as amended by 1981 La. Acts, No. 921, § 1.

53. LA. CIV. CODE art. 2343, as amended by 1981 La. Acts, No. 921, § 1, provides in part:

The donation by a spouse to the other spouse of his undivided interest in a thing forming part of the community transforms that interest into separate property of the donee. Unless otherwise provided in the act of donation, an equal interest of the donee is also transformed into separate property

items, a percentage interest in the community, or all of the donee spouse's community interest. Article 2336 suggests that "thing" will include all of these items.⁵⁴ The article allows the spouse voluntarily to partition the community, thus converting the entire mass into the separate property of either spouse.

Another problem is raised by the provision that "[u]nless provided in the act of donation, an equal interest of the donee is also changed into separate property."⁵⁵ Without this provision a spouse, through his individual act of donation, could make only his interest in a tangible thing that forms part of the community the separate property of his spouse. The other half interest would remain part of the community. This provision is helpful, therefore, in dealing with individual tangible items.⁵⁶ A different problem is raised, however, if a spouse wished to donate to his mate a 10 percent interest in the community. By the operation of this article, it is unclear as to what the donee spouse would be entitled.⁵⁷ Probably, the donee spouse would receive as separate property 10 percent of the entire community. Because of this lack of clarity, spouses should be clear as to their intentions at the time of the donation so as to leave no doubt as to how the act is to be interpreted.

Under article 2343.1 a spouse may convey to the other spouse a thing that forms part of the transferor's separate property, with a stipulation that the thing shall become part of the community.⁵⁸ In essence the transferor conveys to the other spouse one-half of what

54. LA. CIV. CODE art. 2336, as amended by 1981 La. Acts, No. 921, § 1, states:

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime. During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property.

55. LA. CIV. CODE art. 2343, as amended by 1981 La. Acts, No. 921, § 1.

56. For example, the husband buys an expensive ring for his wife for Christmas by spending community funds. This ring, but for the act of donation, normally would be community property. When the husband donates the ring to his wife, the entire ring becomes the wife's separate property.

57. When a spouse donates to his mate "a 10% interest in the community," it is unclear as to whether the donor spouse wishes to donate a 10 percent share of the entire community or of his undivided one-half interest in the community property. See LA. CIV. CODE art. 2336, as amended by 1981 La. Acts, No. 921, § 1. This ambiguity in language will leave the courts free, in the event a conflict should arise, to speculate as to the donor's true intentions. Since the donor did not specify that he wanted to donate to the separate property of his spouse only his interest in ten percent of the community, then a donation of 10 percent of the entire community should be presumed.

58. LA. CIV. CODE art. 2343.1, as amended by 1981 La. Acts, No. 921, § 2.

he owns, and retains the other half interest of the things as a community interest under the legal regime of acquets and gains.⁵⁹ Article 2343 provides only for donations of community property to the donee spouse.⁶⁰ Civil Code article 2343.1, however, provides for both onerous and gratuitous transfers of separate property. This article, like article 2343, does not define "thing." "Thing" should be defined in the same manner as in article 2343, thus allowing for a transfer of all or any part of the separate property of the contracting spouse.

One other very important effect of articles 2336, 2343 and 2343.1 is the effect that the use of these articles will have on the succession rights of the spouses and their heirs. These articles can be used to reclassify property of the marriage from separate to community or vice-versa. Thus, transmutation agreements can influence the effect that the Civil Code succession articles will have on the property rights of surviving spouses.⁶¹ These rights are dictated by the classification of the deceased's property as either separate or community. By the terms of article 916, the surviving spouse has a legal usufruct over as much of the decedent's share in the community property as may be inherited by the deceased's descendants, if the deceased has not disposed of his share in the community by testament.⁶² Additionally, the surviving spouse may receive by testament a usufruct over *all* of the deceased's separate property without impinging on the legitime of forced heirs.⁶³

Since transmutation agreements are allowed, spouses will be able to enter into contracts which will affect their respective rights in regard to the succession of a predeceased spouse. If all of the marital assets are community and one spouse dies intestate, then the surviving spouse will receive as separate property his half of the community in full ownership and a legal usufruct over the deceased spouse's share of the community which may be inherited by the descendants, if any exist.⁶⁴ If there are no descendants, then the surviving spouse receives the deceased's share of the community in full ownership. Spouses, on the other hand, may wish to use transmutation agreements to convert all or part of the community into the separate property of either spouse. If the spouse who dies

59. LA. CIV. CODE art. 2343.1, *as amended by* 1981 La. Acts, No. 921, § 2.

60. LA. CIV. CODE art. 2343, *as amended by* 1981 La. Acts, No. 921, § 1.

61. LA. CIV. CODE art. 890, *as amended by* 1981 La. Acts, No. 919, § 1; LA. CIV. CODE art. 916, *as amended by* 1981 La. Acts, No. 911, § 1.

62. LA. CIV. CODE art. 916, *as amended by* 1981 La. Acts, No. 911, § 1.

63. LA. CIV. CODE art. 916, *as amended by* 1981 La. Acts, No. 911, § 1. *But see* LA. CIV. CODE art. 890, *as amended by* 1981 La. Acts, No. 919, § 1. Under the terms of article 890, the legal usufruct is limited to that which may be inherited by the issue of the marriage with the survivor, or by illegitimate children.

64. *See* text of Civil Code articles cited at note 61, *supra*.

first owns as separate property all of the marital property, and he dies intestate, then the surviving spouse will receive nothing from the succession except possibly the marital portion⁶⁵ and the family home in usufruct.⁶⁶ If there is a testament, however, and the deceased spouse grants a usufruct over all of his separate property to the surviving spouse, that surviving spouse may hold a usufruct over all of the marital property without impinging upon the legitime.⁶⁷

Transmutation agreements are not capable of being used to defeat the inheritance rights of forced heirs, however. The most important characteristic of interspousal contracts, as has been stressed, is that they act upon the property of spouses only after it has been acquired and classified under their matrimonial regime.⁶⁸ A transfer of property by interspousal contract will be treated exactly as a transfer of property between a spouse and a third party has been treated.⁶⁹ All donations between spouses will be subject to reduction to the extent that they may impinge upon the legitime.⁷⁰ All onerous transactions by interspousal contract, if they are truly onerous, will not injure the rights of forced heirs.⁷¹ Naturally, the availability of interspousal contracts will increase the temptation and frequency of simulated transactions which are onerous on their face, but gratuitous in reality. The courts should carefully scrutinize suspected cases of simulated contracts between spouses, as they always have done with suspected cases of simulated transfers between people who are not married.⁷²

Partnership Agreements

Prior to 1980, spouses in Louisiana, even if engaged in the same profession, were not allowed to enter into valid partnership agreements.⁷³ The original comment (a) to proposed article 2329 in

65. See LA. CIV. CODE art. 2432.

66. LA. CIV. CODE art. 916.1. The title of 1981 La. Acts, No. 911, states that it is "AN ACT . . . to repeal article 916.1 of the Louisiana Civil Code relative to the same subject matter [relating to the usufruct of a surviving spouse] . . ." However, the body of the Act failed expressly to repeal this article. Whether the article survives the Act is a question beyond the scope of this note.

67. See text of Civil Code articles cited at note 61, *supra*.

68. See text preceding footnote 32, *supra*.

69. LA. CIV. CODE arts. 1502-1505.

70. LA. CIV. CODE arts. 1502-1505.

71. By operation of Civil Code article 1526, the rules of reduction will apply to a transaction if the value of the object given exceeds by one-half that of the charges or services.

72. See, e.g., *Thompson v. Thompson*, 211 La. 468, 30 S. 2d 321 (1947).

73. See *Bartke*, *supra* note 12.

the new matrimonial regimes revision expressed the intent that interspousal partnership agreements between Louisiana spouses would now be allowed. This reference to partnership agreements was eliminated from the comments as enacted, however.⁷⁴ Thus, whether or not partnership agreements between spouses are allowed under the new regime is questionable, especially due to the flexibility that partners enjoy in the control and management of their partnership affairs. As a general rule, the Code's partnership provisions supplement, rather than restrict, the contractual capabilities of would-be partners. On the other hand, the articles dealing with matrimonial regimes restrict as well as supplement the contractual dealings of married persons. The major issues regarding interspousal partnerships, like the ones previously addressed concerning transmutation agreements, are whether such partnerships are allowed, and, if so, whether they require judicial approval.

The only Code article that has a reference to partnerships in the matrimonial regimes provisions is Civil Code article 2352, which provides: "A spouse who is a partner has the exclusive right to manage, alienate, encumber, or lease the partnership interest."⁷⁵ This provision was drafted to prevent the spouse who is not a party to the other spouse's partnership contract from affecting the legal relationship of a partner-spouse and the other partners.⁷⁶ Article 2352 makes a partnership interest a property interest exempt from the normal rules of equal management. This article presents no obstacle to interspousal partnership agreements.

Historically, spouses were incapable of contracting partnerships because they were generally incapable of contracting. In addition to this restriction, the prior rules of community management and control, which generally gave the husband most of the control over community affairs, were not consistent with the notion of interspousal partnership contracts, especially when the partnership would have a great deal of control over the property of the marriage.⁷⁷ The new regime as a general rule has given to both spouses an equal hand in the control and management of the community affairs.⁷⁸ The main

74. *Id.* at 304 n.48. It is not apparent from Civil Code article 2329 why this reference to partnerships was deleted.

75. LA. CIV. CODE art. 2352.

76. LA. CIV. CODE art. 2352, comment. *See, Note, Management of Community Assets: Incorporeal Movables*, 42 LA. L. REV. 770 (1982).

77. *See* LA. CIV. CODE art. 2404 (as it appeared prior to its repeal by 1978 La. Acts, No. 627, § 6; 1979 La. Acts, No. 709, § 1). *See also* Bartke, *supra* note 12.

78. *See generally* Note, *Management of Community Assets: Incorporeal Movables*, 42 LA. L. REV. 770 (1982).

obstacles to interspousal partnership agreements have been removed,⁷⁹ but the new regime articles now must be examined to see if any new obstacles were created.

Civil Code article 2330 seemingly presents no limits as between the spouses themselves; it simply allows third persons to rely on the management provisions of the legal regime which allow one spouse acting alone to dispose of certain community property.⁸⁰ It appears that spouses are free conventionally to limit the rights of one or both spouses to manage some community property as between themselves, but such an agreement will have no effect on third parties if the agreement conflicts with the express provisions of Civil Code article 2330.

A partnership between spouses may not be desirable if its effect toward third persons is limited or defeated by the restrictions found in article 2330. An examination of some of the different types of partnerships into which a husband and wife might enter illustrates how a partnership might be used to limit the rights of one spouse to manage community property. For example, a husband and wife, for investment purposes, may decide to contribute community property to a partnership consisting of many people, in which the husband and wife may be limited partners. The spouses will lose the right to manage that part of the community which has been contributed to the partnership.⁸¹ Clearly this type of transaction will be allowed under the new matrimonial regimes articles; for it is in many ways similar to any other investments made by spouses which have always been allowed, such as the purchase of stock.

It is only a small step to go from this type of arrangement to a situation where both spouses are general partners in a partnership consisting of many people. As general partners both spouses will have a certain amount of managerial responsibilities over partnership affairs and assets. If the spouses contributed money as well as managerial functions, both spouses will share in the control over their community assets contributed to the partnership as dictated by their individual partnership agreements. This control will be shared more or less equally with all of the general partners. This arrangement should be allowed, since with regard to third persons, it is quite similar to a situation in which both spouses are limited partners. The only difference is that as general partners the spouses have some control over the management of their assets contributed to the partnership, while as limited partners, they could exercise no

79. See notes 39-44, *supra*.

80. LA. CIV. CODE art. 2330.

81. LA. CIV. CODE art. 2840.

such control. Third persons would not be forced to deal differently with the partnership or the spouse.

The situation may take on a different character when a partnership consists of only the husband and wife. If both spouses are general partners and have agreed to share equally in the control and management of partnership affairs, then the matrimonial regimes articles present no obstacle to the partnership. Civil Code article 2814 makes a partner a mandatary of the partnership for all affairs in the ordinary course of its business other than for the alienation, lease, or encumbrance of its immovables.⁸² This provision is not in conflict with the rules of the legal regime because the concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables.⁸³ The spouses have not attempted to violate the mandate of Civil Code article 2330.

The result may be different, however, if the spouses enter into a partnership agreement in which, for example, the husband is the only general partner and the wife is a limited partner. In order for the wife to retain her limited partner status, she cannot exercise any managerial powers over partnership affairs. If the assets of the partnership, both movable and immovable, were community property by the operation of the matrimonial regime between the spouses, then a problem arises. By the partnership agreement, the wife cannot concur in the alienation, control, and management of the partnership. Under Civil Code article 2330, the spouses cannot limit with respect to third persons the right each one has to obligate the community or to alienate, encumber, or lease community property.⁸⁴ Such a partnership arrangement between the spouses will not be effective as to third parties.⁸⁵

The fact that the reference to interspousal partnership agreements was deleted from the comments to Civil Code article 2329 does not by itself create a strong presumption that the legislature intended to disallow interspousal partnerships.⁸⁶ By eliminating certain previous obstacles to interspousal partnerships and by failing to create any new ascertainable restrictions, the legislature arguably intended to permit at least some partnership agreements between husbands and wives.

The final and perhaps most important question in this area is whether interspousal partnerships will modify or terminate a

82. LA. CIV. CODE art. 2814.

83. LA. CIV. CODE art. 2347.

84. LA. CIV. CODE art. 2330.

85. LA. CIV. CODE art. 2330.

86. See note 48, *supra*.

matrimonial regime and thus require judicial approval for validity. Since the purpose behind this requirement is served only when agreements affect future property, the question becomes whether a partnership will have this future effect.

Partnership agreements are very flexible tools, and the parties to such agreements possess the freedom to shape the partnership into many forms to suit their own needs. A partnership can be used by spouses to participate jointly in a business venture, or even as a matrimonial regime to control the marital property. The purpose for which the interspousal partnership agreement was entered should be a major factor in deciding whether judicial approval will be required. Whenever the partnership agreement has a business purpose and is not used to classify marital property, it will not have the sort of future effect on the property of the marriage which would render judicial approval necessary. The partnership property which later becomes marital property will still be classified by the spouses' matrimonial regime. Whenever a partnership is entered into between spouses with the intent to control, manage, and classify marital property, judicial approval will be required since the contract is actually a matrimonial agreement.

A problem arises, however, when the spouses enter into a partnership agreement with a "business purpose" and the property of the business becomes mixed with the property of the marriage. The obvious question is whether the possibility of intermingling of assets presents an obstacle to spouses who wish to become partners. The Civil Code provides little help in solving this problem. Article 2340 does create a presumption that all property in the possession of spouses during the existence of the community is community property.⁸⁷ This presumption cannot be defeated unless one or both spouses prove that the property is of a different nature.⁸⁸ The argument that an interspousal partnership agreement should not be allowed due to the possibility that the property of the partnership might become mixed with the marital property is unconvincing. This same argument, if valid, could be used as to a partnership between a spouse and third parties when the partnership property becomes intermingled with the personal property of the partner spouse. Intermingling of assets, therefore, should present no obstacle to interspousal partnership contracts.

Partnerships between spouses, therefore, should be allowed under the new matrimonial regimes revision. Judicial approval will

87. LA. CIV. CODE art. 2340.

88. LA. CIV. CODE art. 2340.

be required only when spouses attempt to use the rules of a "partnership" agreement as the rules of their matrimonial regime.

Conclusion

The arguments put forth in this paper have been based almost entirely on the text of the new matrimonial regime articles and the legislative purpose behind their enactment. The Louisiana courts at the time of this writing have not yet had the opportunity to examine the validity of such interspousal agreements. Apparently spouses now will be allowed to contract with each other in much the same fashion as they always could contract with third parties. This new contractual freedom will allow spouses to participate in new and imaginative forms of estate planning which heretofore were not available due to the incapacity of the spouses. Louisiana finally has recognized the need for the contractual freedom of husbands and wives.

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