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Matrimonial Regimes

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JUDICIAL PARTITION

During the 1981 legislative session, a joint legislative committee was created to study "the need for and feasibility of developing a specific procedure for the partition of community property between spouses, and settlement of debts and claims for reimbursement upon dissolution of the community regime for any cause."[1] The product of that joint legislative committee was enacted during the 1982 legislative session.[2]

Article 2369.1 of the Civil Code[3] was repealed by the 1982 legislation, and its substance was replaced by Louisiana Revised Statutes 9:2801. Enacted in 1981, article 2369.1 authorized the judge to partition in kind property of the community "by the allocation of assets and liabilities of equal net value to each spouse." Prior to the enactment of article 2369.1, Louisiana courts utilized the "item theory" of partition in kind, rather than the "aggregate theory."[4] Under the "item theory" of partition in kind, it was necessary that each particular community effect be capable of division between the spouses. Normally, community property consists of different assets not capable of "item by item" division in kind. In contrast, under the more flexible "aggregate theory," different assets of equal value are allotted to each spouse, provided that the property each ultimately receives is of equal net value. Article 2369.1 adopted for Louisiana the "aggregate theory" of partition in kind, utilized by the other seven community property

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1. La. S. Con. Res. No. 165, 7th Reg. Sess. (1981).
2. 1982 La. Acts, No. 439.
3. LA. CIV. CODE art. 2369.1 (repealed by 1982 La. Acts, No. 439):
   When the spouses are unable to agree on a partition of the community, either spouse may obtain a judgment decreeing a partition of the community in kind by allocation of assets and liabilities of equal net value to each spouse. If the community or any part thereof cannot be conveniently divided, the court shall order partition by licitation.
4. *See* W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 444-45 (1975); K. Rigby, *Some Views, Old and New, on Recent Developments in Family Law—Partitioning the Community*, 29 LA. B.J. 232, 235 (1982); Note, *Termination of the Community*, 42 LA. L. REV. 789, 811-16 (1982).

states.[5] Under article 2369.1, the judge had authority to partition community property in kind even when the property was indivisible by nature. Thus, the undesirable alternative of a partition by licitation,[6] which previously had been the only other option,[7] was avoided.

No provision was made in article 2369.1 "for how assets [were] to be allocated between the spouses;"[8] the article only provided that the allocation was to achieve equal net value. To the contrary, Louisiana Revised Statutes 9:2801 provides in detail the procedure for a judicial partition of community property, an order of priority, and guidelines to be followed in the allocation of assets and liabilities. Clearly, the purpose of the order of priority is that partitions by licitation, requiring the property to be sold at public auction, be a last resort.

Procedurally, the new legislation is peculiarly suited to the nature of a partition of community property, which may include numerous assets rather than a single co-owned item. For example, as a part of the proceedings to partition the community property, the court is authorized to settle the claims of the spouses, which may include claims for reimbursement,[9] an accounting,[10] or damages for fraud or bad faith in the management of community property.[11]

When proceedings are instituted, each party is required to file a sworn detailed descriptive list of the community property, its fair market value, and its location.[12] Each party either traverses or con-

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5. W. REPPY & W. DEFUNIAK, *supra* note 4, at 464. The other seven community property states are Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington.

6. LA. CIV. CODE arts. 1339 & 1340.

7. *See* LA. CIV. CODE arts. 1337, 1339, 1340; LA. CODE CIV. P. art. 4606. *See also* Wyche v. Taylor, 191 La. 891, 186 So. 602 (1939); Dhuet v. Taylor, 383 So. 2d 1061 (La. App. 1st Cir. 1980), *discussed in* Note, *supra* note 4, at 814.

8. Note, *supra* note 4, at 814. Methods suggested by the author that should or should not have been used by the courts in the allocation of assets and liabilities under Civil Code article 2369.1 included the possibility of ordering the payment of an equalizing sum of money and the inappropriateness of a partition by lots under Civil Code articles 1364-1367. *Id.* at 814-15.

9. LA. CIV. CODE arts. 2364-2368.

10. LA. CIV. CODE art. 2369.

11. LA. CIV. CODE art. 2354.

12. LA. R.S. 9:2801 (Supp. 1982) (emphasis added):

> Each party shall affirm under oath that the detailed descriptive list filed by that party contains all of the community assets and liabilities then known to that party. Amendments to the descriptive lists shall be permitted . . . . *Upon motion of either party, the court shall set a time limit for the filing of each detailed descriptive list.*

Presumably, in fixing a time limit, the court should consider the particular circumstances of the case, including the amount of assets and liabilities, the complexity involved in determining the classification of assets and their value, and the lack of knowledge of a spouse concerning community assets and liabilities.

curs in the inclusion or exclusion of each asset (and its valuation) and liability in the descriptive list of the other party.[13] Such a requirement assists the court, the parties, and their attorneys in identifying what items are in dispute. The trial of the traverses may be by summary procedure or by ordinary procedure, in the court's discretion.[14] At the trial of the traverses, "the court shall determine the community assets and liabilities; the valuation of assets shall be determined at the trial on the merits."[15] If it deems proper, the court is authorized to appoint experts to "assist the court in the settlement of the community and partition of community property, including the classification of assets as community or separate, the appraisal of community assets, the settlement of the claims of the parties, and the allocation of assets and liabilities to the parties."[16]

If the purpose of the pretrial procedures set forth in the new legislation is accomplished, the trial on the merits will be devoted to the classification of items in dispute, their valuation, and the proposed allocation of the assets. Valuation of the assets is to be determined as of the time of trial on the merits.[17]

The court then shall divide the community assets and liabilities so that each spouse receives property of equal net value.[18] The language is identical to that of article 2369.1, which was repealed.[19] The first priority in dividing the assets and liabilities is a partition in kind, evidenced by the following language: "The court shall allocate or assign to the respective spouses all of the community assets and liabilities."[20] In allocating the assets and liabilities, the court has authority to divide a particular asset or liability equally or unequally, or the court may allocate it in its entirety to one of the spouses. In deciding to whom an asset or liability shall be allocated, the court "shall consider the nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances that the court deems relevant."[21] If the allocation results in an unequal net distribution, the court shall order the payment of "an equalizing

13. "Upon the motion of either party, the court shall fix a time limit within which each party shall either traverse or concur." *Id.*

14. "The court, in its discretion, may by ordinary procedure try and determine at one hearing all issues, including those raised in the traverses." *Id.* The bifurcated trial under paragraph 2 of LA. R.S. 9:2801 may not be necessary if the community property consists of only a few items whose classification is not disputed.

15. *Id. See* CAL. [CIV.] CODE § 4800(a) (West Supp. 1982).

16. LA. R.S. 9:2801.

17. See text at note 15, *supra.*

18. La. R.S. 9:2801.

19. See note 3 *supra.*

20. LA. R.S. 9:2801.

21. *Id.*

sum of money, either cash or deferred, secured or unsecured, upon such terms and conditions as the court shall direct."[22]

Should the allocation of an asset in whole or in part be inequitable to a spouse, the court has two options: (1) order the parties to draw lots for the asset,[23] or (2) order a private sale of the asset "on such terms and conditions as the court deems proper."[24] These two options should be used only when neither husband nor wife has a more meritorious claim to an item of community property. Otherwise, it might be inequitable for the court to assign the asset to one spouse. If the court orders a "drawing of lots," the unsuccessful party would be entitled to other community property of equal value or an equalizing sum of money.

A partition by licitation should be ordered only in the event no other alternative can be utilized. If a public sale is ordered, the court has authority to fix minimum bids[25] and "other terms and conditions." However, if the court orders partition by licitation, it "shall expressly state the reasons why the asset cannot be allocated, assigned by the drawing of lots, or sold at private sale."[26] Obviously, partition by licitation is disfavored as a method for partitioning the community, and under the system of priorities, it should be the method of last resort.

The new legislation, as did Civil Code article 2369.1, permits the court to allocate liabilities to a spouse; but it expressly provides that as between the spouses, "the allocation of a liability to a spouse obligates that spouse to extinguish that liability."[27] Without the express creation of an obligation, the other spouse might have no remedy to assert against the spouse who was allocated the liability and failed

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22. *Id.* "The court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security." See note 8, *supra.*

23. Although the possibility of ordering the spouses to draw lots may seem similar to the "drawing of lots" provided for in Civil Code articles 1364-1367, *see* Note, *supra* note 4, at 814, there is an important difference. Under the Civil Code procedure for drawing lots, the lots are drawn for two groups of property of equal value. The new legislation contemplates the drawing of lots for one asset.

24. LA. R.S. 9:2801. The terms and conditions which may be imposed by the court include "the minimum price, the terms of sale, the execution of realtor listing agreements, and the period of time during which the asset shall be offered for private sale." *Id.*

25. *See* Tri-State Concrete Co. v. Stephens, 395 So. 2d 894 (La. App. 2d Cir. 1981). In Note, *supra* note 4, at 813, the author opined: "The setting of a minimum price for purchase at judicial sale serves to protect a spouse with inferior purchasing power, particularly in cases where no third persons will be bidding on the item."

26. LA. R.S. 9:2801.

27. *Id. Cf.* CAL. [CIV.] CODE § 4800.6 (West Supp. 1982).

to pay it. Should the spouse to whom the liability has been allocated default, the creditor could seek satisfaction from former community property allocated to the other spouse in the partition.[28] Since the partition was not accomplished by contract between the spouses, the theoretical basis of the right of the spouse whose property has been seized to claim reimbursement would be unjust enrichment.[29] The legislation's express imposition of a legal obligation relieves the spouse of the necessity of proving the elements of recovery for unjust enrichment.[30]

As to the rights of creditors, section 2801 provides: "The allocation [of liabilities] in no way affects the rights of creditors." The *allocation* of a liability to a spouse does not make him a debtor of the creditor; it only makes the spouse responsible to the other spouse for satisfaction of the allocated liability. In most instances, the judge will allocate a liability to the debtor spouse. Absent a novation of the debt,[31] the creditor's rights will continue to be governed by article 2357 of the Civil Code. Thus, a creditor of either spouse, regardless of which spouse is allocated the liability in the partition, may continue to seize property of the former community allocated to both spouses.[32] Furthermore, if a spouse, not the debtor of a creditor, disposes of assets of the former community other than for the satisfaction of community obligations,[33] he becomes personally liable to the creditor to the extent of the value of the property so disposed.[34] A spouse believing that by virtue of the judicial partition in kind he can now freely dispose of property received discovers that by so doing, he has assumed a personal liability which did not exist previously. The effect of a partition in kind under section 2801 as to pretermination creditors is the same as a voluntary partition by agreement

28. LA. CIV. CODE art. 2357.

29. LA. CIV. CODE art. 1965.

30. There are today five conditions for enrichment without cause as a source of obligation: (1) correlative impoverishment and enrichment, (2) absence of fault on the part of the impoverishee, (3) absence of a personal interest on the part of the impoverishee, (4) absence of cause, (5) absence of another action, which is explained by the subsidiary character of the action de in rem verso. J. DENSON SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON CONVENTIONAL OBLIGATIONS 418 (4th ed. 1973).

31. LA. CIV. CODE arts. 2185-2198.

32. LA. CIV. CODE art. 2357, para. 1: "An obligation incurred by a spouse before or during the community property regime, may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation."

33. LA. CIV. CODE arts. 2360-2363.

34. LA. CIV. CODE art. 2357, para. 2: "If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up to the value of that community property." *See* Note, *supra* note 4, at 789-99.

of the spouses.[35] The only protection afforded a spouse against the continuing effect of article 2357 is to expressly assume responsibility for one-half of the community obligations incurred by the other.[36] Thereafter, the assuming spouse may dispose of property received in the partition without incurring further responsibility.[37]

Whether section 2801 may be applied to pending litigation depends upon whether the provision is procedural or substantive. One purpose of the new legislation is to provide a detailed procedure for partitioning community property. A priority of methods for partitioning the community is also the subject matter of the new legislation. The methods are specific guidelines for the implementation of article 2369.1, enacted in 1981. Because of its history and purposes, it seems the legislation is procedural and remedial and, as such, applicable to pending as well as future litigation.[38] Arguably, the only substantive change made by the legislation is the imposition of an obligation owed to the other spouse upon allocation of a community debt. Yet, an obligation to reimburse the nondebtor spouse should his property be seized in satisfaction of the debt allocated to the other spouse already existed in the form of a claim of unjust enrichment.[39] Thus, the obligation merely changed in character from a quasi-contractual obligation to one imposed directly by law, effecting no substantive change.

To demonstrate the utility of the new partition legislation, consider the circumstances in *Franklin v. Franklin*.[40] Husband and wife had purchased immovable property, consisting of a lot and home, dur-

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35. *See* Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 123-24 (1979); Note, *supra* note 4, at 816.

36. LA. CIV. CODE art. 2357, para. 3: "A spouse may by written act assume responsibility for one-half of each community obligation incurred by the other spouse. In such case, the assuming spouse may dispose of community property without incurring further responsibility for the obligations incurred by the other spouse."

37. However, by an express assumption the following occurs: the assuming spouse (1) limits the responsibility of his share of former community property to *one-half* of each community obligation of the other; (2) the separate property of the assuming spouse also becomes responsible; and (3) *separate* creditors of the other spouse may no longer seek satisfaction of their obligations from property of the assuming spouse. Spaht & Samuel, *supra* note 35, at 130.

38. *See generally* General Motors Acceptance Corp. v. Anzelmo, 222 La. 1019, 64 So. 2d 417 (1953); Shreveport Long Leaf Lumber Co. v. Wilson, 195 La. 814, 197 So. 566 (1940); West v. State, Supt. of Public Educ. & State Bd. of Educ., 356 So. 2d 1015 (La. App. 1st Cir. 1977); Hammond Asphalt Co. v. Joiner, 270 So. 2d 244 (La. App. 1st Cir. 1972); Pelloat v. Greater New Orleans Expressway Comm'n v. Palmer & Baker, Inc., 175 So. 2d 656 (La. App. 1st Cir.), *writ refused*, 248 La. 122, 176 So. 2d 452 (La. 1965).

39. See text at notes 29-30, *supra*.

40. 415 So. 2d 426 (La. App. 1st Cir. 1982).

ing the marriage. After a legal separation, the husband remained in possession of the house and lot, purchased the adjoining lot, and constructed an improvement of the existing house on both lots. The purchase of the adjoining lot and the construction of the addition were with separate funds of the husband. The property consisting of both lots had an appraised value of $58,000; the original house and lot would have had an appraised value of $16,500. Since it was stipulated that the property which included both lots could not be partitioned in kind, the court ordered the property to be sold at public auction for not less than $40,000 cash.

The husband argued that the judge had erred in ordering his separate property sold. According to the husband, only the original value of the property should have been partitioned and that should have been accomplished by reimbursement from the husband's separate estate to the community. By adopting the approach suggested by the husband, the necessity of a partition by licitation could have been avoided.

Concluding that the positive law was silent concerning the partition of property that was in part separate and in part community, the court relied on Civil Code article 21.[41] "Natural law and reason" required that the property, consisting of a house built on two lots which could not be moved or returned to its original state without substantial loss to both parties, be sold. As to the predicament of the husband, the court commented: "Defendant cannot be heard to complain, since the situation has resulted from his own actions."[42]

Although the factual circumstances in the *Franklin* case may be unusual, there is the possibility that a house constructed on separate property of one spouse could be classified as community property. Such a possibility was mentioned in a footnote in *Deliberto v. Deliberto*.[43] A house constructed with community funds on separate

41. LA. CIV. CODE art. 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

42. 415 So. 2d at 428.

43. 400 So. 2d 1096, 1099 n.3 (La. App. 1st Cir. 1981). *See In re* Marriage of Sparks, 97 Cal. App. 3d 353, 158 Cal. Rptr. 638 (1979), where the court awarded the wife community land and a house built with her separate funds on the land and awarded the husband a credit for one-half the value of the land. *See also* Long v. Long, 88 Cal. App. 2d 544, 548, 199 P.2d 47, 50 (1948) in which the court stated:

> The plaintiff is in error in his contention . . . to the effect that since the house was built on his separate property it also became his separate property. Buildings and improvements placed on separate property of a husband and paid for with community funds do not become the separate property of the husband in the absence of an agreement to that effect.

property of the husband was classified as separate with a right of reimbursement accorded to the wife for the use of community funds.[44] However, in a footnote, the court indicated the result might have been different had the operative facts arisen after January 1, 1980. "LSA—CC Art. 491, as of January 1, 1980, would have permitted the spouses to have established ownership of the family domicile separate from the husband's land."[45]

Under article 491 of the Civil Code, buildings[46] permanently attached to the ground may belong to a person other than the owner of the ground. Such constructions are presumed to belong to the owner of the ground unless separate ownership is evidenced by an instrument filed for registry in the conveyance records of the parish in which the immovable is located. Furthermore, article 493 of the Civil Code provides that buildings made on the land of another with his consent belong to him who made them. In most cases involving the construction of a community home on separate property of a spouse, the owner of the immovable will have consented to the construction. Those who made the construction on land belonging to another are the husband and wife, as coowners of community property[47] used to fund the construction.

A question remaining under the new articles on ownership is the effect of failing to record an instrument under article 491 evidencing ownership of the house as community. Failure to record such an instrument should not preclude establishing community ownership of the house for two reasons: (1) registry is intended to establish ownership as to third persons,[48] not as between the parties, which is consis-

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44. *See* LA. CIV. CODE art. 2408 (repealed by 1979 La. Acts, No. 709, § 1). *See* LA. CIV. CODE art. 2366, *quoted in Deliberto*, 400 So. 2d at 1099 n.3.

45. 400 So. 2d at 1099 n.3.

46. Buildings should not be considered "component parts" of an immovable because they are treated separately in article 491 and the first paragraph of article 493 of the Civil Code. Article 493 reads as follows:

> Buildings, other constructions permanently attached to the ground, and plantings made on the land of another with his consent belong to him who made them. They belong to the owner of the ground when they are made without his consent.
>
> Things incorporated in, or attached to, an immovable so as to become its component parts under Articles 465 and 466 belong to the owner of the immovable.
>
> One who lost the ownership of a thing to the owner of an immovable may have a claim against him or against a third person in accordance with the following provisions.

47. LA. CIV. CODE art. 2336.

48. LA. CIV. CODE art. 491:

> Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees may belong to a person other than the owner of the ground. Nevertheless, they are presumed to belong to the owner of the ground, unless separate ownership is evidenced by an instrument

tent with registry requirements generally,[49] and (2) registry simply *displaces the presumption* of article 491 that buildings constructed on an immovable belong to the owner of the ground, rather than prohibiting its rebuttal.

If a house may be classified as community property and the immovable property on which it is located as separate, the problem of partitioning the house arises. The dilemma is novel because past jurisprudence has treated such a factual situation under the law of accession, the result being that the house was classified as separate property with a right of reimbursement accorded to the other spouse for the use of community funds.[50]

Rather than order a partition by licitation as in the *Franklin* case, the court could partition the community property in kind by allocating the house to the spouse upon whose separate property it is located. In allocating a particular community asset under section 2801, the court is to consider all circumstances that it deems relevant. That the house is constructed on the husband's separate property is relevant. If the house is allocated to the husband, the wife must receive equal net value by the allocation of other community property with the same aggregate value as the house (assuming there are other community assets of sufficient value), by ordering the husband to pay an equalizing sum of money, either cash or deferred (requiring the execution of a note, possibly secured by a mortgage on the house and lot), or by allocating to the husband more community debts. The latter alternative is the least desirable since the allocation has no effect on creditors' rights and may not have the practical result of assuring the wife's receipt of equal net value.

With problems such as those presented by the *Franklin* case and the application of Civil Code article 491, the detailed procedure and priorities of the new legislation may serve to protect spouses from the sometimes harsh economic alternative of a partition by licitation. It is hoped that judges will utilize the new legislation to accomplish a just and equitable result in such cases.

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filed for registry in the conveyance records of the parish in which the immovable is located.

LA. CIV. CODE art. 491, comment (c):

> Separate ownership of buildings, of other constructions permanently attached to the ground, of standing timber, and of unharvested crops or ungathered fruits of trees may be asserted *toward third persons* only if it is evidenced by an instrument filed for registry in the conveyance records of the parish in which the immovable is located. In the absence of such an instrument, *third persons* are entitled to assume that these things are component parts of the ground.

(emphasis added).

49. *See, e.g.*, LA. CIV. CODE arts. 2246, 2265, 2266, 2332; LA. R.S. 9:2721 (1950).

50. *See* Succession of Spann, 407 So. 2d 441 (La. App. 3d Cir. 1981); Richard v. Richard, 383 So. 2d 806 (La. App. 1st Cir. 1980). *See also* LA. CIV. CODE art. 2366.