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BOOK REVIEW

COMMUNITY PROPERTY IN THE UNITED STATES. Second edition. By William A. Reppy, Jr. and Cynthia A. Samuel. Charlottesville: The Michie Company, 415 pp., 1982.

*Katherine Shaw Spaht**

In a mobile society where married persons are increasingly acquiring property in many states, it is incumbent upon the attorney to be informed of questions likely to be posed by his clients. For a Louisiana attorney, the experience of other community property states on questions not yet addressed by either the Louisiana courts or legislature may prove extremely valuable. Although *Community Property in the United States* is a casebook written primarily for students, the wealth of information contained therein can be of tremendous assistance to the practicing attorney. The second edition of *Community Property* differs from the first edition by Professor Reppy and the late Professor William Q. DeFuniak in organization of the chapters, which is explained by the authors as follows:

The material on characterizing the ownership of property on the basis of agreement has been moved to the beginning of the book to reflect not only the logical starting point for solving characterization problems but also the increasing incidence of such inter-spousal agreements, both of the formal and informal kind.¹

The reason for the reorganization is important for Louisiana readers since the 1980 matrimonial regime legislation permitted for the first time inter-spousal contracts as a general rule.² Other community property states³ had permitted such contracts between the spouses, and subsequent amendments to the Louisiana legislation have specifically authorized transmutation agreements⁴ similar to those of the other states. The addition of tax notes at the end of each chapter is to alert the student or attorney to the tax implications of a community property issue, whether the implication involves federal income, state income, gift, or estate tax consequences. However, the general format of the first edition was retained: "[i]llustrative leading cases are followed by notes describing the position of the other community property states and raising further questions."⁵ At the end of each chapter are problems for discussion "intended to raise debatable issues for

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1. W. REPPY & C. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* vii (2d ed. 1982).

2. LA. CIV. CODE art. 1790.

3. Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington.

4. LA. CIV. CODE arts. 2343 & 2343.1. See text at notes 8-9 *infra*.

5. W. REPPY & C. SAMUEL, *supra* note 1, at vii.

all eight states."⁶ Of particular interest to practicing attorneys are those chapters containing the treatment of subjects which either the legislation or the courts have not considered. For example: In Chapter 3, entitled "Characterizing Ownership of Property on the Basis of Agreement," the subject of transmutation is explored. Transmutation is defined by the authors as a generic term that describes contractual and donative transactions between husband and wife which change the character of property from separate to community and vice versa.⁷ A formal transmutation would be a matrimonial agreement changing or altering the regime. In contrast, an informal transmutation would be all other transactions altering the character of property, *i.e.*, Civil Code article 2343⁸ changing community property to separate property by donation or Civil Code article 2343.1⁹ changing separate property to community either onerously or gratuitously. Other issues related to transmutation treated in the chapter include implying transmutation from the form of title to the property, retransmutation ("undoing" the change in property agreed to by the spouses), and the rights of third parties if there is a transmutation.¹⁰ Many of the transmutation issues have not yet been addressed by the Louisiana legislature or courts; hence the experience of the other community property states is invaluable as persuasive authority.

Another area of particular interest to a Louisiana reader is classification of property acquired with separate and community funds over a period of time. Prior to 1980 the Louisiana jurisprudence did not adopt one particular theory for the classification of such property: "No state uses a single theory consistently for all kinds of acquisitions over time. Louisiana, for example, uses time of vesting for real estate acquisitions, . . . but inception of title for acquisitions of personal property, . . . and pro-rata for pensions"¹¹ In the

6. *Id.*

7. *Id.* at 23.

8. 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 and the natural and civil fruits of the thing, and minerals produced from or attributed to the property given as well as bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases, form part of the donee's separate property.

LA. CIV. CODE art. 2343.

9. The transfer by a spouse to the other spouse of a thing forming part of his separate property, with the stipulation that it shall be part of the community, transforms the thing into community property. As to both movables and immovables, a transfer by onerous title must be made in writing and a transfer by gratuitous title must be made by authentic act.

LA. CIV. CODE art. 2343.1.

10. See LA. CIV. CODE arts. 1969-1994.

11. W. REPPY & C. SAMUEL, *supra* note 1, at 82.

case of long-term acquisitions financed on credit, the cases selected are noteworthy because of the approach taken by other community property states. The notes that follow the leading cases in these two chapters¹² are extensive and prove helpful in summarizing developments in the other states. One such note cites *Curtis v. Curtis*,¹³ a Louisiana Supreme Court case involving a credit purchase of immovable property by the wife with what she declared to be separate funds.

In Chapter 13 the leading cases and notes consider the developing jurisprudence in community property states concerning professional goodwill and the characterization of educational degrees and professional licenses. The excellent notes in the chapter collect citations to cases and articles on the subject, including how to measure the value of such "property" once characterized as community. In Louisiana no reported appellate court decisions have dealt with characterizing of a degree or measuring the value of professional good will for the purposes of partition at termination of the community.

The chapters of the book that concern management of community property are divided into equal management and dual management. Because Louisiana so recently adopted equal management, the jurisprudence of the other six states with similar management provisions¹⁴ reveals practical problems in application and suggests resolutions. Interestingly, the seven states adopting equal management as a general principle provide exceptions requiring joinder of the spouses. The notes explore problems and cases which consider, in particular, the meaning of *encumbrance* and *concurrence*. Consideration also is given to the problem of reliance by the third party purchaser on assurances by the seller that he is not married.¹⁵ With the

12. *Id.* at chs. 7 & 8.

13. 403 So. 2d 56 (La. 1981).

14. Arizona, California, Idaho, Nevada, New Mexico, and Washington.

15. *Cf.* LA. CIV. CODE art. 2342:

A declaration in an act of acquisition that things are acquired with separate funds as the separate property of a spouse may be controverted by the other spouse unless he concurred in the act. It may also be controverted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse.

Nevertheless, when there has been such a declaration, an alienation, encumbrance, or lease of the thing by onerous title may not be set aside on the grounds of the falsity of the declaration.

The provision of this article that prohibits setting aside an alienation, encumbrance, or lease on the ground of the falsity of the declaration of separate property is hereby made retroactive to any such alienation, encumbrance, or lease prior to the effective date of this article.

A person who has a right to set aside such transactions on the ground of the falsity of the declaration, which right is not prescribed or otherwise extinguished or barred upon the effective date of this article, and who is adversely affected by the provisions of this article, shall have six months from the effective

increase in bankruptcies due to the present economic climate, the inclusion of cases and citation to articles on the interrelationship of federal bankruptcy law and state community property law are particularly pertinent. The article continually cited in the book is that by Pedlar, *Community Property and the Bankruptcy Reform Act of 1978*,¹⁶ which is an excellent survey of the numerous problems created in the application of the Act in a community property jurisdiction.

At termination of the community, the spouses become co-owners of former community property and the myriad of problems that exist until partition are considered. The rights of pretermination creditors are contrasted to those of post-termination creditors, including the authority of the judge to allocate unpaid pretermination debts.¹⁷ The notes and cases in *Community Property* explaining the application of the "aggregate theory"¹⁸ of partition suggest how Louisiana's statute

date of this article to initiate proceedings to set aside such transactions or otherwise be forever barred from exercising such right or cause of action. Nothing contained in this article shall be construed to limit or prescribe any action or proceeding which may arise between spouses under the provisions of this article.

16. 11 ST. MARY'S L.J. 349 (1979).

17. The judge in Louisiana did not have the authority specifically to allocate debts between the spouses until 1981, with the enactment of Civil Code article 2369.1:

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.

That article was replaced by 1982 legislation reenacting Louisiana Revised Statutes 9:2801. In addition to the authority given the judge to allocate debts during the partition proceedings, he also was given authority to allocate assets as long as what the spouses ultimately received was of equal net value.

When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising from the matrimonial regime, either spouse, upon termination of the matrimonial regime, may institute a proceeding, which shall be conducted in accordance with the following rules:

(4) The court shall then partition the community in accordance with the following rules:

(a) The court shall value the assets as of the time of trial on the merits, determine the liabilities, and adjudicate the claims of the parties.

(b) The court shall divide the community assets and liabilities so that each spouse receives property of an equal net value.

(c) The court shall allocate or assign to the respective spouses all of the community assets and liabilities. In allocating assets and liabilities, the court may divide a particular asset or liability equally or unequally or may allocate it in its entirety to one of the spouses.

LA. R.S. 9:2801 (reenacted 1982).

18. The description of the "aggregate theory" of partition, as opposed to the "item theory" contained in Note, *Termination of the Community*, 42 LA. L. REV. 789, 811-12 (1982), is as follows:

may be interpreted, since many of the 1982 legislative refinements were patterned after California statutes. Tax notes at the end of this chapter consider the consequences of an asset-by-asset division (partition in kind) of community property or the possibility of surrendering community property in exchange for separate property or a promissory note.

One of the last chapters contains cases and notes on the choice of law in multistate transactions and the methods adopted by different states to resolve the choice of law issues. The effect of constitutional law on community property law under the supremacy clause and the due process clause (retroactivity of amendments to the community property legislation) is the subject matter of the last chapter, including United States Supreme Court decisions, such as *McCarty v. McCarty*¹⁹ and *Kirchberg v. Feenstra*.²⁰ Obviously, the subject matter considered by the book includes significantly more topics than those isolated and mentioned above. For example, the collection of cases and articles in the notes on the subject of the improvement of separate property with community funds and vice versa are excellent. A considerable increase in the Louisiana cases and notes in the second edition makes the publication more attractive for students and practitioners in this state.

Case selection, the quality of the notes which follow, and the thought-provoking questions and problems raised contribute to the quality of *Community Property* both as a teaching tool and as a resource for the attorney with a community property problem. The publication offers to the reader a rich comparative perspective on community property, its underlying principles which make it responsive to present day needs, and the application of legislation incorporating those principles. The superb efforts of Professors Reppy and Samuel offer to the legal community a publication on a subject that is nowhere else so comprehensively treated.

The use of the phrase "equal net value" in the new article [LA. CIV. CODE art. 2369.1; see note 17 *supra*] indicates that Louisiana is now adopting the more flexible "aggregate theory." Under this approach, different assets of equal value are allotted to each spouse. The crucial language in the article is "net value," since it suggests that several items may be given to one spouse and several other items given to the other spouse as long as the total, or net, value of the items given each spouse is equal. Certain items which are by their nature indivisible will no longer have to be sold automatically. Rather, one spouse may take possession of such items in exchange for assets of equal net value given to the other spouse.

19. 453 U.S. 210 (1981).

20. 450 U.S. 455 (1981).

