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MATRIMONIAL REGIMES

*Katherine Shaw Spaht**

LEGISLATION

Reimbursement

The potential dilemma of the classification of a house as community property, even though constructed upon separate immovable property,¹ has been resolved by legislation amending the articles on accession and those on reimbursement at termination of the community.² In a previous symposium article,³ the dilemma described was discussed by the author with the suggestion that, at least at termination of the community, the legislation on partition of the community property could assist in resolving the problem.⁴

In the section of the Civil Code containing the rules of accession,⁵ the articles now declare their inapplicability to constructions made on the separate property of a spouse with community funds⁶ or with separate funds of the other spouse,⁷ or to constructions made on community property with separate assets of a spouse.⁸ Corresponding amendments to the articles governing the right to reimbursement between the spouses were enacted.⁹

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1. See, e.g., *Franklin v. Franklin*, 415 So. 2d 426 (La. App. 1st Cir. 1982); *Deliberto v. Deliberto*, 400 So. 2d 1096, 1099 n.3 (La. App. 1st Cir. 1981), discussed in Spaht, *Developments in the Law, 1981-1982—Matrimonial Regimes*, 43 La. L. Rev. 513, 518-21 (1982).

2. 1984 La. Acts, No. 933, § 1.

3. Spaht, *supra* note 1.

4. *Id.* at 519-21 (citing the legislation on partition of community property, La. R.S. 9:2801 (1983)).

5. La. Civ. Code arts. 490-506.

6. La. Civ. Code art. 493, as amended by 1984 La. Acts, No. 933, § 1 ("When buildings, of [sic] other constructions permanently attached to the ground, or of [sic] plantings are made on the separate property of a spouse with community assets or with separate assets of the other spouse and when such improvements are made on community property with the separate assets of a spouse, this Article does not apply. The rights of the spouses are governed by Articles 2366, 2367, and 2367.1.'). For a discussion of the recent Civil Code amendments relating to accession, see Symeonides, *Developments in the Law, 1983-1984—Property*, 45 La. L. Rev. 541 (1984).

7. La. Civ. Code art. 493.

8. La. Civ. Code art. 493.

9. 1984 La. Acts, No. 933, § 1 (amending La. Civ. Code arts. 2366-2367 and enacting La. Civ. Code arts. 2367.1-2367.2).

The legislation provides initially that the constructions belong to the owner of the land.¹⁰ If community property is used to construct an improvement upon separate property of a spouse, at termination of the community the owner of the land owes the other spouse "one-half of the amount or value that the community assets had at the time they were used."¹¹ Likewise, if separate property of a spouse is used to construct an improvement upon community property, the spouse whose separate property has been so used is entitled to "one-half of the amount or value that the separate assets had at the time they were used if there are community assets from which reimbursement may be made."¹² In both situations, the rules are consistent with the measure of reimbursement due in every instance,¹³ except where common labor results in an increase in value of the separate property of a spouse.¹⁴

Although not a traditional reimbursement issue, the legislation further provides for reimbursement where improvements were constructed on the separate property of a spouse with separate assets of the other spouse.¹⁵ The construction is classified as separate property of the owner of the land, and the measure of reimbursement "is the amount or value that the assets had at the time they were used."¹⁶ In *Babin v. Babin*,¹⁷ a home was constructed upon the separate property of the husband but financed with separate funds of the wife. The matrimonial regimes legislation contained no rules regulating the respective rights of the spouses, so the court resorted to the general articles on accession,¹⁸

10. La. Civ. Code art. 2366, as amended by 1984 La. Acts, No. 933, § 1 ("Buildings, other constructions permanently attached to the ground, and plantings made on the separate property of a spouse with community assets belong to the owner of the ground."); La. Civ. Code art. 2367, as amended by 1984 La. Acts, No. 933, § 1 ("Buildings, other constructions permanently attached to the ground, and plantings made on community property with the separate assets of a spouse become community property."); La. Civ. Code art. 2367.1, as enacted by 1984 La. Acts, No. 933, § 1, quoted *infra* note 16.

11. La. Civ. Code art. 2366.

12. La. Civ. Code art. 2367.

13. La. Civ. Code arts. 2365-2367.

14. La. Civ. Code art. 2368. The measure of reimbursement under this article is one-half the enhanced value of the separate property. Cf. La. Civ. Code art. 2408 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1).

15. See *Babin v. Babin*, 433 So. 2d 225, 227 (La. App. 1st Cir. 1983), noted in Symeonides, *Developments in the Law, 1982-1983—Property*, 44 La. L. Rev. 505, 519 (1983).

16. La. Civ. Code art. 2367.1, as enacted by 1984 La. Acts, No. 933, § 1 ("Buildings, other constructions permanently attached to the ground, and plantings made on the land of a spouse with the separate assets of the other spouse belong to the owner of the ground. Upon alienation of the land, legal separation, or termination of the marriage, the spouse whose assets were used is entitled to reimbursement of the amount or value that the assets had at the time they were used.").

17. 433 So. 2d 225 (La. App. 1st Cir. 1983).

18. La. Civ. Code art. 508 (as it appeared prior to its amendment by 1979 La. Acts, No. 180, § 1).

which were not appropriate for a dispute between spouses. The comments to new Louisiana Civil Code article 2367.1 express the same reservation¹⁹ and conclude: "It is preferable to establish a special rule of accession in the relations between spouses and accord the remedy of reimbursement to the spouse whose separate assets were used for the improvement of the separate property of the other spouse."²⁰

The remedy accorded to a spouse whose separate assets were used to improve separate property of the other spouse is not restricted in its exercise to termination of the community.²¹ Unlike the other instances of reimbursement,²² a spouse whose separate property was so used may assert a claim against the other upon alienation of the land. This is an instance where the prohibition of suit between husband and wife does not apply because it is a cause of action "arising out of . . . the provisions of Title VI, Book III"²³ Furthermore, because the new article expressly permits such a suit, the implication is that although the other instances of reimbursement might be considered a cause of action under Title VI, they may only be asserted at termination.²⁴ This interpretation is consistent with the legislative history of the articles.²⁵ With the bar to suit inapplicable, the cause of action would prescribe

19. La. Civ. Code art. 2367.1, comment (b), as enacted by 1984 La. Acts, No. 933, § 1 ("[P]resumably, improvements made on the land of a spouse with the separate assets of the other spouse are made with the consent of the owner of the ground. Nevertheless, under this article the improvements belong to the owner of the ground. Application of Article 493 would have resulted in undesirable complications in the field of matrimonial regimes. It is preferable to establish a special rule of accession in the relations between spouses and accord the remedy of reimbursement to the spouse whose separate assets were used for the improvement of the separate property of the other spouse.").

20. La. Civ. Code art. 2367.1, comment (b), as enacted by 1984 La. Acts, No. 933, § 1.

21. La. Civ. Code art. 2367.1, as enacted by 1984 La. Acts, No. 933, § 1 ("Upon alienation of the land, legal separation, or termination of the marriage, the spouse whose assets were used is entitled to reimbursement of the amount or value that the assets had at the time they were used."). Comment (c) to the article explains: "The second sentence of this article applies 'upon alienation of the land, legal separation, or termination of the marriage.' A spouse does not have the right to reimbursement at any other time, unless, of course, he has reserved that right under a contract with the other spouse." Note that the list contained in article 2367.1 does not include all causes for termination found in Civil Code article 2356. See also La. Civ. Code art. 2356, comment (b). The failure to include absence, nullity of marriage, and a matrimonial agreement as causes for termination of the community was discussed in Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 La. L. Rev. 83, 123-24 (1979).

22. La. Civ. Code art. 2358.

23. La. R.S. 9:291 (Supp. 1984).

24. Louisiana Civil Code article 2358 (Supp. 1984) reads: "*Upon termination of a community property regime, a spouse may have against the other spouse a claim for reimbursement in accordance with the following provisions.*" (Emphasis added).

25. See Spaht & Samuel, *supra* note 21, at 143 n.367.

ten years²⁶ from the date of the alienation of the land.²⁷

The comments emphasize that article 2367.1, permitting exercise of the right to claim reimbursement only when the property is alienated or the community terminates, is not a matter of public order;²⁸ thus, the spouses could alter the provision by matrimonial agreement.²⁹

In the official comments, the explicit justification for restricting a spouse's recovery to the value of the separate assets at the time they were used is that the spouse whose separate assets were used has had the use of the property.³⁰ In fact, in *Babin* the wife apparently did have the use of the property of her husband. However, it is conceivable that the spouse whose separate property has been used would not have had the use of the other's property. For example, separate funds of the wife might be used to improve the husband's separate property occupied by family members who do not pay rent when the rent, if paid, would be classified as community property.³¹ Even if rent is paid, the husband may have recorded a declaration reserving that income as separate property.³² Thus, the fundamental assumption underlying the article may be invalid in many cases. Furthermore, the use of such property until termination of the community was not the basic assumption underlying articles 2366-68, as mentioned in the comment.³³ Where separate funds were used to improve community property or vice versa, articles 2366 and 2367³⁴ considered the expenditure an interest-free loan—a presumed gift of the interest on account of the marriage relationship—thus fostering and encouraging cooperative living.

Renunciation of the Right to Concur

At the 1984 Legislative Session two different acts were passed amend-

26. La. Civ. Code art. 3499.

27. La. Civ. Code art. 2367.1, as enacted by 1984 La. Acts, No. § 1. "Alienation" should not include encumbrance; other articles of the matrimonial regimes legislation use the two terms in the alternative. See, e.g., La. Civ. Code arts. 2347, 2350-2352.

28. La. Civ. Code art. 11.

29. La. Civ. Code arts. 2328-2330.

30. La. Civ. Code art. 2367.1, comment (d) ("During marriage, or prior to the alienation of the improved property, the spouse whose assets were used to improve it has the use of that property; therefore, reimbursement is limited to the value that his separate assets had at the time they were used.").

31. La. Civ. Code art. 2339 (Supp. 1984).

32. La. Civ. Code art. 2339.

33. La. Civ. Code art. 2367.1, comment (d) ("The second sentence of this article reflects the general principle established in Civil Code Articles 2366, 2367 and 2368 . . .").

34. Article 2368 is not based on such a principle since a spouse whose separate property is enhanced by common labor is liable to the other spouse for one-half the enhanced value of the property, not one-half the value of the labor at the time it was performed.

ing Louisiana Civil Code article 2348.³⁵ Most of the amending language of both acts was consistent;³⁶ thus, it is possible to construe the two together so as to give effect to each.³⁷ The only serious conflict exists within Act 622 of 1984,³⁸ and the other act may provide assistance in resolving that conflict.

Both acts were intended to limit the irrevocability of renunciations of the right to concur to a period of three years. Yet the language adopted was, "The renunciation may be irrevocable for a stated term not to exceed three years."³⁹ Clearly, if the renunciation is irrevocable for a stated term, it cannot exceed three years. After the stated term expires, the renunciation is revocable under the legislation. In the case of immovable property, to affect third parties the renunciation must be revoked by an act recorded in the conveyance records of the parish where the immovable property is located.⁴⁰

If the renunciation has no stated term, the amendment would not apply if interpreted literally, and the renunciation would be irrevocable until the termination of the community, and then only by implication.⁴¹

35. 1984 La. Acts, Nos. 554 & 622.

36. Only two sentences which appear in article 2348 of the Civil Code, as amended by Act 622 of 1984, do not appear in the amended version of article 2348 in Act 554 of 1984. Sections 2 and 3 of both acts are virtually identical.

37. *Hilton v. Hilton*, 451 So. 2d 90 (La. App. 3d Cir. 1984).

38. Act 622 of 1984, contains the following sentence in section 1 that amends Louisiana Civil Code article 2348:

Further, any renunciation of the right to concur in the alienation, encumbrance, or lease of a community immovable, or some or all of the community immovables or community immovables which may be acquired in the future, or all or substantially all of a community enterprise which was proper in form and effective under the law at the time it was made shall continue in effect for the stated term not to exceed three years or if there was no term stated, then until it is revoked.

Yet, section 2 of the same act reads as follows:

Any renunciation by a spouse which was validly executed prior to the effective date of this Act and which was made irrevocable shall be valid and shall continue in effect and be irrevocable for a period not in excess of three years from the effective date of this Act or if the renunciation was made irrevocable for a stated term, it shall be irrevocable for the term stated in the renunciation or for a period not to exceed three years from the effective date of this Act, whichever is less.

39. La. Civ. Code art. 2348, as amended by 1984 La. Acts, Nos. 554, § 1; 622, § 1.

40. La. Civ. Code arts. 2265-2266. By virtue of Act 331 of 1984, these two articles, along with some others, will be redesignated as La. R.S. 9:2741-2759 and as Chapter 2B of Civil Code Title IV of Book III, entitled "Registry." Section 5 of Act 331 of 1984, which redesignates these articles, specifically provides: "This redesignation is neither an amendment to nor reenactment of these Articles."

41. Article 2348 does not provide for the effect of termination of the community

This interpretation of the amendment is possible because of the awkward original phraseology of the sentence in article 2348 which was amended. The phrase is awkward because it states the obvious: the renunciation may be irrevocable for a stated term. This obvious statement creates negative implications, and those implications result in a literal interpretation which could defeat the purpose of the amendments. The intention to restrict irrevocability of all renunciations is evidenced in both acts by the section addressing retroactivity.⁴² Under section 2 of both acts,⁴³ if the renunciation was executed before January 1, 1985 (the effective date of the legislation) and had no stated term, the renunciation will be irrevocable for a period not to exceed three years from January 1, 1985, the date of the acts.

In addition to restricting the irrevocability of the renunciation to three years, one of the acts permits the renunciation to apply to property acquired in the future.⁴⁴ Before January 1, 1980, a general waiver by

upon the irrevocability of the renunciation. The argument that the effects of the irrevocable renunciation end with a termination of the community is supported by the title of the section in which article 2348 appears ("Section 2. Management of Community Property") and the fact that such property ceases to be community with a termination of the community. In fact, in article 2357 such property is referred to as *former* community property since it is now property co-owned in the traditional sense. Furthermore, § 2 appears in chapter 2 entitled "The Legal Regime of Community of Acquets and Gains."

Under article 2356 the legal regime is terminated by the death of a spouse, or by a judgment of divorce or separation from bed and board—both of which are retroactive to the date of filing of the original petition in the action in which the judgment is rendered. La. Civ. Code arts. 155 & 159—or by judgment of separation of property, which is retroactive to the date on which the petition was filed, La. Civ. Code art. 2375. The legal regime may also terminate by matrimonial agreement, La. Civ. Code arts. 2328-2329, La. Civ. Code art. 2356, comment (b); declaration of nullity of a marriage. *Patton v. Cities of Philadelphia & New Orleans*, 1 La. Ann. 98 (1846). *Prince v. Hopson*, 230 La. 575, 89 So. 2d 128 (1956); and declaration that a spouse is an absentee, La. Civ. Code arts. 5, 64, 70. See also *Spaht & Samuel*, *supra* note 21, at 123.

Particularly in the case of a termination of the community regime by a judgment of separation from bed and board or divorce, a spouse who fails to obtain injunctive relief preventing the other spouse from disposing of community property under Civil Code article 149 and Code of Civil Procedure article 3944 will be protected by the termination of the community as of the date of filing suit. From that date, if the renunciation is no longer effective and assuming that third persons have notice by the filing of *lis pendens*, there are two possible results: (1) the renunciation is revocable requiring the spouse who executed it to file another instrument revoking the renunciation; or (2) the renunciation is considered terminated and the concurrence of the spouse who initially executed the renunciation is required for the alienation, encumbrance or lease of the property. Under the circumstances of a termination of the community property, the author prefers the latter solution as the more reasonable one, affording the greatest protection to the renouncing spouse.

42. 1984 La. Acts, No. 554; 1984 La. Acts, No. 622.

43. 1984 La. Acts, No. 554, § 2; 1984 La. Acts, No. 622, § 2.

44. 1984 La. Acts, No. 622.

the wife of the necessity of her consent could apply to property acquired in the future.⁴⁵ However, article 2348, as enacted in 1980, only permitted the renunciation of the right to concur as to a particular piece of presently-owned community immovable property. The statutory language of article 2348,⁴⁶ as well as the official comments,⁴⁷ severely restricted the object of the renunciation which otherwise would have been subject to the general rule of conventional obligations that future things may become the object of contracts.⁴⁸ Even though article 2348 was amended in 1981,⁴⁹ the limitation restricting the renunciation to presently-owned property was unaffected. The 1984 amendment which authorizes a spouse to renounce irrevocably the right to concur in the alienation of community immovable property not yet acquired (the value of which is unknown) permits one spouse to abuse his management powers. By virtue of the renunciation as to future property, a spouse may acquire and dispose of valuable community property without the knowledge or consent of the other spouse. This potential for abuse was a major impetus for the revision of the matrimonial regimes law.

The most disturbing issue raised by the two acts concerns the provisions on retroactivity. Section 2 of both acts provides that, as to

45. See La. Civ. Code art. 2334 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1):

The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

The declaration may be general as to all such property or it may specify property to which it shall or shall not apply. If the declaration so provides, it may apply generally to property which may be acquired in the future, but a contrary declaration of withdrawal of her authority or consent by the wife may be made and recorded.

46. La. Civ. Code art. 2348 ("A spouse may expressly renounce the right to concur in the alienation, encumbrance or lease of a community immovable or all or substantially all of a community enterprise. . .") (emphasis added).

47. La. Civ. Code art. 2348, comment (b) ("A spouse may expressly renounce the right to concur in the alienation, encumbrance or lease of a particular community immovable or a particular community business or all, or substantially all, of the assets of that business . . .").

48. La. Civ. Code art. 1887. Even though the renunciation is a unilateral act by a spouse, it should be subject to some of the same rules as those which govern consensual acts. In the case of the applicability of article 1887, it seems appropriate to apply the article to the renunciation by analogy. See also La. Civ. Code art. 1976, as enacted by 1984 La. Acts, No. 331, § 1 (effective Jan. 1, 1985) (reproducing the substance of current Civil Code article 1887).

49. La. Civ. Code art. 2348 (as it appeared prior to its amendment by 1984 La. Acts, Nos. 554 & 622):

A spouse may expressly renounce the right to concur in the alienation, en-

irrevocable renunciations executed before January 1, 1985, those without a stated term shall be irrevocable for three years from the effective date of the acts. Renunciations with a stated term exceeding three years from the date of the act remain irrevocable until January 1, 1988.⁵⁰ The provisions of the two transitional sections are identical, unambiguous, and fair in striking a balance between applicability of the new statute and its underlying policy, and the justified expectations of those who have relied upon renunciations executed before January 1, 1985. However, Act 622 contains a sentence in the first paragraph that Act 554 does not. The sentence reads as follows:

Further, any renunciation of the right to concur in the alienation, encumbrance, or lease of a community immovable, or some or all of the community immovables or community immovables which may be acquired in the future . . . which was proper in form and effective under the law at the time it was made shall continue in effect for the stated term not to exceed three years or if there was no term stated, then until it is revoked.⁵¹

Under this provision, if the renunciation was executed before January 1, 1985 (which is the implication of the language quoted above) and did not contain a term, then it is irrevocable until revoked. Such a conclusion provides for an absurd result: irrevocable renunciations are now revocable. Furthermore, it strikes an unfair balance. Even renunciations which contain a stated term of irrevocability continue in effect for the term, not to exceed three years. Whether the three year period is to be calculated from the date of execution or January 1, 1985 is unclear.

Arguably, section 2 of both acts (the wording of which is inconsistent with the sentence added to article 2348 in Act 655) ought to prevail because it appears in both acts and is obviously an attempt to provide expressly for retroactivity. In addition, section 2 is unambiguous and accomplishes the fairer result. If section 2 prevails, consider the case of the lawyer who consults the Civil Code and reads the additional sentence which will appear in article 2348. He may reach a decision without the knowledge of or seeming necessity to consult the official acts where section 2 is buried.

cumbrance, or lease of a community immovable or some or all of the community immovables, or all or substantially all of a community enterprise. . . .

A spouse may nonetheless reserve the right to concur in the alienation, encumbrance, or lease of specifically described community immovable property.

50. 1984 La. Acts, No. 554, § 2; 1984 La. Acts, No. 622, § 2.

51. 1984 La. Acts, No. 622, § 1 (amending La. Civ. Code art. 2348).

JURISPRUDENCE⁵²*Separation of Property by Judgment*

In *Pan American Import Co. v. Buck*,⁵³ the Louisiana Supreme Court had the opportunity to interpret the Civil Code articles permitting

52. In *United Credit Plan v. Pullen*, 435 So. 2d 1055 (La. App. 4th Cir. 1983), rev'd, 448 So. 2d 95 (La. 1984), the creditor had obtained a judgment against the husband for medical services rendered to his wife and child, the services having been rendered and the judgment obtained before January 1, 1980. The contest over the distribution of proceeds from the wife's separate property was between the judgment creditor and a conventional mortgagee of the wife. The Louisiana Supreme Court concluded that it was unnecessary to decide the issue of the retroactivity of Civil Code article 2345 because the judgment creditor did not have a lien against the wife and her separate property by virtue of a judgment obtained against the husband. According to the court:

Bobalin Pullen's obligation on this community debt has not produced a judgment against *her*. Consequently no lien against her separate property has arisen out of it. At best we can speculate about her separate responsibility, since the unpaid bill to Southern Baptist was one for medical treatment she and her new born daughter received. Southern Baptist might even argue (whether plausible or not) that a judicial mortgage attached to the wife's separate property when the new law took effect on January 1, 1980, and that the court should, based upon a January 1, 1980 change in the law, *constructively* add the name of Bobalin Pullen to Southern Baptist Hospital's existing recorded inscription against Richard Pullen.

448 So. 2d at 98-99.

The court correctly applied the law since the question of the retroactivity of article 2345 might be dispositive in hypothetical cases, but it was not dispositive here. Under either the law effective before January 1, 1980 or under article 2345, the conventional mortgagee would prevail over the judicial mortgagee. The most interesting questions raised by *United Credit Plan* involve the ramifications of the decision upon creditors who failed to obtain a judgment against the wife for a community debt incurred by her before January 1, 1980. In many instances under the law effective before January 1, 1980, the wife, acting as an agent of the community, who incurred a debt was not legally responsible if her husband was. See *Louisiana Bank & Trust Co. v. Pernici*, 372 So. 2d 788 (La. App. 2d Cir. 1979); *Midland Discount Co. v. Robichaux*, 184 So. 2d 93 (La. App. 4th Cir. 1966); *Isana Prods., Inc. v. Lewing*, 168 So. 2d 903 (La. App. 2d Cir. 1964); *D.H. Holmes Co. v. Morris*, 188 La. 431, 177 So. 417 (1937). The evidence had to be clear and convincing that the wife intended to bind herself personally for the obligation. Therefore, since the community property, other than the wife's earnings, La. R.S. 9:3584-85 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 3), was a part of the patrimony of the husband, *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973), many creditors obtained judgments only against the husband.

If the obligation incurred by the wife has not yet prescribed, presumably the creditor could obtain a judgment against her if he could prove by clear and convincing evidence under the law effective at the time the obligation was incurred that she intended to bind herself personally. Civil Code article 2286, stating the principle of *res judicata*, would not preclude such action since the parties are not the same. Section 7 of Louisiana Act 331 of 1984 transferred and redesignated Civil Code article 2286 as La. R.S. 13:4231 (Supp. 1985) (effective Jan. 1, 1985).

53. 452 So. 2d 1167 (La. 1985).

a spouse to obtain a separation of property during the existence of the marriage.⁵⁴ The critical issue which the court described as "res nova" was the grounds for intervention in the action by creditors. Article 2376 permits creditors of a spouse to intervene and object to a separation of property "as being in fraud of their rights."⁵⁵

Prior to her marriage, the wife had embezzled money from the plaintiff. Plaintiff had obtained a judgment against the wife and had instituted garnishment proceedings against the husband. The husband sought to enjoin the garnishment, but the trial judge refused to grant the requested injunctive relief. Thereafter, the husband petitioned for a judicial separation of property, alleging that his interest in the community was threatened "to be diminished by the . . . incompetence of the other spouse, or by the disorder of the affairs of the other spouse. . . ."⁵⁶ Plaintiff intervened in the suit objecting to the separation of property on grounds that it was in fraud of its rights.

Although the law previously provided a remedy of intervention to the husband's creditors in a suit by the wife to obtain a separation of property,⁵⁷ the court opined: "We cannot look to prior jurisprudence interpreting the phrase 'in fraud of their rights' because no case has ever before considered the matter."⁵⁸ The court instead relied "in pari materia and by analogy"⁵⁹ upon the articles governing the revocatory action⁶⁰ to interpret the phrase "in fraud of a creditor's rights." Under those articles the creditor must prove that the act of the debtor was both in bad faith⁶¹ and injurious to the creditor.⁶² Further, the injury suffered by the creditor must be a present injury, not a future injury.⁶³

54. La. Civ. Code arts. 2374-2376 (Supp. 1984).

55. La. Civ. Code art. 2376 (Supp. 1984).

56. La. Civ. Code art. 2374 (Supp. 1984).

57. La. Civ. Code art. 2434 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1).

58. *Pan American Import Co. v. Buck*, 452 So. 2d at 1169.

59. *Id.*

60. La. Civ. Code arts. 1968-1994. See also La. Civ. Code arts. 2036-2043, as enacted by 1984 La. Acts, No. 331, § 1 (effective Jan. 1, 1985) (referring to the revocatory action).

61. La. Civ. Code art. 1978 ("No contract shall be avoided by this action but such as are made in fraud of creditors, and such as, if carried into execution, would have the effect of defrauding them. If made in good faith, it can not be annulled, although it prove injurious to the creditors; and although made in bad faith, it can not be rescinded, unless it operate to their injury.').

62. La. Civ. Code art. 1978.

63. As authority for this proposition, the court cited *Feist v. Willer & Gamm, Inc.*, 16 La. App. 618, 133 So. 797 (2d Cir. 1931), which was quoted with approval in *Martin Lebreton Ins. Agency v. Phillips*, 364 So. 2d 1032 (La. 1978). The language quoted by the court in *Martin Lebreton* was from the *Feist* case:

The revocatory action, we think, is given to individual creditors in contemplation

Therefore, the court found "in the instant case, Pan Am did not suffer a present injury by being deprived of the right to garnish Jerry's salary because that salary constituted future property against which Pan Am had no present right of execution."⁶⁴ This interpretation promotes consistency in result, according to the court, since a spouse who obtains a separation of property by judgment is in the same position as to creditors as one who obtains a separation from bed and board,⁶⁵ a divorce,⁶⁶ or a separation of property by matrimonial agreement.⁶⁷

An interesting aspect of *Pan American* is that the act which constituted grounds for a separation of property occurred before the marriage. Since an obligation incurred by a spouse before or during the community regime is capable of satisfaction from community property,⁶⁸ the wife's act of embezzlement did threaten the husband's interest in community property. The language and purpose of article 2374 suggest that the contemplated acts of incompetence, fault, or neglect are ordinarily those that occur after the creation of the community.⁶⁹ Yet, the language which permits a separation for "the disorder of the affairs of the other spouse" includes acts before or during the community regime. This interpretation is consistent with past jurisprudence.⁷⁰

Although past jurisprudence interpreting "in fraud" of creditors' rights is scant, some authority does exist. A judgment of separation of property "in fraud" of creditors, in most of the cases which considered the issue, was coextensive with a collusive judgment—one obtained "by

that they have or will proceed under their judgments against the property of the debtor, . . . and that when the action sought to be revoked is merely a preference, such preference must relate to property which is subject to execution under their judgments and not to property which may become subject to execution in the near or distant future

Feist, 16 La. App. at 620-21, 133 So. at 799. See also *New Orleans Credit Men's Ass'n v. Cattana*, 145 La. 330, 82 So. 289 (1919); *City of Alexandria v. Police Jury*, 139 La. 635, 71 So. 928 (1916).

64. *Pan American*, 452 So. 2d at 1170.

65. La. Civ. Code art. 155 (Supp. 1984).

66. La. Civ. Code art. 159 (Supp. 1984).

67. La. Civ. Code arts. 2329, 2370-2373 (Supp. 1984).

68. La. Civ. Code art. 2345 (Supp. 1984).

69. La. Civ. Code art. 2374 (Supp. 1984) ("When the interest of a spouse in a community property regime is threatened to be diminished by the fraud, fault, neglect, or incompetence of the other spouse"). The implication of this language is that a community property regime exists and the spouse is guilty of a breach of duty in managing community property. Historically, an action for separation of property was a remedy available to the wife when the husband was a poor manager of the community property. Therefore, this remedy was devised in contemplation of situations where the community regime was in existence and the spouse with managerial powers was abusing them.

70. See, e.g., *Phelps v. Rightor*, 15 La. Ann. 33 (1860).

surprise"⁷¹ without sufficient proof of grounds.⁷² In all of the cases the creditors were seeking to annul a judgment of separation of property,⁷³ which Planiol identified as a particular form of the revocatory action.⁷⁴ Thus, in *Natchez Drug Co. v. Bell*,⁷⁵ a judgment dismissing a creditor's suit against the wife of the debtor was affirmed because the creditor had failed to allege the husband's insolvency.⁷⁶

The action to annul the judgment was only one of two defenses accorded to creditors of the husband; the other was intervention in the action for the purpose of protecting their claims as the creditor had done in *Pan American*.⁷⁷ An illustration by Planiol of the right of the creditor to intervene and protect his claim was the example of the creditor's ability to "question the grounds of the wife's action . . ."⁷⁸ This historical commentary supports the position that for either defense—annulment of the judgment or intervention in the action—"in fraud" of creditors' rights meant without proving any serious cause or a collusive judgment.⁷⁹ Furthermore, the grounds for obtaining a separation of property provide additional support for the proposition that "in fraud" of creditors' rights means a collusive attempt by the spouses to obtain

71. See, e.g., *Natchez Drug Co. v. Bell*, 151 So. 134 (La. App. 2d Cir. 1933); *Friedlander v. Brooks*, 35 La. Ann. 741 (1883); *Haney v. Maxwell*, 24 La. Ann. 49 (1872); *Webb v. Peet*, 7 La. Ann. 92 (1852).

72. 3 M. Planiol, *Treatise on the Civil Law* pt. 1, no. 1199 (11th ed. La. St. L. Inst. trans. 1959). "She could also obtain a surprise separation without any serious cause." *Id.* no. 1196.

73. See cases cited supra note 71. See also *Jones v. Jones*, 119 La. 677, 44 So. 429 (1907); *Brown & Learned v. Smythe*, 40 La. Ann. 325, 4 So. 300 (1888); *Dejan v. Schaeffer*, 40 La. Ann. 437, 4 So. 89 (1888); *Darcy & Wheeler v. Labennes*, 31 La. Ann. 404 (1879); *Powlis v. Cook*, 28 La. Ann. 546 (1876); *Farrell v. O'Neil*, 22 La. Ann. 619 (1870); *McMurphy v. Bell & Haggerty*, 16 La. Ann. 369 (1861); *Phelps v. Rightor*, 15 La. Ann. 33 (1860); *Campbell v. Bell*, 12 La. Ann. 193 (1857); *Malone v. Kitching*, 10 La. Ann. 85 (1855).

La. Civ. Code art. 2376 (Supp. 1984) ("They (creditors) also may sue to annul a judgment of separation of property within one year from the date of the rendition of the final judgment. After execution of the judgment, they may assert nullity only to the extent that they have been prejudiced.").

74. 3 M. Planiol, supra note 72, no. 1198 ("This is a particular form of the revocatory action against a judgment. . . . Hence the creditors have the burden of proof that spouses acted in concert to defraud them.").

75. 151 So. 134 (La. App. 2d Cir. 1933).

76. *Id.* at 135-36 ("It is only such acts of the debtor that work injury or loss to his creditors that they may complain of and invoke the court's aid in annulling to the end that the wrong done them may be rectified.").

77. 3 M. Planiol, supra note 72, no. 1197 ("The husband's creditors may intervene to protect their claims, either before trial court or on appeal (Art. 1447). For instance, they may question the grounds of the wife's action; in fact they are invited to do so by the publicity to which this action is subject.").

78. *Id.*; La. Civ. Code art. 2376 (Supp. 1984) ("The creditors of a spouse, by intervention in the proceeding, may object to the separation of property . . . as being in fraud of their rights.").

79. La. Civ. Code art. 2376 (Supp. 1984).

a judgment. French commentators recognized that if a separation of property was necessary to preserve a spouse's earnings for the family, it could be obtained.⁸⁰ Likewise, courts have interpreted the grounds for a separation of property as including the preservation of a spouse's income for support of the family.⁸¹ If preserving a non-debtor's income is grounds for a separation of property, then it would be inconsistent to deny the judgment because a creditor no longer has access to that spouse's income.

Relying on the revocatory action "in pari materia" to interpret "in fraud" of a creditor's rights in *Pan American* was both unnecessary and inappropriate. The creditor could not have proved that the husband had no grounds for the action; therefore, it was unnecessary to deny the creditor relief for failure to prove present injury. Furthermore, it seems inappropriate to rely too heavily upon the revocatory action legislation. The action to obtain a separation of property is distinguishable from the revocatory action. In the former, the creditor is objecting to an action by the non-debtor spouse⁸² and in the latter, to an act of his debtor. For that reason, absent proof of the lack of statutory grounds, the creditor should not have the right to prevent the separation of property.

Moreover, the policy underlying article 2374 is different from that underlying the revocatory action. The fact that the action is permitted if it is necessary to preserve a spouse's income in the interest of the family is demonstrative of the difference in policy. Rather than weighing the interest of the creditor against a third-party transferee as in the revocatory action, the court is weighing the interest of the creditor against the desire to maintain the family as a viable, economically independent unit. The distinction between the interests involved ought to be emphasized rather than relying upon the purported similarity of the actions.

Another reason for abandoning the requirement of present injury⁸³ is that, in the context of the judgment of separation of property, it will be difficult in the ordinary case for the creditor to prove injury to

80. 2 R. Pothier, *Traite de la Communauté* no. 501 (1st ed. 1806); 13 Toullier, *Droit Civil Français*, no. 28 (3d ed. 1836); 8 A. Duranton, *Cours de Droit Civil* no. 404 (4th ed. 1841).

81. *Carite v. Trotot*, 105 U.S. 751 (1881); *Sonnier v. Fris*, 220 La. 1085, 58 So. 2d 393 (1952); *Gastauer v. Gastauer*, 131 La. 1, 58 So. 1012 (1912); *Davock v. Darcy*, 6 Rob. 342 (1844); *Mitchell v. Mitchell*, 231 So. 2d 414 (La. App. 2d Cir. 1970).

82. Historically, the intervention was permitted in favor of the husband's creditors who objected to the action's being instituted by the wife, a non-debtor. Although Louisiana Civil Code article 2376 refers only to the creditors of a spouse, it was intended in that respect simply to extend the privilege to creditors of the wife if, after January 1, 1980, the husband instituted an action to obtain a separation of property from his wife.

83. La. Civ. Code art. 2036, as amended by 1984 La. Acts, No. 331, § 1 ("An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases

a present interest as required in *Pan American*. If denying the creditor access to future earnings of the non-debtor spouse is not a present injury, the only injury the creditor could suffer is denial of access to community property owned at the time the petition for a separation of property is filed.

Under the matrimonial regimes legislation, the creditor of the wife may seize property of the former community in satisfaction of his pre-termination obligation even after there has been a conventional or judicial partition of the community property.⁸⁴ Furthermore, article 2357 provides that if the husband who receives former community assets after the judgment of separation of property disposes of them for a purpose other than the satisfaction of community obligations, he becomes personally responsible to all creditors of the wife to the extent of the value of the property disposed of.⁸⁵ Therefore, because of the protection afforded to creditors after termination of the community, it ordinarily will be impossible for a creditor to prove present injury resulting from a judgment of separation of property.

Conceivably, the only instance where present injury may occur is if the creditor is a separate creditor of one spouse, as in *Pan American*,⁸⁶ and the other spouse assumes responsibility for one-half of the community obligations of the debtor spouse.⁸⁷ If the act of assumption is

the obligor's insolvency.''). Comment (a) to article 2036 reads as follows: "This Article is new. It changes the law insofar as it abandons the notion of fraud contained in the source articles." Comment (b) to article 2036 adds:

This Article substitutes an act of the obligor that causes or increases his insolvency for the notion of an act in fraud of creditors contained in the source articles. As used in those articles, the word 'fraud' has a meaning which is difficult to determine but which appears different from its meaning in other contexts. In this revision, the criterion for the revocatory action is an objective one. It may be satisfied by an act done negligently as well as intentionally.

84. La. Civ. Code art. 2357 (Supp. 1984). Potentially, since it is distinguishable from wages, one might argue that a creditor suffers an injury presently if he is deprived of the income produced from community property, at least to the extent of one-half of that income to be produced in the future. This argument does not apply to separate property of the non-debtor spouse since that spouse at any time may reserve unilaterally the income as separate property. La. Civ. Code art. 2339 (Supp. 1984). However, for the same policy reasons as those that exist for permitting separation of property in order to preserve the wages of a spouse for support of the family, the court ought to deny a claim of present injury produced by depriving the creditor of one-half the income from community property.

85. La. Civ. Code art. 2357 (Supp. 1984) ("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.'').

86. An antenuptial obligation of a spouse is classified as a separate obligation under article 2363. See La. Civ. Code art. 2363 (Supp. 1984).

87. La. Civ. Code art. 2357 (Supp. 1984) ("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.'').

contained in a conventional partition which transfers to the non-debtor spouse property in satisfaction of his one-half interest in the community, the creditor could assert the revocatory action against the partition agreement. The matrimonial regimes law provides that the effect of the act of assumption is to deny the separate creditor access to property of the assuming spouse acquired by virtue of the partition.⁸⁸ In such a case, the creditor has suffered injury to a present interest, since he has been denied property which was subject to execution. The injury results, however, from the agreement containing the assumption, not from the judgment.⁸⁹ If no more property than the value of the non-debtor spouse's one-half interest is transferred by the partition and the law permits the assumption by the non-debtor spouse, the separate creditor will probably not be successful in asserting the revocatory action.

Admittedly, there is less likelihood of a collusive judgment of separation of property since the matrimonial regimes legislation of 1979. Spouses are now permitted to contract a separation of property regime during the marriage with court approval.⁹⁰ A greater possibility exists for a judgment "by surprise" or a collusive judgment where the spouses conventionally agree to a separation of property regime and file a joint petition for judicial approval. Although the spouses must prove that the agreement serves "their best interests," at least one writer has expressed the opinion that "their" should not include the interests of the creditors of a spouse who might intervene to oppose approval of the agreement.⁹¹ The creditor is relegated to a revocatory action asserted against the partition of community property, which may or may not be included in the separation of property agreement, with the same difficulties encountered in proving present injury caused by a partition after a judgment of separation of property.

The creditors of the spouse against whom the judgment is pronounced should not be able to prevent the separation of property if statutory grounds are proved. In interpreting article 2376 it is preferable, in light of the history of the article as well as the balancing of interests reflected in the provision, to interpret "in fraud" of creditors' rights as a judgment collusively obtained by the spouses without proof of the statutory grounds.

88. See Spaht & Samuel, *supra* note 21, at 130.

89. More particularly, the injury suffered is the result of an act by the non-debtor spouse, *i.e.*, the assumption of one-half of the community obligations of the debtor. Without the execution of the partition agreement containing the assumption, the creditor of the debtor would have no remedy.

90. La. Civ. Code arts. 2329, 2370-2373 (Supp. 1984).

91. Spaht & Samuel, *supra* note 21, at 98-108. Louisiana Civil Code article 2376, although not found in the section of the matrimonial regimes legislation governing matrimonial agreements, provides that: "The creditors of a spouse, by intervention in the proceeding, may object to the separation of property or modification of their matrimonial regime as being in fraud of their rights." La. Civ. Code art. 2376 (Supp. 1984).

