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Matrimonial Regimes

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ACCOUNTING AT TERMINATION

Under Louisiana Civil Code article 2369 "[a] spouse owes an accounting to the other spouse for community property under his control at the termination of the community property regime." The duty to account can be distinguished from the obligation to reimburse a spouse for use of community property to enhance separate property.[1] The former assumes that community property no longer exists or cannot be identified and applies only where a spouse had community property under his control at the termination of the regime. The latter assumes community property *improved* or *benefited* separate property and applies for expenditures made during the existence of the community.[2]

In *Lococo v. Lococo*[3] community property was in existence and had been allocated to the wife in the judicial partition. The wife discovered that due to the husband's inattention, "certain properties were in a state of disrepair and taxes were left unpaid during the years that the defendant managed the property."[4] The wife filed suit alleging a breach of his fiduciary duty to preserve community property under his control after termination of the community regime, and the husband filed an exception of prescription. The court opined: "We do not believe that C.C. Art. 2369 has any application in this case, nor after much research into the legislative history of Act. 790 [sic] of 1979 have we been able to determine exactly in what situation C.C. Art. 2369 applies."[5]

As observed by the court, article 2369 with its three-year prescriptive period did not apply. In *Lococo*, there was no issue of the existence of community property; it was in the possession of the husband and

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1. La. Civ. Code arts. 2364-68.

2. La. Civ. Code art. 2358: "*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).

3. 462 So. 2d 893 (La. App. 4th Cir. 1984), cert. denied, 462 So. 2d 889 (La. 1985).

4. Id. at 895.

5. Id.

then allocated to the wife. Factually,[6] article 2369 contemplates community property in existence at the termination of the community under the control of one spouse that cannot be accounted for. The spouse who seeks an accounting under article 2369 need prove only that the property was under the control of the other spouse, and "thereafter the burden [is] upon the fiduciary to establish what disposition he [has] made of the money or property."[7]

The court, despite having concluded that article 2369 did not apply, utilized the official comments to that article[8] and the law concerning co-ownership to dispose of the husband's exception of prescription.[9] The comment relied upon by the court has been criticized elsewhere;[10] its description of article 2369 as "the reiteration of the rule that governs the relations between co-owners under the general laws of property," is inaccurate. There is a significant difference between the obligation to account and the obligation of one co-owner to compensate the other for loss or deterioration of the thing due to his fault. If the article 2369 duty to account applies, "a spouse would only have to prove that the other spouse had community property under his control at termination, not that the other spouse was guilty of *fault* resulting in the *loss* or *deterioration* of the property."[11]

In *Lococo* the law of co-ownership did apply to the wife's claim, and the court's resort to the inaccurate comment was unnecessary. Spouses are co-owners upon termination of the community and absent the application of a specific article in Title VI—Matrimonial Regimes, the general law of co-ownership applies.

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6. Article 2369 was intended to codify and extend to both spouses the rule imposed by the jurisprudence that the husband owed a fiduciary duty to his wife for community property under his control at termination of the community regime.

7. Hodson v. Hodson, 292 So. 2d 831, 835 (La. App. 2d Cir. 1974). For a discussion of *Hodson* see Spaht & Samuel, Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law, 40 La. L. Rev. 83, 144 (1979).

8. La. Civ. Code art. 2369, comment(c):

> A spouse having control of community property at the termination of a community property regime occupies the position of a co-owner under the general law of property. Thus, he ought to be accountable for any loss or deterioration of the things under his control attributed to his fault, and for the fruits produced by the things, since the termination of the community property regime. Article 2369 thus reiterates a rule that governs the relations between co-owners.

9. If C.C. Art. 2369 is to have any application to this case, it must be presumed that its authors intended for a spouse having control of community property at the termination of a community property regime to occupy the position of a co-owner under the general law of property. Thus, a spouse ought to be accountable for any loss or deterioration of the things under his or her control attributed to his or her fault and for the fruits produced by the things since the termination of the community property regime. LSA-C.C. 2369 Comment (c).

Lococo, 462 So. 2d at 895.

10. Spaht & Samuel, supra note 7, at 143-44.

11. Id. at 144.

The specific claims of mismanagement were the husband's failure to pay *ad valorem* taxes due on the property, his failure to refund damage deposits to tenants of the leased property, and his failure to repair deterioration to the property. As to the failure to pay debts due third persons in the nature of *ad valorem* taxes and damage deposits, the concurring opinion[12] correctly observed that the wife should have sought a supplemental partition for the purpose of allocating these debts,[13] or, if she had paid them, she should have sought contribution from the husband for one-half.[14]

On the other hand, the wife's claim that the husband's failure to repair community property can be distinguished from the failure to pay debts due to third persons since the deterioration may not be discovered until the wife assumes possession of the property allocated to her in the partition. Furthermore, after termination of the community, the wife's claim for failure to repair is not a claim "between the spouses arising from the matrimonial regime"[15] within the contemplation of the partition statute. The claim arises because one co-owner has undertaken, by his assertion of control, to manage the interests of the other co-owner.[16]

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12. *Lococo*, 462 So. 2d at 896.

13. La. R.S. 9:2801(4)(c) (1983): "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. . . ." (Emphasis added). La. Civ. Code art. 1394. See also Moon v. Moon, 345 So. 2d 168 (La. App. 3d Cir. 1977), cert. denied, 347 So. 2d 250 (La. 1977).

14. Analogy to La. Civ. Code arts. 2364-2368 or, depending upon the circumstances, La. Civ. Code arts. 1794, 1797, 1804. See also Spaht & Samuel, supra note 7, at 125-27.

15. La. R.S. 9:2801 (1983):

> 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: . . .

16. La. Civ. Code arts. 2295-2300; Broussard v. Bernard, 7 La. 216 (1834); Beavers v. Stephens, 341 So. 2d 1278 (La. App. 3d Cir. 1977).

At least one court described joint ownership even without proof of an assumption of control as a quasi contract: "So, the only question for the decision of this Court is, whether the quasi contract of joint ownership imposes the obligation of exercising ordinary diligence on the property which is the object of it, or whether fraud alone renders the joint owner liable?" Guillot v. Dossat, 4 Mart. (o.s.) 203 (1816).

But see concurring opinion in *Lococo*, 462 So. 2d at 896:

> The petition does allege that the defendant "insisted that he manage" properties; but I deem that insufficient to allege that the defendant was the only one of the two co-owners who had any right or obligation to maintain the property—a duty *to the plaintiff* to attend to the physical repair and maintenance of their common property.

Accord, Aiken v. Ogitvie, 12 La. Ann. 353, 354 (1857), where the court observed,

> so we think that where it appears that the partner has acted in good faith in

A *negotiorum gestor* owes to the master the care of a prudent administrator.[17]

In *Beavers v. Stephens*,[18] a case involving facts similar to those in *Lococo*, a husband continued to operate a liquor store that was community property after the death of his wife. According to the court, the husband owed a fiduciary obligation to the daughter of the deceased wife founded upon the principle of *negotiorum gestio*. The court held that husband was responsible to the daughter for losses which the business incurred due to his mismanagement. In so holding, the court opined: "The serious decline in profits of the business under his management, absent a sufficient explanation of the causation thereof, indicates a breach of that fiduciary duty, and the trial judge so found."[19]

Whether or not the husband in *Lococo* breached his fiduciary obligation to manage the community property as a prudent administrator ("as if it were wholly his own")[20] cannot be determined from the facts. Although the husband has "the right of incurring expenses necessary for the preservation of the common property,"[21] he may not have the obligation to incur such expenses.[22]

> [T]he petition alleges deterioration because of mere failure by the ex-husband to repair and maintain, rather than because of deliberate or negligent damage by him. That states no claim because failure to spend rent money on maintenance and repairs means more money divided between the former co-owners in the partition.[23]

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matters of business which it was no more his duty to attend to than his co-partners, that he ought not to be held for the negligent or irregular acts of such competent agents in the ordinary discharge of their duty as he may be obliged to employ.

17. La. Civ. Code art. 2298.

18. 341 So. 2d 1278 (La. App. 3d Cir. 1977).

19. Id. at 1281.

The court distinguished earlier cases (cited in Miller, Judicial Reorganization, 7 Tul. L. Rev. 235, 253 (1933)) propounding that the relationship of *negotiorum gestio* cannot exist between co-owners. But see, e.g., Smith v. Wilson, 10 La. Ann. 255 (1855); Comment, Ownership in Indivision in Louisiana, 22 Tul. L. Rev. 611, 612 (1948); cases cited supra note 16.

20. Smith v. Wilson, 10 La. Ann. 255, 257 (1855). See also Southwestern Gas & Elec. Co. v. Liles, 16 La. App. 500, 133 So. 835 (2d Cir. 1931).

21. Id.

22. See supra note 16. In Guillot v. Dossat, 4 Mart. (o.s.) 203 (1816), the court considered whether a co-owner breached his duty to preserve the co-owned property (a runaway slave). Recognizing that the co-owner had the obligation to bestow the "care which most men ordinarily take of their property," the court concluded that he breached his duty by failing to take any step for the recovery of the slave after he fled. Id. at 206.

23. *Lococo*, 462 So. 2d at 896, (Rodmann, C.J., concurring).

Ultimately, whether the husband is responsible to the wife for damages will depend upon whether his "failure to maintain caused destruction of a value greater than the saving in unspent maintenance costs."[24]

Once the action has been identified as one for damages for breach of the obligation to prudently administer under article 2298, the applicable prescriptive period is ten years.[25] Because the specific obligation breached is imposed upon the gestor as an incident of the quasi-contract, the one year prescriptive period for damage to immovable property is not applicable.[26]

Exploring the problems that co-ownership presents leads to the conclusion that legislation governing the relationship of co-owners is inadequate.[27] It is time that attention be focused upon the incidents of such a fundamental institution and that legislative solutions be offered.

REIMBURSEMENT—SEPARATE PROPERTY TO IMPROVE COMMUNITY PROPERTY

Under the legislation governing reimbursement, there are two instances where recovery is permitted if separate property is expended: (1) if separate property is used to satisfy a community obligation[28] and (2) if separate property is used to acquire, improve, or benefit community property.[29] An important limitation upon the exercise of the right of reimbursement where separate property has been used is "if there are community assets from which reimbursement may be made."[30] Although

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24. Id.

25. La. Civ. Code art. 3499. See Philip Devot & Co. v. Marx, 19 La. Ann. 491 (1867); Henley v. Haynes, 376 So. 2d 1030 (La. App. 1st Cir.), cert. denied, 377 So. 2d 843 (La. 1979) (fiduciary duty of partners).

26. La. Civ. Code art. 3493.

27. La. Civ. Code arts. 1289-1414 (partition of successions).

28. La. Civ. Code art. 2365.

29. La. Civ. Code art. 2367.

30. La. Civ. Code arts. 2365 and 2367. See article 2365, comment(a):

> In principle, reimbursement may be made only if there are sufficient community assets; there is no obligation for reimbursement from the separate property of the other spouse. However, if the community obligation discharged with separate property is one incurred for the ordinary and customary expenses of the marriage, or for the support maintenance, and education of children, in keeping with the economic condition of the community, there is an obligation for reimbursement even if there are no sufficient community assets. In such a case, reimbursement may be made from the separate property of the other spouse.

The exception was made because the Joint Legislative Subcommittee, rather than imposing solidary liability on spouses living under a community regime for necessaries contracted by either of them, (see La. H.B. No. 783, 3d Reg. Sess. (1977)), chose to regulate the allocation of those expenses, which should be borne equally by the spouses, through reimbursement. For spouses living under a separation of property regime, the law imposes solidary liability for necessaries. La. Civ. Code art. 2372.

other reimbursement problems have been discussed elsewhere,[31] the legislative intent underlying the limitation has not been considered. At least three court of appeal[32] decisions provoke comment concerning the interpretation of "if there are community assets from which reimbursement may be made." The history of the reimbursement articles, Civil Code articles 2365 and 2367, proves instructive. Of particular interest is the functioning of reimbursement in the context of an administration of the community, a concept never adopted by the Legislature.[33] Under the administration scheme, community assets were to be managed by an administrator who, first, paid the debts owed to third persons; second, calculated the net community and each spouse's share; third, accomplished the adjustments and *reimbursements by deductions from a spouse's share* of the community; and fourth, distribute to a spouse his net share.[34] A limitation was imposed on reimbursement where separate property was used to benefit the community to assure that such an obligation could be enforced *only* if the community were solvent. The Legislature intended that the obligation to reimburse for the use of separate property be discharged at the time of partition of the community and not continue indefinitely into the future. An exception to the general rule existed, however, for those ordinary expenses of the marriage that should have been shared equally by the spouses,[35] such as those for the education of the children. The Legislature decided that liability should continue for these obligations even if the obligation had to be satisfied from separate property of a spouse.

As the history of the administration of a community reflects, the calculation which determined if reimbursement was due required first a deduction of debts due to third persons from the value of community assets. Though the administration concept was never adopted the calculation scheme was incorporated into the judicial partition statute. Rather than the administrator discharging the obligations owed by a spouse from community assets, the judge is empowered to allocate debts

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31. See, e.g., Spaht & Samuel, supra note 7, at 141-43; Note, Termination of the Community, 42 La. L. Rev. 789, 799-804 (1982).

32. Feazel v. Feazel, 471 So. 2d 851 (La. App. 2d Cir. 1985); Patin v. Patin, 462 So. 2d 1356 (La. App. 3d Cir.), cert. denied, 466 So. 2d 470 (La. 1985); Gachez v. Gachez, 451 So. 2d 608 (La. App. 5th Cir.), cert. denied, 456 So. 2d 166 (La. 1984).

33. See Spaht & Samuel, supra note 10, at 133-36; Note, supra note 31, at 816-19.

34. Utilizing the pattern of the administration of a succession, there were specific provisions for the priority of payment of secured creditors; then, payment of unsecured creditors, whether separate or community; and finally, appropriate adjustments and reimbursements between the spouses. Thereafter, the administrator was required to divide the remainder equally between the two spouses. Spaht & Samuel, supra note 7, at 134.

35. See supra note 30.

to either spouse if ultimately what each receives is of equal *net* value.[36] The partition statute is not specific about how the judge is to settle "the claims between the parties."[37] It is suggested that before the judge allocates specific assets in satisfaction of a spouse's share, he should, if the community is solvent, credit or deduct from *one spouse's share* the reimbursement claims. The deductions and credits, if reciprocal, may result in compensation.[38] However, it is clear that the deduction is to be from a spouse's *share* of the community, not from the total community, for the following reasons: (1) reimbursement is a claim by one spouse against the other,[39] not against the community since it is not a legal entity;[40] and (2) the amount of reimbursement is *one-half* the amount expended, rather than the *total* amount.[41] Such an interpretation is consistent with the history of the articles on reimbursement and the objective to be accomplished by the statutory language of limitation.

In two of the court of appeal decisions,[42] the method for accomplishing reimbursement was directly at issue. In *Gachez v. Gachez*,[43] incident to a partition of community property, the fifth circuit detailed the reimbursement procedure utilized by the trial court. The net value of community assets, after deduction of debts, was $16,920.54. The court then awarded to each spouse reimbursement from that amount—$4,550 to the wife, one-half of her separate property used to satisfy a community obligation, and $2,750 to the husband, one-half of his separate property used to satisfy a community obligation. The remainder of community property was valued at $9,620.54 and was divided equally between the spouses, entitling each to $4,810.27. Against the sum due each spouse from community property, an amount was deducted for community property received in advance—$800 to the wife and $3,032 to the husband. The judgment ultimately awarded the wife "$8,560.27 (reimbursement of $4,550.00 plus $4,010.27) and [the husband] . . . $4,528.27 (reimbursement of $2,750.00 plus $1,778.27)."[44]

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36. La. R.S. 9:2801(4)(c) (1983).

37. La. R.S. 9:2801 (3) & 4(a) (1983).

38. La. Civ. Code arts. 1893-1902 (eff. Jan. 1, 1985).

39. La. Civ. Code art. 2358: "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).

40. La. Civ. Code art. 2336, comment (c): "The community property is not a legal entity but a patrimonial mass, that is, a universality of assets and liabilities." See generally, Spaht & Samuel, supra note 7; Note, supra note 31.

41. La. Civ. Code arts. 2364-2368.

42. Patin v. Patin, 462 So. 2d 1356 (La. App. 3d Cir.), cert. denied, 466 So. 2d 470 (La. 1985); Gachez v. Gachez, 451 So. 2d 608 (La. App. 5th Cir.), cert. denied, 456 So. 2d 166 (La. 1984).

43. 451 So. 2d 608 (La. App. 5th Cir.), cert. denied, 456 So. 2d 166 (La. 1984).

44. Id. at 611.

However, if calculated in light of the foregoing history and analysis of Civil Code articles 2365 and 2367, the result would be different.. Rather than deducting reimbursement from the net community, the court should have proceeded by recognizing that each spouse's share of community property was $8,460.27. Compensation occurred with the reciprocal claims for reimbursement[45] such that the husband owed the wife $1,800 from his share of community assets. After reimbursement, the wife should have received $10,260.27 less the $800 received in advance, leaving a balance of $9,460.27. The husband, after deducting from his share the reimbursement due the wife ($1,800) and the community property which he received in advance ($2,132 + $900), should have been awarded community assets valued at $3,628.27. The error in calculation made a significant difference.

In *Patin v. Patin*,[46] the third circuit, in examining the wife's assignments of error in the partitioning of community property, commented: "Accordingly, we hold the trial court correctly reimbursed Mr. Patin out of his wife's share of the funds to be distributed, one-half of the amounts paid by him."[47] Although *Patin* may be criticized for other reasons,[48] the court did correctly implement the judicial partition statute relating to the settlement of claims between the spouses.

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45. La. Civ. Code art. 1893 (eff. Jan. 1, 1985):

> Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due.
>
> In such a case, compensation extinguishes both obligations to the extent of the lesser amount. . . .

La. Civ. Code art. 1902 (eff. Jan. 1, 1985): "Although the obligation claimed in compensation is unliquidated, the court can declare compensation as to that part of the obligation that is susceptible of prompt and easy liquidation."

For an interesting example of the application of the articles on compensation in a community property context, see Coburn v. Commercial Nat'l Bank, 453 So. 2d 597 (La. App. 2d Cir. 1984), cert. denied, 457 So. 2d 681 (La. 1984) (article 2357, para. 2).

46. 462 So. 2d 1356 (La. App. 3d Cir.), cert. denied, 466 So. 2d 470 (La. 1985).

47. Id. at 1359.

48. The trial court awarded the husband a credit for one-half the rental value of the community home for the period of time the wife occupied it after termination of the community. Although citing article 2369, which would not be applicable factually (see supra text accompanying notes 1-27), the court ultimately concluded that "[t]his use has benefited her separate estate and Mr. Patin was properly reimbursed for one-half the value of the community property used at the time it was used to benefit Mrs. Patin's separate estate." 462 So. 2d at 1358. This error was rectified by the Legislature, which amended La. R.S. 9:308 (1985 La. Acts, No. 732) to add another paragraph, which reads:

> B. A spouse awarded the use and occupancy of the family residence pending the partition of the community property in accordance with the provisions of R.S. 9:308(A) shall not be liable to the other spouse for rental for the use and occupancy, unless otherwise agreed by the spouses or ordered by the court.

Most recently, in *Feazel v. Feazel*, the second circuit court of appeal was meticulous in distinguishing claims for reimbursement from the payment of debts which are allocated in a partition judgment.[49] The distinction is critical, as is evidenced by the preceding calculations. An amount owed in reimbursement is to be deducted *from a spouse's share after* deduction of debts due a third person; whereas, if the debt due a third person is allocated in the partition judgment, it is first to be deducted from the gross value of community assets to produce a net value. The net value is then halved, and the resulting figure represents each spouse's share. Each spouse receiving his net share is allocated assets and *allocated debts*. Commenting upon the trial judge's credit to the husband for community obligations paid, the court stated:

> This "credit" is merely a reduction in the amount of liabilities he must pay in the future and is not Art. 2365 "reimbursement." Thus, regardless of when he had *paid* a particular community debt after termination of the community, he should be entitled to credit in the asset distribution for the full amount of that debt.[50]

The difficulty which article 2365 presents in application arises primarily because the language utilized expresses *only indirectly* the intention of the Legislature. "[I]f there are community assets"[51] and "to the extent of community assets"[52] were intended only to mean if a spouse were to receive a share of community property from which reimbursement claims could be deducted, and not to mean that the deduction of claims was to be literally from community assets.

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49. 471 So. 2d 851, 857 (La. App. 2d Cir. 1985): "The trial court merely recognized that he had already paid some of the community debts that the partition judgment ordered him to assume. His payments since March 1982 were likely in reliance on the validity of the original community property settlement."

50. Id.

51. La. Civ. Code art. 2367.

52. La. Civ. Code art. 2365.