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Matrimonial Regimes

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ACCOUNTING BETWEEN SPOUSES REVISITED

As a general rule, topics that have been discussed previously in a symposium[1] should not immediately reappear. In the case of a spouse's duty to account for former community property under his control after termination of the regime, however, it is necessary to disregard this rule. The relationship of spouses after termination of the regime is an extremely complicated legal issue with a potentially enormous impact on the practice of law. Cases decided by the Louisiana appellate courts within the past year reflect a misunderstanding of Civil Code article 2369.

Article 2369, which imposes upon a spouse the obligation of accounting for community property under his control at the termination of the community regime, had no statutory basis prior to 1980.[2] Article 2369 was intended to codify in part the jurisprudence creating a fiduciary duty owed by the husband to his wife upon termination of the community.[3] The specific obligation codified was that recognized in *Hodson v. Hodson*,[4] wherein the court imposed a responsibility upon the husband to establish the dispositions he had made of community property under

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1. Spaht, Developments in the Law, 1984-1985—Matrimonial Regimes, 46 La. L. Rev. 559 (1986).

2. La. Civ. Code art. 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 obligation to account prescribes in three years from the date of termination of the community property regime."

The obligation imposed by the article is heritable. La. Civ. Code art. 2369, comment (b).

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

> Under the regime of the Louisiana Civil Code of 1870, courts have at times required a *husband* to account for his administration of community property during the existence of the community property regime. See, e.g., Hodson v. Hodson, 292 So. 2d 831 (La. App. 2d Cir. 1974); cf. Broyles v. Broyles, 215 So. 2d 526 (La. App. 1st Cir. 1968). In this revision, either spouse may be required to account for community property under his control during the existence of the community property regime. Article 2354. . . .

See also Pitre v. Pitre, 172 So. 2d 693 (1965), and Lee v. Lee, 214 La. 434, 38 So. 2d 66 (1948).

4. 292 So. 2d 831 (La. App. 2d Cir. 1974).

his control. According to the court, the husband's *fiduciary duty* owed to his wife was based primarily upon his superior position as head and master of the community of acquets and gains.[5] Because the mandatary is also a fiduciary,[6] the court in *Hodson* reasoned that the same particular obligation owed by the mandatory to the principal[7] should be imposed upon the husband:

> In an action against a fiduciary for an accounting, the burden is upon the principal to show that the fiduciary received the funds or property and the amount or quality thereof, and thereafter the burden is upon the fiduciary to establish what disposition he has made of the money or property.[8]

The obligation of a spouse to account for the community property under that spouse's control at termination of the regime is only one duty that may be owed by a fiduciary. Other duties may include the duty to disclose the existence and value of community assets,[9] and to account for income and other revenues produced from former community property.[10] It is essential to distinguish the statutory duty to account from (1) the duty owed by a spouse during the existence of the regime,[11]

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5. La. Civ. Code art. 2404 (repealed by 1979 La. Acts No. 709; eff. Jan. 1, 1980). Cf. La. Civ. Code art. 2346: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law."

6. In the *Hodson* case the husband was described as a fiduciary to whom the principles of mandate should be applied. See infra text accompanying notes 7-8.

7. La. Civ. Code art. 3004: "He is obliged to render an account of his management, unless this obligation has been expressly dispensed with in his favor."

See, e.g., Savoie v. Estate of Rogers, 410 So. 2d 683 (La. 1981), on rehearing, and the cases cited in *Hodson*, 292 So. 2d 831, which included Bauer v. Albers, 187 La. 496, 175 So. 39 (1937); Rose v. Shaw, 144 La. 571, 80 So. 727 (1918); Laporte v. Laporte, 109 La. 958, 34 So. 38 (1903); Crescent River Port Pilots' Ass'n v. Heuer, 193 So. 2d 276 (La. App. 4th Cir. 1966); Justin v. Delta Motor Line, 43 So. 2d 53 (La. App. Orl. 1949); City of Gretna v. Gosserand, 191 So. 750 (La. App. Orl. 1939).

8. *Hodson*, 292 So. 2d at 835.

9. Oliphint v. Oliphint, 219 La. 781, 54 So. 2d 18 (1951); Lee v. Lee, 214 La. 434, 38 So. 2d 66 (1949); Gay v. Martinolich, 271 So. 2d 689 (La. App. 1st Cir. 1972); Troxler v. Troxler, 255 So. 2d 240 (La. App. 1st Cir. 1971); Smith v. Smith, 117 So. 2d 670 (La. App. 2d Cir. 1960); Luquette v. Floyd, 147 So. 2d 894 (La. App. 3d Cir. 1962) writ denied, 150 So. 2d 585 (1963).

10. State ex rel Evans v. Theard, 48 La. Ann. 926, 20 So. 286 (1896); Dillon v. Dillon, 35 La. Ann. 92 (1883); Fouchi v. Fouchi, 487 So. 2d 496 (La. App. 5th Cir. 1986); McKey v. McKey, 449 So. 2d 564 (La. App. 1st Cir. 1984); Auger v. Auger, 381 So. 2d 879 (La. App. 2d Cir. 1980); Lane v. Lane, 375 So. 2d 660 (La. App. 4th Cir. 1978), writ denied, 381 So. 2d 1222 (1980).

11. La. Civ. Code art. 2354: "A spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property."

See comment (c) to La. Civ. Code art. 2369: "In contrast with Article 2354, the obligation for accounting under Article 2369 is not predicated upon a showing of fraud or bad faith in the administration of the community." See also Oliphint v. Oliphint, 219

(2) the obligation to reimburse the other spouse for certain expenditures during the existence of the community,[12] and (3) the previously described duties of disclosure and accounting for post-termination revenues.

The obligation to properly administer community property during the existence of the regime is not a fiduciary obligation. One spouse is liable to the other spouse only for fraud or bad faith in the management of community property during the existence of the regime.[13] The jurisprudence, however, has failed to distinguish between the duty to manage community property during the existence of the regime, which is *not* a fiduciary duty, and the duty to account imposed upon termination.

For example, in *Huckabay v. Huckabay*[14] the Louisiana Second Circuit Court of Appeal, in dicta, described the language of article 2369 as ambiguous. According to the court, the duty to account "clearly encompasses accounting for acts performed up until the termination."[15] Furthermore, since article 2369 does not describe the assets under a spouse's control as those of the "former community," the court reasoned: "Thus, it (article 2369) applies only to assets of the community, managed by one spouse during the existence of the community property regime."[16] In *Queenan v. Queenan*[17] the Louisiana Third Circuit Court of Appeal recognized that a former spouse owed a fiduciary duty to the other spouse after termination of the community regime. The court did so, however, by concluding: "Until there is a community property settlement, there exists a practical or empirical extention [sic] of the community regime insofar as the duties and obligations of the former spouses relate to each other in the management of the community assets."[18] The court cited no authority for such a proposition, and the matrimonial regimes legislation does not support the conclusion.[19] Iron-

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La. 781, 54 So. 2d 18 (1951); Frierson v. Frierson, 164 La. 687, 114 So. 594 (1927); Bynacker v. McMichael, 194 So. 2d 335 (La. App. 4th Cir. 1967), aff'd in pt., rev'd in pt., 251 La. 654, 205 So. 2d 433 (1967), cert. denied, 393 U.S. 871 (1968), appeal after remand, 310 So. 2d 159, writ denied, 313 So. 2d 835 (La. 1975).

But see the discussion by the court in Huckabay v. Huckabay, 485 So. 2d 165 (La. App. 2d Cir. 1986), noted infra in text accompanying notes 15-16.

12. La. Civ. Code arts. 2358-2368.

13. La. Civ. Code art. 2354; see supra text accompanying note 11.

One case that did distinguish the "accountability" of a spouse from his responsibility for administration during the existence of the community was Bynacker v. McMichael, 194 So. 2d 335 (La. App. 4th Cir. 1967), aff'd in pt. and rev'd in pt., 251 La. 654, 205 So. 2d 433 (1967).

14. 485 So. 2d 165 (La. App. 2d Cir. 1986).

15. Id. at 166.

16. Id. at 167.

17. 492 So. 2d 902 (La. App. 3d Cir. 1986).

18. Id. at 912.

19. During the existence of the community property regime the spouses are co-owners

ically, "extension" of the community would accomplish the opposite of what the court intended in the *Queenan* case, for during the existence of the community the spouses are not fiduciaries.

The obligation to reimburse a spouse for community property used to enhance separate property is predicated on an expenditure during the existence of the community which benefitted separate property.[20] By contrast, article 2369 contemplates former community property under a spouse's control at termination of the regime, which the other spouse need not prove was expended to acquire, benefit or improve separate property.

The importance of the distinction among duties imposed on former spouses *at termination* of the regime lies in whether a spouse incurs "fiduciary" duties other than the statutory duty of an accounting. Related to the inquiry is the accuracy of the comment to article 2369 that describes one spouse's relationship to the other at termination as that "of a coowner under the general law of property."[21]

In the case of a judicial partition, the statute enacted in 1982 provides a special procedure which includes an affirmation under oath that the descriptive list of community assets and their value submitted by a spouse "contains all of the community assets and liabilities then known to that party."[22] After the filing of the descriptive list, each party may traverse or concur "in the inclusion or exclusion of each asset and liability and the valuations contained in the detailed descriptive list of the other party."[23] There follows a trial of the traverses. Thus, the duty once owed by the husband alone is enforced against both spouses through

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of a "distinct species." See La. Civ. Code art. 2336, comments (a), (c), and (d); La. Civ. Code art. 2337, comment (a).

La. Civ. Code art. 2369, comment (c) describes the relationship of former spouses at termination of the community as one of co-ownership: "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."

20. La. Civ. Code art. 2358 provides that a spouse may have a claim for reimbursement upon termination of the regime. If a claim exists at termination of the regime it can only be for some expenditure that occurred prior to that termination.

La. Civ. Code arts. 2364 and 2366 concern an enhancement of separate property. Article 2364 requires the use of community property to satisfy a separate obligation, and article 2366 requires the use of community property for "the acquisition, use, improvement, or benefit of the separate property of a spouse. . . ."

21. La. Civ. Code art. 2369, comment (c); see supra text accompanying note 19. The legislature did not explicitly overrule the jurisprudence which imposed upon the husband the duty to disclose the existence and value of community assets. However, the historical reason for imposing the duty upon the husband alone has been eliminated. See supra text accompanying notes 6-7. Each spouse now theoretically enjoys the management of community property. La. Civ. Code art. 2346.

22. La. R.S. 9:2801 (Supp. 1987).

23. Id.

the procedure adopted for a judicial partition of community property.

If the parties desire to partition community property voluntarily,[24] however, the question remains: do both spouses owe a general "fiduciary" duty to disclose the existence and value of community assets? The comment to article 2369, which describes the spouses as co-owners, suggests they do not, because an ordinary co-owner is not a fiduciary of the other *by virtue of the relationship alone.*[25]

Consider, for example, the case of *Adams v. Adams*[26] in which the wife, by way of defense, sought to annul a voluntary partition on the

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24. La. Civ. Code art. 1294: "Partition is voluntary or judicial: "It is voluntary, when it is made among all the coheirs . . . by their mutual consent . . . ."

25. La. Civ. Code art. 480 is the only article in the law of property governing the relationship of co-owners.

Rights accorded to co-owners and recognized by the jurisprudence describe a relationship that is not a fiduciary one. See, e.g., Touchet v. Huval, 391 So. 2d 28 (La. App. 3d Cir. 1980); Butler v. Hensley, 332 So. 2d 315 (La. App. 4th Cir. 1976); Coon v. Miller, 175 So. 2d 385 (La. App. 2d Cir. 1965), writ refused, 247 La. 1089, 176 So. 2d 145 (1965). See also Comment, Ownership in Indivision in Louisiana, 22 Tul. L. Rev. 611, 617-20 (1948).

La. Civ. Code art. 3439 negates the proposition that co-owners are fiduciaries: "A co-owner, or his universal successor, commences to possess for himself when he demonstrates this intent by overt and unambiguous acts sufficient to give notice to his co-owner." In fact the co-owner who possesses property adversely to his co-owner may do so with a lesser requirement of notice than other precarious possessors: "Any other precarious possessor, or his universal successor, commences to possess for himself when he gives *actual notice* of this intent to the person on whose behalf he is possessing." Id. (emphasis added). See also La. Civ. Code art. 3478, comment (c). See an excellent commentary in Symeonides, Developments in the Law, 1984-1985—Property, 46 La. L. Rev. 655, 683-87 (1986).

Two cases involving co-ownership, other than of former community property, likewise suggest that the relationship of co-owners is not that of fiduciaries. Butler v. Hensley, 332 So. 2d 315 (La. App. 4th Cir. 1976), on rehearing; Coon v. Miller, 175 So. 2d 385 (La. App. 2d Cir. 1965). See generally 2 Aubry and Rau § 221 Nos. 340-54 (7th ed. 1966).

In Aubry and Rau, Droit Civil Francais, Vol. II, 7th ed., § 221 the authors describe the rights of co-owners as being extended to co-ownership in a matrimonial community with only the modifications indicated for this type of co-ownership. "Each co-owner may bring about such material changes which do not interfere with the use of the thing by the other co-owners; and, a fortiori, such changes which are useful to all." Id. at 387. "Acts by a sole co-owner, if useful to all, are ratified as a de facto agency (*negotiorum gestio*)." Id. at 388. Such a description suggests that co-ownership is not a fiduciary relationship.

But see Guillot v. Dossat, 4 Mart. (o.s.) 203 (La. 1816), where the court described joint ownership as a quasi contract without the assumption of control by an act of a co-owner: "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?"

See also 86 C.J.S. Tenancy in Common § 15 (1954).

26. 503 So. 2d 1052 (La. App. 2d Cir. 1987).

grounds of error, fraud or duress. The wife contended that her consent to the voluntary partition had been induced by fraud and attempted to establish the fraud by two facts:

> The first is the trust she placed in Calvin Adams (attorney who represented both spouses).[27] The second is the statements made by Calvin and William Adams' [sic] that unless Mrs. Adams accepted the community property settlement as proposed, Mr. Adams would be forced to declare bankruptcy and Mrs. Adams should have to take responsibility for her share of the community debts.[28]

The wife relied primarily upon the trust she placed in the attorney to fairly represent both her and her husband, but the court observed that "the essential concept from which fraud evolved is not the relationship of trust, but the misrepresentation or suppression of the truth."[29] In *Adams*, the wife failed to prove a misrepresentation or suppression of the truth.[30] In the alternative, the wife claimed that her consent to the partition was induced by the husband's threats of declaring bankruptcy and the emotional and mental strain resulting from the separation. Applying the law of conventional obligations, the court correctly found

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27. According to the court in a footnote in the *Adams* opinion: "There is no allegation that the attorney for William Adams acted in any unethical manner. In fact, Calvin Adams, the attorney, and several other people advised Mrs. Adams that she should seek independent counsel." *Adams*, 503 So. 2d at 1056 n.1.

Under the new Rules of Professional Conduct adopted by the Supreme Court of Louisiana, effective January 1, 1987,

> (a) lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. Rule 1.8 (g), 498 So. 2d LXXV (1987). For a discussion of the new rules, see in this symposium Mengis, Developments in the Law—Professional Responsibility, 48 La. L. Rev. 437 (1987).

28. *Adams*, 503 So. 2d at 1056.

29. Id.

30. Id. at 1056-57:

> If the truth were misrepresented or suppressed herein, it would be in the claims of impending bankruptcy and the sharing of community debts. William Adams' sole source of income is from farming. The community property settlement establishes the value of the community assets at $400,277.33. These values were not contested at trial. Likewise, the community property settlement contract establishes the community debt at $349,678.89. Mr. Adams testified that his farming operation was faltering. Under these circumstances we cannot say that bankruptcy would not be a serious consideration at the time the contract was confected. Moreover, Mrs. Adams would continue to be liable for community obligations. See: LSA-C.C. Art. 2367.

that the wife failed to prove facts sufficient to invalidate a contract because of duress.[31]

What is noteworthy about the *Adams* case is the fact that the court applied general principles of law to spouses as both co-owners and parties to a voluntary partition of community property.[32] No mention is made of a "fiduciary" duty owed by either spouse. The same approach is taken in cases applying the general law of rescission of a partition for lesion.[33] The nature of the remedy of lesion suggests no fiduciary duty, because the remedy acknowledges that the values may not be exactly equal.[34] By applying the general articles on fraud,[35] the court

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31. Id. at 1057:

> Most of the violence or threats of which Mrs. Adams complained surround the claims by Mr. Adams to declare bankruptcy and statements made to Mrs. Adams concerning her obligation to pay her portion of the community debts. However, a threat of doing a lawful act or a threat of exercising a right does not constitute duress. LSA-C.C. Art. 1962.
>
> Another aspect of the duress claimed by Mrs. Adams is the emotional and mental strain caused by going through a separation and division of property. However, the conflicting emotions caused by the strain of going through a critical period in one's life is not the type of strain constituting legal duress.
>
> Last, Mrs. Adams failed to prove a reasonable fear of unjust or considerable injury to her person. There is some testimony that Mr. Adams had physically shaken her prior to the separation. However, if any violence occurred by Mr. Adams, there is no testimony establishing it was in any way associated with the community property settlement contract.

For a consistent interpretation, see Lewis v. Lewis, 387 So. 2d 1206 (La. App. 1st Cir. 1980). But see Lee v. Lee, 214 La. 434, 38 So. 2d 66 (La. 1948). The court in *Lee* concluded that the husband practically, if not positively, coerced his wife into accepting the settlement.

32. Cf. Decuers v. Decuers, 441 So. 2d 788, 790 (La. App. 5th Cir. 1983), wherein the court stated: "This partition is, after all, an agreement between a former husband and wife, not strangers dealing at arm's length." The issue in the *Decuers* case actually involved a suit to annul the partition for lesion. The remedy, thus, suggests no fiduciary duty since it acknowledges that the value of property allocated to each co-owner may not be equal. See infra text accompanying notes 33 and 34.

See also Pitre v. Pitre, 247 La. 594, 172 So. 2d 693 (1965); Lee v. Lee, 214 La. 434, 38 So. 2d 66 (1948); cases cited supra note 9.

33. King v. King, 493 So. 2d 679 (La. App. 2d Cir.), writs denied, 497 So. 2d 316 (1986); Cenac v. Cenac, 492 So. 2d 39 (La. App. 1st Cir. 1986); Cowling v. Cowling, 486 So. 2d 1060 (La. App. 2d Cir. 1986); Gates v. Gates, 485 So. 2d 114 (La. App. 2d Cir. 1986); Sunseri v. Sunseri, 480 So. 2d 1003 (La. App. 4th Cir. 1985); Stuckey v. Stuckey, 475 So. 2d 84 (La. App. 2d Cir. 1985); Steadman v. Steadman, 423 So. 2d 710 (La. App. 3d Cir. 1982); Bedwell v. Bedwell, 399 So. 2d 685 (La. App. 1st Cir. 1981); Ozane v. Ozane, 392 So. 2d 774 (La. App. 3d Cir. 1980); Watkins v. Watkins, 376 So. 2d 1316 (La. App. 1st Cir. 1979).

34. La. Civ. Code art. 1398: "They (partitions) may even be rescinded, on account of lesion; and, as equality is the base of partitions, it suffices to cause the rescission, that such lesion be of more than one-fourth part of the true value of the property."

35. La. Civ. Code arts. 1953-1958.

may avoid a contract even if a party could have ascertained the truth without difficulty "when a relationship of confidence has *reasonably* induced a party to rely on the other's assertions or representations."[36] Thus, under circumstances where the spouse seeking relief from the partition proves both a false representation[37] and an existing relationship of confidence with the former spouse, fraud may vitiate consent to the contract if the offended spouse was reasonable in relying on the assertions.[38] Relief from a voluntary partition is available without imposing a "fiduciary" duty upon spouses at termination of the community.

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36. La. Civ. Code art. 1954: "Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill.

"This exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations."

37. La. Civ. Code art. 1953: "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction."

See related discussion infra note 38.

38. For examples under prior jurisprudence of circumstances where a spouse could be considered reasonable in relying upon a relationship of confidence, see Pitre v. Pitre, 247 La. 594, 172 So. 2d 693 (1965); Troxler v. Troxler, 255 So. 2d 240 (La. App. 1st Cir. 1971).

In the *Pitre* case the court considered the following facts pertinent:

> Plaintiff, a housewife with a very limited education and relatively inexperienced in business and business matters, was without the benefit of independent counsel in the partition of this large and complex community. Her husband's attorney prepared the act of partition. She testified that she did not have counsel because she trusted her husband and relied on him to deal fairly with her, and because he had suggested that they not incur additional attorney's fees.

Pitre, 247 La. at 609, 172 So. 2d at 698.

By contrast, in Rivers v. Rivers, 381 So. 2d 573 (La. App. 2d Cir. 1980), the court concluded that the husband had not breached his fiduciary duty to the wife because of certain facts indicating the wife's knowledge of business matters:

> As the trial court pointed out, Mrs. Rivers is a woman with a higher than average knowledge of business and finance and had a general understanding of her husband's business affairs. She obtained her Bachelor's Degree in Accounting with an overall grade average of 3.9. A few years after her separation from Mr. Rivers, she returned to school and obtained her Master's Degree in Business Administration with a perfect 4.0 average. She subsequently passed the CPA exam on her first try.

Id. at 577.

In many of the older cases the breach of duty by the husband was that of a suppression of the truth, i.e., withholding information about the value of the community assets. Under La. Civ. Code art. 1954, if the truth can be detected without difficulty, inconvenience or special skill, then the contract cannot be vitiated. Arguably, since both spouses theoretically may manage community property, the truth about the existence and value of assets *may* be detectable without difficulty or inconvenience. Surely this is true if the spouse actually does manage community assets.

The only exception to the rule of the first paragraph of article 1954 is if there is a false representation, *not* suppression, and because of a relationship of confidence the

The duty to account for income and revenues produced by the former community (or co-owned) property has long been recognized by the jurisprudence.[39] The comment to article 2369 states that as a co-owner, a former spouse is accountable for things under his control and "for the fruits produced by the things, since the termination of the community property regime."[40] Hence, it is unnecessary to impose a "fiduciary" duty upon the spouses at termination in order to require an accounting for revenues produced from co-owned assets. Any other "fiduciary" duty[41] that one former spouse may owe the other will

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party against whom the fraud was practiced was reasonable in relying on the assertion. The question can be posed whether it is ever reasonable for a former spouse to rely upon assertions of the other in negotiating a community property settlement. It is conceivable, however, that in a case with facts such as those of *Pitre*, the result may be rescission for fraud utilizing article 1954, second paragraph, if there is an *assertion*.

39. Fouchi v. Fouchi, 487 So. 2d 496 (La. App. 5th Cir. 1986); McKey v. McKey, 449 So. 2d 564 (La. App. 1st Cir. 1984); Auger v. Auger, 381 So. 2d 879 (La. App. 2d Cir. 1980); Lane v. Lane, 375 So. 2d 660 (La. App. 4th Cir. 1978), writ denied, 381 So. 2d 1222 (La. 1980); Butler v. Butler, 228 So. 2d 339 (La. App. 1st Cir. 1969); Fortier v. Fortier, 221 So. 2d 653 (La. App. 4th Cir. 1969), appl. denied, 254 La. 292, 223 So. 2d 412 (1969).

In *McKey*, 449 So. 2d 564, the wife sought an accounting for the rent she alleged the husband received from a community owned home. The court opined: "Mr. McKey testified that he did not receive any rent or other revenue from anyone who stayed at the Central Avenue property other than reimbursements for his expenses. Mrs. McKey has failed to carry her burden of proof to show that Mr. McKey received any rentals or other revenue." Id. at 568.

40. La. Civ. Code art. 2369, comment (c). See also Juneau v. Laborde, 228 La. 410, 82 So. 2d 693 (1955); Vance v. Sentell, 178 La. 749, 152 So. 513 (1934); Moreira v. Schwan, 113 La. 643, 37 So. 542 (1904); Scott v. Hunt Oil Co., 152 So. 2d 599 (La. App. 2d Cir. 1963).

In *Juneau*, the court distinguished the responsibility of the co-owner to account for rents and profits from the responsibility to account for possession of common property. Although the co-owner has no obligation to account to other co-owners for his occupancy of co-owned property, he does have an obligation to account for rents and profits received. The court in *Juneau* cited *Vance*, where the court stated the obligation to account as follows:

> Plaintiffs and defendant own this property in common and it was always subject to partition and it has been held repeatedly that where one of the co-owners of real estate has possession of the whole and enjoys all the revenues of the common property, he is not protected by the statute of limitations from accounting to his co-owners for rents and profits.

Vance, 178 La. at 766, 152 So. at 515.

41. The definition in Black's Law Dictionary (5th ed. 1979) of a "fiduciary relation" is

> [a]n expression including both technical fiduciary relations and those informal relations which exist whenever one man trusts and relies upon another. It exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence. A relation subsisting between two persons in regard

be dependent upon a change in the relationship of the former spouses

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> to a business, contract, or piece of property, or in regard to the general business or estate of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith.

Id. at 753-54.

In 36A C.J.S. *Fiduciary* (1961) a fiduciary relationship is described as one relating to, or founded upon a trust or confidence; equivalent to confidential. A fiduciary relationship requires that the parties: (1) repose special trust and confidence in each other, (2) can or do have influence over each other, and (3) implies a condition of superiority of one over the other. Generally, one must repose confidence, the other must accept it, and superiority and influence over the one accepting the confidence must result. See also Plaquemines Par. Comm'n Council v. Delta Dev., 502 So. 2d 1034, 1040 (La. 1987).

There is no general fiduciary standard applicable in Louisiana to all persons who administer the property of others.

The fiduciary with the highest standard of performance required is the trustee. Under La. R.S. 9:2082 (1965), the trustee is bound to administer the trust "solely in the interest of the beneficiary." According to comment (c) to section 2082, "the fundamental duty that a trustee owes a beneficiary is the duty of loyalty, a duty that all states recognize." In Martinez v. Alto Employee's Trust, 273 So. 2d 735 (La. App. 4th Cir. 1972), writ denied, 277 So. 2d 675 (1973), the court described the trustee's duty as follows: "In the exercise of his discretionary powers a trustee must act not only reasonably, but with the highest good faith toward, and loyalty to, the beneficiary and in the latter's best interest." Id. at 737. See also Vuskovieh v. Thorne, 498 So. 2d 1072 (La. 1986). Succession of Simpson, 311 So. 2d 67 (La. App. 2d Cir.), writ denied, 313 So. 2d 839 (1975). His duty to administer the trust is imposed by La. R.S. 9:2090 (1965): "A trustee in administering a trust shall exercise such skill and care as a man of ordinary prudence would exercise in dealing with his own property."

Compare the obligation of the trustee to administer the trust as a man of ordinary prudence with the duty of the tutor under La. Civ. Code art. 4269:

> In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of a minor, a tutor shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

In official revision comment (a) the intention to change the law is expressed as follows:

> The above article represents a change in the Louisiana law which has always restricted fiduciaries to prescribed lists of approved investments. However, this is a change which is long overdue and which will be of great benefit to minors. A similar change is recommended for other fiduciaries, particularly curators of interdicts.

The same obligation exists for the curator. See La. Civ. Code art. 4554.

For a description of the obligation imposed upon a mandatary, see La. Civ. Code arts. 3002, 3003. It was the duty of the mandatary that was imposed upon the husband in Hodson v. Hodson, 292 So. 2d 831 (La. App. 2d Cir. 1974), and codified in La. Civ. Code art. 2369.

Consider also the duty to prudently administer imposed upon the usufructuary in La. Civ. Code art. 576. The usufructuary is "answerable for losses resulting from his fraud, default, or neglect." The comments to article 576 indicate that this standard of care is

from that of co-ownership to that of negotiorum gestio.[42] If, after termination of the community, a former spouse undertakes to manage the co-owned property, including the interest of the other co-owner, he must act as a prudent administrator.[43] For example, in *Lococo v. Lococo*[44] the wife's petition, in which she sought recovery for the husband's failure to maintain former community property in a state of repair, alleged that the husband had "insisted that he manage" the property. If he had insisted and thus undertook "to manage the affairs of another," then he would be bound to do so as a prudent administrator. Similar allegations were made in the wife's petition in *Queenan v. Queenan*.[45] The wife alleged that the husband had bled the co-owned family corporation to benefit his solely-owned corporation formed after termination of the community, had failed to use diligence in renting co-owned houses, and had harassed the tenants. In *Garcia v. Garcia*,[46] there was no question that the husband had undertaken to manage former community property after termination. The court in *Garcia* recognized that prior to termination of the community, the husband had made decisions necessary to administer the community mineral interests,

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stricter than the "reasonable man" standard. See also definition of slight fault, La. Civ. Code art. 3556 (13).

In Queenan v. Queenan, 492 So. 2d 902, 906 (La. App. 3d Cir. 1986), the court, in a footnote quoting from the trial court opinion, described the fiduciary duty of former spouses as follows: "Mike and Penny Queenan are co-owners as spouses; *partners*, and *shareholders*, leaving Mike owing Penny a fiduciary responsibility insofar as management of her (1/2) property is concerned" (emphasis added).

42. La. Civ. Code art. 2295.

43. La. Civ. Code art. 2298:

> In managing the business, he is obliged to use all the care of a prudent administrator.
>
> Yet, where circumstances of friendship or of necessity have induced a person to undertake the management, that consideration may authorize the judge to mitigate the damages which may arise from the faults or the negligence of the manager.

The duty to administer prudently has been described by at least one court as a fiduciary duty. Hodges v. Southern Farm Bureau Cas. Ins. Co., 411 So. 2d 564 (La. App. 1st Cir. 1982), writ granted, 427 So. 2d 863 (1983).

But see Comment, Negotiorum Gestio in Louisiana, 7 Tul. L. Rev. 253, 255 (1933), where the author observes: "Article 2295 provides that the affair managed must be of *another*. Therefore, a co-owner of property could not satisfy this requirement, and he would have no action as a *negotiorum gestor* against his co-owner for the latter's share of the expense." The authority cited for this proposition is Buckland, Textbook of Roman Law 535 (1921). Louisiana jurisprudence has not been in accord. The probable reason is that although La. Civ. Code art. 2292 indicates that the law imposes obligations directly upon a co-owner, rather than by voluntary act of another, the law does not in fact impose any obligations. See supra note 25.

44. 462 So. 2d 893 (La. App. 4th Cir. 1984), cert. denied, 462 So. 2d 889 (1985).

45. 492 So. 2d 902 (La. App. 3d Cir. 1986).

46. 491 So. 2d 1350 (La. App. 5th Cir. 1986).

and thus after the separation he continued to do so "but for the joint interest of the co-owners."[47]

If a duty of prudent administration exists, it is because one spouse has asserted control over the interest of the other spouse and thus undertaken its management as gestor.[48] The reasons offered in support

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47. Id. at 1355. In reversing the trial court's decision that the husband could not unilaterally bind the wife's interest for a net loss because they were co-owners, the court erred in relying upon the fictitious continuation of the community:

> The nature of the mineral interest requires active administration for its maintenance. In essence, the administration of the mineral interests owned by the community is comparable to the conduct of a business by one spouse, subsequent to the termination of the community. In legal theory . . . the community is fictionally considered to remain in existence for the purpose of continued operation and preservation of the community owned business with both parties sharing in its income and expenses. Moreover, if the wife shares in the fruits, as she did here, when the mineral interests were sold, equity requires that she also participate in the losses.

Id. See supra text accompanying notes 17-19.

The court cited as authority two cases involving a community property regime that terminated after January 1, 1980. In Phillips v. Wagner, 470 So. 2d 262 (La. App. 5th Cir. 1985), the husband continued to manage certain assets after termination of the community and sought reimbursement for his business and administrative expenses. The court awarded the husband reimbursement, concluding that his services were of great benefit to the community. In Abbott v. Abbott, 456 So. 2d 1028 (La. App. 5th Cir. 1984), the parties entered into a community property settlement whereby they continued to co-own property in indivision and the husband managed it. The issues litigated involved his expenditures while managing the property. The court ultimately found that the wife had benefitted by the expenditures made by the husband. In neither case did the court explicitly rely upon the fictitious continuation of the community regime.

48. La. Civ. Code art. 2295 provides:

> When a man undertakes, of his own accord, to manage the affairs of another, whether the owner be acquainted with the undertaking or ignorant of it, the person assuming the agency contracts the tacit engagement to continue it and to complete it, until the owner shall be in a condition to attend to it himself; he assumes also the payment of the expenses attending the business.
>
> He incurs all the obligations which would result from an express agency with which he might have been invested by the proprietors.

See Lane v. Lane, 375 So. 2d 660 (La. App. 4th Cir. 1978), where the court considered the former husband as an agent for his wife in the sale of a co-owned stock after termination of the community. Although she had the right to repudiate the husband's acts, the wife, according to the court, ratified his authorized acts by demanding half of all stocks acquired after dissolution. La. Civ. Code art. 3010.

For a detailed history of the institution of negatiorium gestio see Buckland, The Main Institutions of Roman Private Law (1937). Professor Dawson, author of Negotiorum Gestio: The Altruistic Intermeddler, 74 Harv. L. Rev. 817 (1961), cautions against incorporation of the institution into common law, preferring instead, an extension of unjust enrichment.

In Comment, Management of the Affairs of Another, 36 Tul. L. Rev. 108 (1961), the author discusses the necessary elements of the institution in light of its historical origins. See also Comment, Negotiorum Gestio in Louisiana, 7 Tul. L. Rev. 253 (1933). Cited

of a fiduciary obligation, (1) the fictitous continuation of the community regime, or (2) the survival of the husband's "fiduciary" duty under the 1870 code and its imposition upon both spouses in the 1980 revision of community property, or (3) the "fiduciary" duty owed between ordinary co-owners, are incorrect. The law regulating negotiorum gestio applies.[49]

Application of the prudent administrator standard will depend upon whether the offending spouse has undertaken the management of the other spouse's interest and whether that management must be to the exclusion of the offended spouse. Judge Redmann in his concurring opinion in *Lococo v. Lococo*[50] expressed this opinion:

> 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.[51]

Although the husband had the right to incur expenses necessary for the preservation of the common property, he may not have had the obligation to incur such expenses.

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in that comment is Lorenzer, The Negotiorum Gestio in Roman and Modern Civil Law, 13 Cornell L.Q. 190 (1927).

49. La. Civ. Code arts. 2298-99.

One of the most concise explanations of *gestion d'affaire* appears in case materials for the course on Conventional Obligations prepared by Professor J. Denson Smith. He describes the institution of negotiorum gestio as follows:

> The management of another's affairs is the act of a person, who, without having been charged, concerns himself with the affairs of another person, the master of the affair. In certain respects the management of another's affairs resembles the mandate but it is noticeably different; it does not rest on an accord of the wills. If the master consents, the result is a mandate. Since the master is bound without his will, contractual capacity is not required.
>
> The master must not be opposed to the management; the person who intervenes in the affairs of another against his will commits a delictual fault.
>
> The manager must have the intention to manage the affairs of another, but it is not indispensable that he act in the exclusive interest of the master: a co-proprietor who performs a useful act manages the affairs of all.
>
> The act of management may be a juridical act, such itions [sic] (1) it should be useful at the moment it is accomplished even if, because of subsequent circumstances, it does not procure any enrichment for the master; (2) it must not go beyond the limit of acts of administration; but the jurisprudence does not appear to be very rigorous in the application of this second condition.

J. Smith, Louisiana and Comparative Materials on Conventional Obligations 417 (4th Ed. 1973).

50. 462 So. 2d 893 (La. App. 4th Cir. 1984), cert. denied, 462 So. 2d 889 (1985).

51. Id. at 896.

In the *Lococo* case, the wife alleged deterioration of the co-owned property by virtue of the husband's failure to repair and maintain, "rather than because of deliberate or negligent damage by him."[52] Even though the legal issue litigated was prescription,[53] the concurring judge took the opportunity to express his opinion about the nature of the husband's duty. Because the husband failed to spend money on repairs there was more rent money to be divided with the wife. Thus, whether the husband had breached his duty to manage the community property "as if it were wholly his own" depended upon whether his "failure to maintain caused destruction of a value greater than the saving in unspent maintenance costs."[54] In *Queenan v. Queenan*[55] the wife alleged that the husband had failed to use diligence in renting community property allocated to her in the partition. The trial court awarded the wife damages for the husband's lack of diligence and the award was affirmed on appeal.

The wife in *Singh v. Singh*[56] alleged that the husband had failed to answer a suit filed by his brother resulting in a judgment capable of satisfaction from community property. The wife contended that the judgment was obtained by "fraud or a breach of Dr. Singh's duty. . . ." Because the community terminated before January 1, 1980, the law applicable to the litigation was that which imposed a fiduciary obligation on the husband. The wife alleged that the husband failed to assert that some payments had been made to the judgment creditor and that prescription had run on a portion of the debt. Although the court found that the husband's failure to assert the payments to the creditor was "neither a breach of his *fiduciary* responsibility or evidence of fraud,"[57] the court also concluded that the husband's failure to assert prescription

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52. Id.

53. The precise issue concerned whether or not the prescriptive period of article 2369 applied (three years) or some other prescriptive period (ten years). According to the court, article 2369 did not apply and the applicable prescriptive period was that for personal actions under La. Civ. Code art. 3499 (ten years).

See a discussion of the case in Spaht, Developments in the Law, 1984-1985—Matrimonial Regimes, 46 La. L. Rev. 559 (1986).

54. *Lococo*, 462 So. 2d at 896 (Redmann, J., concurring). "In the absence of allegation of special consequential damage, the value of the property not properly maintained is equal to the value of the property not properly maintained plus the cost of proper maintenance." Id.

55. 492 So. 2d 902 (La. App. 3d Cir. 1986).

56. 496 So. 2d 506 (La. App. 1st Cir. 1986).

57. Id. at 508 (emphasis added).

> Herein, the record indicates that Dr. Singh made at least partial payments to Jarnail, both prior to and after the filing of suit. The record also indicates that both Dr. Singh and Jarnail knew, understood, and agreed that any payments made would be setoffs in the final accounting between them.

Id.

as a defense and his revival of the debt "was not done fraudulently."[58] As to the latter failure to act, "fiduciary" duty was not mentioned.

Article 2369 was intended to impose only a particular duty of a fiduciary upon both spouses at termination of the community. The duty was "to account for" community property under a spouse's control at termination. The meaning of "account for," in light of the jurisprudence it codified, is simply to explain what happened to the property.[59] The sole purpose of article 2369 is to assure that former community assets do not disappear. It was not intended to impose a more general, ill-defined "fiduciary" duty upon each spouse. Thus, issues concerning actions by a spouse in relation to former community assets, if those assets have not disappeared, should be governed by the law of co-ownership,[60] negotiorum gestio, or partition of community property.

It is undesirable to impose a "fiduciary" duty upon each spouse at termination without knowing what specific responsibilities are included within that duty and why each one is imposed.[61] However, the author

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58. Id.

> Nevertheless, the record indicates that Dr. Singh believed that Jarnail's judgment reflected what was truly owed less those payments made. While not specifically asserted, it appears from the record that Dr. Singh felt a natural obligation to pay Jarnail what was due. LSA-C.C. art. 1757 (2.) (amended and reenacted effective January 1, 1985, see now Article 1760) provided that a natural obligation is one which could not be enforced by legal action but which was binding on the party making it in conscience and according to natural justice. The instant case is a perfect example of such type obligation. See LSA-C.C. art. 1758 (3) (amended and reenacted effective January 1, 1985, see now Article 1762 (1)).
>
> *As administrator of the community*, the record indicates that Dr. Singh's conduct evidence [sic] an acknowledgment of and promise to pay those wages due notwithstanding the community's right to assert prescription of the debt.

Id. (emphasis added).

59. The duty to account "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." Spaht, Developments in the Law, 1984-1985—Matrimonial Regimes, 46 La. L. Rev. 559, 559 (1986).

60. The Louisiana Law Institute has created a committee to study the revision of the law of co-ownership. For a discussion of present law, see supra note 25.

61. To the extent that a "fiduciary" duty may require the spouse to act in the interest of the other spouse, an attorney negotiating a community property settlement could never rely upon its validity if subsequently a suit is filed to annul the partition. It is unrealistic to expect a former spouse to act in the interest of the other while negotiating a community property settlement. Furthermore, it is in the public interest that community property settlements be encouraged so as to reduce litigation and its attendant costs.

The court cautioned in Decuers v. Decuers, 441 So. 2d 788, 790 (La. App. 5th Cir. 1983):

> While the agreement in question is most certainly a partition, and as such subject to rescission on grounds of lesion . . . to ignore such evidence as outlined above [paying off debts and repairing property] would be to negate the compromise quality of all such agreements, and discourage such non-judicial partitions.

recognizes that application of the rules of co-ownership and negotiorum gestio is not without its own risks.[62] When the law of co-ownership is revised by the Louisiana Law Institute,[63] attention should be focused upon whether the codified principles should apply to all types of co-ownership, either voluntarily or involuntarily assumed.[64] Furthermore, the law of negotiorum gestio is rarely utilized and on at least one occasion has prompted the following observation:

> The profession in Louisiana, however, unfortunately is informed insufficiently on the role of this ancient primary institution of the civil law and has not made much use of it.[65]

The irony of applying the law of negotiorum gestio to former spouses is the reintroduction of the term "master," but this time the reference is gender-neutral.

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62. Consider the explanation of the law of negotiorum gestio, supra note 49, and in particular the requirements that (1) the "master" whose business is managed must not be opposed to administration by the "gestor," and (2) the acts of management must not go beyond the limits of administration. As to the latter, the author of the explanatory material observes that "the jurisprudence does not appear to be very rigorous in the application of this second condition." J. Smith, Louisiana and Comparative Materials on Conventional Obligations 417 (4th ed. 1973). For an application in the jurisprudence of the first criteria see Succession of Mulligan v. Kenny, 34 La. Ann. 50 (1882); Tucker v. Carlin, 14 La. Ann. 734 (1859).

63. See supra note 60.

64. Heirs to a succession co-own the deceased's property in indivision. La. Civ. Code art. 1292. Interestingly enough, in describing the co-ownership of heirs the code likens the ownership to a "community of property": "When a person, at his decease, leaves several heirs, each of them becomes an undivided proprietor of the effects of the succession, for the part or portion coming to him, which forms among the heirs of a community of property, as long as it remains undivided." Id.

The law of partition among co-owners is found in Chapter 12 of Title I of Book III of the Civil Code, La. Civ. Code arts. 1289-1414.

65. Pascal and Spaht, Louisiana Family Law Course 109 (4th ed. 1986).