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MATRIMONIAL REGIMES

*W. Lee Hargrave**

PUBLIC RECORDS AND TRANSFER OF COMMUNITY IMMOVABLES

A community property regime comes into existence upon marriage[1] although the fact of the marriage is not shown in the conveyance or mortgage records. The rules regulating management of community assets thus come into play even though nothing in these public records indicate that a community exists. Especially important, since 1980, is the rule that one spouse acting alone cannot alienate, encumber, or lease community immovables regardless of the name in which those assets are listed in the public records.[2] The basic notion is that a contract of marriage[3] is not among those documents that must be recorded to affect third persons.[4]

It is true that a registry of marriage licenses exists, along with a return that indicates whether the marriage was celebrated, but failure to complete the registry requirements does not invalidate the marriage and the resulting community property regime. Even if the license is

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1. This is so if the couple does not execute a matrimonial agreement providing otherwise. Such a matrimonial agreement affects third persons only from the time it is recorded. La. Civ. Code art. 2332.

2. See La. Civ. Code art. 2347, which reads as follows:

> The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, furniture or furnishings while located in the family home, all or substantially all of the assets of a community enterprise and movables issued or registered as provided by law in the names of the spouses jointly.

See also Succession of James, 147 La. 944, 86 So. 403 (1920) (a community property interest in an immovable may be asserted against third persons even though it is not recorded).

3. The contract of marriage is the agreement to marry, the agreement to establish a certain status relationship under Civil Code article 86. It is not the same as a matrimonial agreement, which is defined in article 2328 as one relating to the property of the spouses.

4. See Redmann, The Louisiana Law of Recordation: Some Principles and Some Problems, 39 Tul. L. Rev. 491, 502-05 (1965). This notion holds even though Civil Code article 86 states, "Marriage is a legal relationship between a man and a woman that is created by civil contract[,]" and Louisiana Revised Statutes 9:2721 (1965) provides in part, "No . . . contract . . . affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry . . . ."

registered, the information is located in the parish where the license was obtained, and not necessarily where the property is located or where the couple currently resides.[5] Moreover, a person married in another state or country is not required to record evidence of his or her status upon moving to this state. The functional result of all this is that a person's marital status must be determined by reputation and from information outside a reliable public record.

Even if some public record of the marriage happens to exist in a particular parish, a separation or divorce judgment need not be recorded in that same parish. In the United States, no certain identity documents exist to attest to one's marital status. Under current practice, then, third persons undertake some risk that a spouse exists even though the person with whom they are dealing declares otherwise in some juridical act. This seems to have been the rule at least since *Succession of James*.[6]

The supreme court applied the rule again in *Camel v. Waller*,[7] saying the wife acquired an interest in property acquired by the husband during marriage despite his false declaration that he was judicially separated. A judicial separation that terminated the community regime was subsequently obtained but it was not recorded in the conveyance records when the husband sold the property to a third person. The court reasoned that the judgment of separation was subject to Louisiana Revised Statutes 9:2721[8] and had to be recorded to affect third persons. Absent such recordation, third persons could deal with the husband as married even though he declared otherwise in his act of sale.

Since the sale in *Camel* occurred in 1977, however, before the 1980 community property revision, the husband had the authority as head of the community to convey ownership of the community immovable without consent of the wife. Therefore, the purchaser had acquired good title, and the court denied the wife's claim to half ownership of the property.

The result preserves the *James* approach while also protecting the third-party purchaser. Some language in the opinion, however, suggests that the court might be willing to reconsider the *James* result if necessary to protect third persons.[9]

More important, since the 1980 revision, facts similar to *Camel v. Waller* will result in annulment of the transfer upon the request of the

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5. La. R.S. 9:252-53 (Supp. 1988).

6. 147 La. 944, 86 So. 403 (1920).

7. 526 So. 2d 1086 (La. 1988).

8. See supra note 4, quoting the relevant portions of La. R.S. 9:2721.

9. See the discussion at 526 So. 2d at 1091-92, concluding with, "The results in these cases indicate that the law in this area is by no means settled."

nonconsenting spouse because the consent of both is required to alienate a community immovable.[10]

This current state of the law presents a basic irony in the *Camel* situation: The marriage contract is not in the public records but affects third persons' rights in immovables transferred by the spouses, yet the separation and divorce judgments must be recorded to affect third persons.[11] In Judge Redmann's words, "It appears anomalous to hold recordation necessary for a judgment terminating the community, on the ground that such a judgment is one affecting immovables, while holding that the contract of marriage establishing the community need not be recorded, even though it is, in one sense, a contract affecting immovables."[12]

It might be possible to reconsider *James* and conclude under the clear text of the legislation that marriage is a contract affecting immovable property and therefore must be recorded to affect third persons. But that would be contrary to long-established expectations and to a policy of protecting innocent spouses against the loss of important community assets. Furthermore, the view that recordation is not required was implicitly recognized in the 1980 matrimonial regimes legislation, which provides for establishment of the community simply by the fact of marriage[13] and requires that matrimonial agreements providing for some alternative to the community regime must be recorded to affect third persons.[14] A statutory solution requiring recordation of the marriage would be preferable to a judicial one for the latter would involve the practical difficulties of recording the marriage in all parishes in which immovables are located. Legislation, on the other hand, could establish a central statewide registry for such marriages.

Another important principle was applied by the court in *Camel v. Waller*: Third parties are not entitled to rely on false declarations in recorded acts. The court analyzed the legal situation in the case without regard to the husband's false declarations. The result depended on the lack of recordation of the separation judgment, not on the buyer's ability to rely on the declaration of marital status. This approach is necessary, for no mechanism exists whereby notaries can ever guarantee the correctness of a person's declaration regarding marital status. Indeed, the fundamental concept of the public records doctrine is that it is a negative doctrine. It protects third persons against the effects of un-

10. La. Civ. Code arts. 2347, 2353.
11. Humphreys v. Royal, 215 La. 567, 41 So. 2d 220 (1949).
12. Redmann, supra note 4, at 504.
13. La. Civ. Code art. 2334.
14. Id. art. 2332.

recorded documents. It does not, and as presently organized, cannot guarantee the correctness of recorded documents.[15]

The situation, however, has been complicated by a 1987 statute that, though adopted without fanfare and without the usual scrutiny given to such civil code-related legislation, might be construed to give conclusive effect to false declarations before notaries. The statute is not found in the Civil Code or its ancillaries, where such legislation is usually found, but in a section of the Revised Statutes regulating notaries. Louisiana Revised Statutes 35:11 now contains the following provisions:

> B. A declaration as to one's marital status in an acquisition of immovable property by the person acquiring the property creates a presumption that the marital status as declared in the act of acquisition is correct and, except as provided in Subsection C of this Section, any subsequent alienation, encumbrance, or lease of the immovable by onerous title shall not be attacked on the ground that the marital status was not as stated in the declaration.
>
> C. Any person may file an action to attack the subsequent alienation, encumbrance, or lease on the ground that the marital status of the party as stated in the initial act of acquisition is false and incorrect; however, such action to attack the alienation, encumbrance, or lease shall not affect any right or rights acquired by a third person acting in good faith.[16]

By its terms, the provision establishes a presumption of marital status based solely upon one person's declaration in an act of acquisition of an immovable.[17] This is so despite the fact that a notary before

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15. The leading commentator on the public records doctrine, law professor and former Judge William V. Redmann, explained it this way: "One is not protected by reliance on the presence in the public records of a judgment of possession based on a forged will or a false proof of heirship, or of a fraudulent cancellation of a recorded mortgage, or, presumably, of any other invalid document. Nor is one protected by reliance on the presence of recitations of marital status in recorded instruments. The usual plea in such cases is reliance on the public records or on the faith of the public records. This plea asks too much of the law of registry; it loses sight of the basically negative character and limited scope of that law and construes recordation as creating rights, rather than as simply making rights effective against third persons." Redmann, supra note 4, at 500.

The Massachusetts Supreme Court required reconveyance of the property to its owner when the transferee had made false statements and had acted in reckless disregard of the facts to secure a confirmation and registration of title from the land court. Kozdras v. Land/Vest Properties, Inc., 382 Mass. 34, 413 N.E.2d 1105 (1980). Massachusetts has a title registration statute that is a direct descendant of the Australian Torrens System and is designed to protect bona fide purchasers with conclusiveness of title. See generally, B. Shick & I. Plotkin, Torrens in the United States (1978).

16. 1987 La. Acts No. 467, § 1 (effective Sept. 1, 1987).

17. This result goes beyond the estoppel provisions of Civil Code article 2342, whereby a spouse who appears in an act of acquisition in which the other spouse makes representations of ownership of the property is estopped from later claiming otherwise.

whom the declaration would be made has no means normally of assuring the truthfulness of the declaration. It would seem that one spouse acquiring an asset without the knowledge or participation of the other spouse could thus establish a presumption that he or she is single by a simple declaration.

Although the presumption can be rebutted in some cases, the legislature may have intended it to be conclusive as to third person acquirers who are in good faith. If the declarant subsequently alienates, encumbers, or leases the immovable, an action to attack the transaction on the grounds of the false declaration of the person's status "shall not affect any right or rights acquired by a third person acting in good faith." The language used here, however, is not as clear as it might be. If the provision had included only Part B, it would have been clear that any alienation, encumbrance, or lease "shall not be attacked," language that indicates a conclusive presumption. However, Part C states that an action to avoid a transfer "shall not affect any right or rights acquired by a third person acting in good faith."

In the normal case in which a married person states that he or she is unmarried and purports to transfer a community asset, the third person does not acquire ownership. All that person gets is a relatively null title, which could be either ratified or annulled by the other spouse.[18] Since "no right [was] acquired by a third person," it is then arguable that the statute does not preclude the other spouse from attacking the transfer. That seems to be the technical, literal meaning of the words here. On the other hand, it is questionable that the legislation would have had any other purpose than to protect such third persons.

In any event, the ambiguity of the statute's language might provide the courts with a basis for returning to the basic principles and basic policies of the public records system in construing the statute. In view of the placement of the statute outside of the main provisions dealing with protecting good faith purchasers and considering the danger that a conclusive presumption would encourage fraud, the courts may have sufficient grounds to limit the statute's effect.[19]

Pensions—Dividing the Pension Check

Under the authority of *T. L. James & Co. v. Montgomery*[20] and *Sims v. Sims*,[21] a court can order divorced or separated spouses to remain owners in indivision of one spouse's contingent pension rights.

18. La. Civ. Code art. 2352.

19. Subsection D also provides expressly that the statute is to apply retroactively to any such declarations made before the effective date of the statute. La. R.S. 35:11(D) (Supp. 1988).

20. 332 So. 2d 834 (La. 1975).

21. 358 So. 2d 919 (La. 1978).

When payments under the pension plan commence, the spouses are required to divide each payment according to their respective ownership interests in those rights. The Civil Code matrimonial regimes provisions contain no special authorization for ordering the pension fund administrator to deal with a nonmember of the plan such as the other spouse. Under general privity principles it would seem that the provider could be required only to issue one check to its member.[22] That member would then be required to make a payment to the ex-spouse.[23]

The inconvenience of such a situation to potentially combative ex-spouses is obvious, as is the problem of continuing litigation to enforce payment orders. To ameliorate these problems, the supreme court in *Eskine v. Eskine*[24] ordered a retirement system to pay one-half of the benefits due to the retired employee directly to his former wife. The source of authority for such an order is somewhat thin: the court relied on the very general terms of article 2164 of the Louisiana Code of Civil Procedure, which provides that "the appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." It may well be argued that such a general procedural article cannot supplant the substantive law of obligations. However, as Justice Lemmon remarked in a concurring opinion, "resort to La. C.C.P. art. 2164 to order the Retirement System to issue separate monthly benefit checks serves everyone's interest."[25] Such an order may well inconvenience the retirement system provider, but any inconvenience should be minor, for such systems are normally equipped with the necessary processing equipment to divide benefits among spouses and survivors of covered members with little real difficulty.[26] More importantly, this inconvenience is outweighed by the important benefits the order affords to the nonmember spouse.

Management—Enforcement of Debts

A basic principle of obligations law is that one is personally liable only for his or her own contractual and delictual obligations and not

22. Analysis and Interpretation of the New Matrimonial Regimes Law, 42 La. L. Rev. 725, 770 (1982).

23. The federal legislation providing for application of state community property laws to military pensions does contain a provision by which the United States will make the actual payment to both spouses. See 10 U.S.C. § 1408 (1982 & Supp. IV 1986).

24. 518 So. 2d 505 (La. 1988).

25. Id. at 509.

26. Accord, Quirk v. Quirk, 524 So. 2d 279 (La. App. 5th Cir. 1988). The pension board in this case was neither cited as a party, nor served with the original petition. Nonetheless, the board "appealed this judgment." Id. at 280. But note the dictum, "Besides, this judgment does not purport to exercise jurisdiction over the Board. It merely adjudicates rights in the pension fund." Id. at 281.

for those of others, unless some statute provides for such vicarious personal liability.[27] Personal liability means, of course, that in addition to the existing property, the property to be acquired in the future by the responsible party can be seized and sold to satisfy the obligation.[28] No law makes spouses personally liable for each other's obligations, except for the narrow codical provision adopted in 1979 that makes them solidarily liable with each other for necessities.[29] This rule applies, by its terms, to spouses under a separate property regime and is not part of the community property system.

The principle of no vicarious liability for each other's debts applies even if the spouses are living under a community regime. In that case, the legislation makes the existing community property available to the creditors of both spouses, a type of in rem liability of the property, rather than establishing personal liability.[30]

The court of appeal for the second circuit applied these principles in *Lawson v. Lawson*[31] and held that the wife was not personally liable on two promissory notes executed by the husband during the existence of the community. The court did recognize, of course, that the plaintiff-creditor could reach all of the community property existing at the time of the termination of the community. In *Lawson*, the plaintiff-creditor did not contest a lower court determination that the debt was a separate obligation of the husband. That fact, however, should not affect the result, since the creditor's rights under Louisiana Civil Code articles 2345 and 2357 are not dependent on the classification of the debt. The primary concern is the person who contracted the obligation, not the type of obligation that is contracted; *that* person's separate property and all of the community property can be reached by creditors.

Personal liability of a spouse for the debts of the other spouse can arise under Louisiana Civil Code article 2357 if, after termination of the community, a spouse disposes of a former community asset for a purpose other than satisfaction of a community obligation. In *Lawson*, however, no proof of such a disposition was presented. Even if there

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27. Hargrave, Developments in the Law, 1983-1984—Louisiana Constitutional Law, 45 La. L. Rev. 397, 399 (1984). See also Comment, Liability of the Husband for Contractual Obligations of His Wife—Louisiana Legislation and Jurisprudence, 30 La. L. Rev. 441 (1970); Bilbe, Community Property Symposium—"Management" of Community Assets Under Act 627, 39 La. L. Rev. 409 (1979).

28. La. Civ. Code art. 3182: "Whoever has bound himself personally, is obliged to fulfill his engagements out of all his property, movable and immovable, present and future."

29. La. Civ. Code art. 2372, adopted by 1979 La. Acts No. 709.

30. La. Civ. Code arts. 2345, 2357. Spaht & Samuel, Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law, 40 La. L. Rev. 83, 122 (1979).

31. No. 19,840-CA, 1988 La. App. Lexis 1724, 1988 WL 85629 (2d Cir. 1988).

had been such proof, the personal liability of the spouse would have been limited to the value of the former community property that was alienated.[32]

In a similar case, *First National Bank of Commerce v. Ordoyne*,[33] the Louisiana Fifth Circuit Court of Appeal held that a husband was not liable where his wife, after obtaining a credit card by forging his name on the application form, accumulated several charges on the account. The court also rejected the plaintiff's claim that the husband was liable in tort because of the wife's fraud, for again, there was no proof that he participated in the fraud.

Another application of the principle of no vicarious liability of spouses came in *Ciaccio v. Cazayoux*,[34] a case in which the pregnant wife, but not the husband, signed an arbitration agreement with her obstetrician. Twins were born prematurely, but died afterwards. The Louisiana First Circuit Court of Appeal enforced the agreement as it applied to her claims for malpractice, but held that the husband was not bound. He could pursue his claims against the physician without first arbitrating them.[35]

The first circuit, however, was not as clear on the principle that spouses are not generally personally liable for one another. In *Bridges v. Osborne*,[36] a creditor attempted to collect a sum from both the husband and the wife. Testimony established that the plaintiff-painter contracted with the wife to paint one-half of a duplex. Although the factual record was less than clear, it appears that the only evidence of the husband's connection with the incurring of the obligation was that the wife told plaintiff during a phone conversation, "Wait just a minute. I'll get back with you. I'm going to talk to my husband."[37] The court of appeal determined that the painting contract was a community debt even though it was the wife's separate property that was being maintained[38] and then stated, "As such, these expenditures are a community *obligation* for which both Mr. and Mrs. Osborne are responsible. *See* La. C.C. art. 2345."[39]

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32. La. Civ. Code art. 2357, para. 2. See Spaht & Samuel, supra note 30, at 124-33.

33. 528 So. 2d 1068 (La. App. 5th Cir. 1988).

34. 519 So. 2d 799 (La. App. 1st Cir. 1987).

35. The court also held that the survival claims of the children, who lived a short time before their death, were also not precluded.

36. 525 So. 2d 337 (La. App. 1st Cir.), writ denied, 530 So. 2d 567 (1988).

37. Id. at 340.

38. This conclusion probably was justifiable, since the community would get the benefit of the rental income, and the painting was an expense related to the generation of the community income. See Analysis and Interpretation of the Matrimonial Regimes Law, 42 La. L. Rev. 725, 789 (1982).

39. 525 So. 2d at 342.

Article 2345 does not support the court's conclusion. Indeed, under article 2345, characterization of the debt as separate or as community is irrelevant to the issue of the third person's enforcement rights. Under the clear language of that article, the issue is who was a contracting party; the third person can enforce the debt against that party's separate estate and the entire community. But no personal liability is provided against the noncontracting spouse. The issue in *Bridges* was whether the husband was an obligor under the contract; in other words, whether he contracted with the painter. Perhaps the court could have concluded from the testimony that the wife sought his authorization to hire the painter, and thus that he expressed his consent to be bound. Such a factual inference, however, would have been a rather questionable determination given the limited evidence.

It is true that spouses can act as agents and mandataries for each other, and that an agent-spouse acting in the name of the other can bind the other personally. Indeed, the law prior to the 1980 revision had stretched the principles of apparent authority and ratification to allow wives to bind the husbands who were managers of the community.[40] The holding in the *Bridges* case, however, goes beyond those cases. More important, after the 1980 revision, it is no longer necessary to rely upon such circuitous means to empower the wife to bind the husband and thus to enable her creditors to reach the community assets: the revised provisions, particularly articles 2345 and 2357, directly and explicitly authorize the wife to obligate the community assets in this way.

Reimbursement—Retroactivity

Under the prior law, reimbursement for community funds used to improve separate property, or vice versa, was based on the enhanced value of the property that was improved. In an inflationary economy, that rule often resulted in the spouses sharing the windfall resulting from inflation. The 1980 revision changed the basis for reimbursement, fixing the award according to the amount of funds used. In an inflationary economy, this rule gives a windfall to the owner of the property; in a deflationary economy, it would work to the advantage of the person who contributed the funds. It thus appears that the interests of the spouse making the contribution of funds may have been harmed by the change, raising the issue of whether the new law, if applied to funds contributed before 1980, would result in a taking without due process.

An initial issue is the extent to which anything that is "vested" or anything that one had strong expectations of recovering has been taken. Technically, the right to be reimbursed does not arise until the community

40. See Comment, supra note 27.

is terminated, and then only as part of an overall liquidation and accounting of the countervailing claims of both spouses. This prospect of obtaining an enhanced value is more like what is traditionally termed an expectancy interest than an interest that has already vested. This characterization of the interest apparently was adopted by the First Circuit in *Guarisco v. Guarisco*,[41] where the court approved the application of the new level of reimbursement to claims arising out of a 1968 marriage and a 1983 divorce. The court stated, "The trial court was correct in applying Louisiana Civil Code Article 2368, since the right to claim reimbursement for enhancement of the value of separate property becomes available upon dissolution of the community and not before."[42]

Matrimonial Agreements

A growing body of jurisprudence is demonstrating the usefulness of the expanded authority that spouses have to enter into matrimonial agreements. *Thurman v. Thurman*[43] demonstrates the flexibility that spouses have to use such agreements even at a time of impending separation or divorce. The spouses, as part of the agreement, provided for the establishment of an escrow account containing $159,000 in community funds. Those funds were to pay future obligations of an uncertain amount relating to a tax shelter. The wife, however, made some withdrawals for other purposes in violation of the agreement, and the court ordered her to return to the escrow account the amount of funds she wrongfully withdrew.

In *O'Krepki v. O'Krepki*,[44] the Louisiana Fifth Circuit Court of Appeal, one judge dissenting, recognized that spouses could contract during marriage to change their matrimonial regime retroactive to the date of their marriage. The spouses had contracted a separate property regime before their marriage in 1984 and then contracted in 1986 to "re-establish the community of acquets and gains constituting the legal regime . . . as though they had not taken any action previous to marriage."[45]

Anything not prohibited may be the object of a contract, and it would seem that no provisions of the Civil Code or the Revised Statutes explicitly prohibit retroactive application of matrimonial agreements. In

41. 526 So. 2d 1126 (La. App. 1st Cir.), writ denied, 523 So. 2d 1337 (1988).

42. Id. at 1127.

43. 521 So. 2d 579 (La. App. 1st Cir. 1988).

44. 529 So. 2d 1317 (La. App. 5th Cir. 1988).

45. Id. at 1318. The term "re-establish" was perhaps ambiguous since no community had ever been established, but the court found an intent to establish the community retroactively.

terms of substantive law, such agreements may have the effect of donating property[46] from one spouse to another, but donations between spouses are not prohibited.[47] In terms of form, the Code contains no explicit requirement, as the defendant in *O'Krepki* urged, that a valid transfer requires an enumeration of each specific item being donated. That there is no such itemization requirement is supported by Louisiana Civil Code article 155, which has long provided that the spouses may, upon their reconciliation after a judgment of separation, re-establish the community without an itemization of the assets involved. It should also be noted that retroactive application of a matrimonial agreement does not threaten the interests of third persons, since those interests are not affected by the agreement's provisions until the time of recordation.[48]

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46. And thus may cause some tax problems and also may complicate matters of forced heirship since donations are considered in determining the legitime.

47. Analysis and Interpretation of the Matrimonial Regimes Law, 42 La. L. Rev. 725, 727 (1982).

48. La. Civ. Code art. 2332.