Louisiana Law Review

Volume 50 | Number 2
Developments in the Law, 1988-1989
November 1989

Matrimonial Regimes

Katherine Shaw Spaht

MATRIMONIAL REGIMES

*Katherine Shaw Spaht**

REIMBURSEMENT AND ACCOUNTING AT TERMINATION

At its 1989 Regular Session, the Louisiana Legislature adopted a resolution requesting that the Louisiana State Law Institute "study certain articles of the Civil Code and related laws dealing with reimbursement and accounting between separated or divorced spouses and determine whether changes in the present language of such articles and laws are necessary."[1] There is little question that the manner in which reimbursement is to be calculated as a part of the partition proceedings[2] and what duties are owed by one former spouse to the other in the management of unpartitioned former community property[3] has created confusion. However, if the Legislature is to examine the two general subject matters it should resolve other inequities and discrepancies in related statutory provisions as well.

Reimbursement Calculation

The circuit courts of this state are in conflict as to whether the trial court is to deduct reimbursement claims by one spouse against the other from the net community assets or from the *share* of the net community of the obligor spouse. As early as *Gachez v. Gachez*,[4] a fifth circuit court of appeal decision, that court reasoned that sums to reimburse a spouse for the use of separate funds to satisfy a community obligation[5] or to acquire or benefit community property[6] must be deducted from the net community, because the two pertinent civil code articles essentially state reimbursement is to be made "if there are community assets from

---

* Jules F. and Frances L. Landry Professor of Law, Louisiana State University.

1. H.R. Res. 6, Reg. Sess. 1989.

2. La. Civ. Code arts. 2348-2368; La. R.S. 9:2801-2802 (1983 and Supp. 1989). See discussion of this problem in Spaht, Matrimonial Regimes, Developments in the Law, 1984-1985, 46 La. L. Rev. 559, 563-67 (1986).

3. La. Civ. Code art. 2369. See Spaht, Matrimonial Regimes, Developments in the Law, 1986-1987, 48 La. L. Rev. 371 (1987).

4. 451 So. 2d 608 (La. App. 5th Cir.), writ denied, 456 So. 2d 166 (1984).

5. La. Civ. Code art. 2365.

6. La. Civ. Code art. 2367.

which reimbursement may be made."[7] The *Gachez* case was cited and followed in *Nash v. Nash*,[8] a second circuit court of appeal opinion. Other circuits[9] have repudiated the reasoning of the *Gachez* and *Nash* cases, adopting the view that reimbursement claims are to be satisfied from the obligor spouse's net *share* of community assets, since reimbursement is a claim to be made by one spouse against the other,[10] not against the "community" as if it were an entity.[11]

As this author has observed before,[12] it is only after each spouse's net share of former community property has been calculated that reimbursement claims can be asserted by one spouse against the other. The limitation upon reimbursement claims for the use of separate property "was intended to permit reimbursement only if the spouse from whom it was claimed had a share of former community property that was sufficient to satisfy the claim."[13] The difficulty the courts have encountered in interpreting the pertinent Civil Code articles and statutory provisions is attributable to the indirect expression selected by the Legislature to convey its intention.[14] It is the language of the limitation that has created the confusion. In *Davezac v. Davezac*[15] the court, by practical example, illustrated the inequitable and unintended result if reimbursement claims are deducted from net community assets before calculating each spouse's share:

> To adopt appellee's interpretation would lead to the inequitable result of appellant being "reimbursed" for one-half of the amounts he paid from funds of which he owns half. The net

---

7. Id. Actually, the language formulation in La. Civ. Code art. 2365 varies from that quoted, but conveys the same idea: "Reimbursement may only be made to the extent of community assets . . . ."

8. 486 So. 2d 1011 (La. App. 2d Cir. 1986). See also Kaplan v. Kaplan, 522 So. 2d 1344 (La. App. 2d Cir. 1988); Gilley v. Ketchens, 478 So. 2d 683 (La. App. 2d Cir. 1985); Longo v. Longo, 474 So. 2d 500 (La. App. 4th Cir.), writ denied, 477 So. 2d 711 (1985).

9. Patin v. Patin, 462 So. 2d 1356 (La. App. 3d Cir.), writ denied, 466 So. 2d 470 (1985); Davezac v. Davezac, 483 So. 2d 1197 (La. App. 4th Cir. 1986); Williams v. Williams, 509 So. 2d 77 (La. App. 1st Cir. 1987); Mara v. Mara, 513 So. 2d 1220 (La. App. 4th Cir. 1987); Cabral v. Cabral, 543 So. 2d 952 (La. App. 5th Cir. 1989).

10. 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).

11. La. Civ. Code art. 2336, comment (c): "The community of acquets and gains is not a legal entity but a patrimonial mass, that is, a universality of assets and liabilities . . . ."

12. Spaht, supra note 2, at 563-67. See also discussion in K. Spaht and L. Hargrave, Matrimonial Regimes § 7.14, at 287-91, in 16 Louisiana Civil Law Treatise (1989).

13. K. Spaht and L. Hargrave, supra note 12, § 7.14, at 287.

14. Id. at 288.

15. 483 So. 2d 1197 (La. App. 4th Cir. 1986).

result would be that he would pay seventy-five percent of the payments to maintain a community asset from which the wife would eventually derive one-half of the proceeds.[16]

Recently, the issue of how to calculate reimbursement claims in a partition suit arose in a situation where "the community" was insolvent—the community debts exceeded the community assets.[17] In *Kaplan v. Kaplan*[18] the husband had proved to the satisfaction of the trial judge that "the community owes him $116,394."[19] The trial judge then proceeded to deduct the total sum due the husband from the community assets ($135,862 − $116,394 = $19,468), divided the difference between husband and wife ($9,734), and then the husband was allocated all community obligations (approximately $180,000, including the federal tax lien). The wife received $9,734 in assets, but no debts; the husband received $126,128 in assets, and $180,000 in debt. Obviously, under the correct calculation method, the community debts should have been deducted from the community assets, and the indebtedness exceeding the assets should have been allocated equally between the former spouses.[20]

Even though, as a general principle, the husband's reimbursement claim is extinguished if the wife has no share of the community from which this obligation may be satisfied, an exception is made in the case of "ordinary and customary expenses of the marriage, or for the support, maintenance, and education of children of either spouse in keeping with the economic condition of the community."[21] Although the *Kaplan* court does not elaborate upon the payments for which the husband is entitled to receive reimbursement, it does identify them as "insurance premiums, house payments, taxes, and various interest on loans."[22] Some of these expenses probably were ordinary and customary expenses of the marriage, in which case the wife would owe the husband reimbursement for one-half the amount[23] even if the community was insolvent. The rationale

16. Id. at 1199.

17. Kaplan v. Kaplan, 522 So. 2d 1344 (La. App. 2d Cir. 1988). Community assets were valued at $135,862 by the trial judge; "the total amount [of debt] exceeds $140,000, clearly showing the community to be insolvent." Id. at 1346. "In addition, there is a federal tax lien of $37,943.27 presently due." Id.

18. 522 So. 2d 1344 (La. App. 2d Cir. 1988).

19. Id. at 1346.

20. This is only implicit in the language of La. R.S. 9:2801(4)(b) (1983) which ostensibly deals with a solvent community but equal division is a fundamental principle of our community property law: "The court shall divide the community assets and liabilities so that each spouse receives property of an equal net value."

21. La. Civ. Code art. 2365.

22. 522 So. 2d at 1346.

23. In an asterisk footnote in the opinion the court observes: "Kaplan was actually entitled to *half* the amount of separate funds he spent in fulfillment of community obligations . . . . However, since Mrs. Kaplan did not appeal or answer the appeal, this issue cannot be addressed by this court." Id. at 1347.

underlying pursuit of these special reimbursement claims is, "The Legislature concluded that ultimately expenses of the marriage, including support of the children . . . should be borne equally by the spouses. . . . [I]f separate property of one spouse is used to satisfy the obligation, reimbursement imposes responsibility for one-half of that amount by permitting recovery even if only separate property of the other spouse is available."[24]

The trial and appellate courts' reason for ignoring the principle of equal division was summarized in the following language:

> The trial judge was well within his discretion in taking Mrs. Kaplan's mental illness and resulting financial condition into account. Under the circumstances of this case, his decision to order Kaplan to assume all community obligations, in return for receipt of other community assets, was not an abuse of that discretion. On the contrary, it is a fair and equitable division of the community, as contemplated by the statute.[25]

Louisiana, however, is not an "equitable" distribution jurisdiction. Civil Code article 2336 and the special partition statute are rather explicit pronouncements that our community property law requires *equal*, not equitable, distribution. The partition process, under an aggregate theory that proceeds by allocation of assets and liabilities, may be sensitive to equity[26] but the end result must be equal division. The courts confused equitable *allocation*, with equitable *distribution*.

Reimbursement for Expenses on Depreciating Movable

Another conflict exists among the various circuit courts of appeal on whether an ex-spouse owes reimbursement for the use of separate property to pay a community obligation which was incurred for the purpose of acquiring what is now former community property—for example, the use by one spouse of separate funds (i.e., his earnings), after termination of the community, to pay "the notes" on the car which is former community property. The reimbursement articles have been extended to apply to expenditures after termination of the community, even though the Civil Code articles contemplate such expenditures during the existence of the community.[27]

---

24. K. Spaht and L. Hargrave, supra note 12, § 7.14, at 286.

25. 522 So. 2d at 1347.

26. La. R.S. 9:2801(4)(c) (1983). The court cites the same provision as authority for the proposition that the distribution may be equitable, not simply the allocation.

27. La. Civ. Code art. 2358: "*Upon termination* of a community property regime, a spouse may have against the other spouse a claim for reimbursement . . . ." (emphasis

In *Williams v. Williams*,[28] in a typical pattern of facts, after termination of the community the husband continued to pay the notes from his separate property on a vehicle, which was community property. The wife argued that he was not entitled to reimbursement because he had "exclusive use" of the automobile and in essence the use value had to be deducted from the amount of separate funds used to pay the notes—a roughly equivalent sum. In responding to the wife's argument, the court observed:

> Our brethren of the Fourth and Fifth Circuits have chosen to treat reimbursements from the separate property differently depending on whether the debt paid was on movable or immovable property. However, LSA-C.C. art. 2365 makes no such distinction, and we see no reason to deny appellant [husband] reimbursement for one-half of the separate property used to pay the note on the Subaru automobile.[29]

The fourth and fifth circuit courts of appeal decisions referred to in the *Williams* case are *Davezac v. Davezac*[30] and *Gachez v. Gachez*.[31] The difference between movable and immovable property which those two circuits offer to justify a different result is "that an automobile rapidly depreciates so that its use is directly related to its depreciation"[32] and "[e]quity dictates that appellant be charged for the full amount of maintaining an asset of which he had exclusive use while that asset steadily declined in value."[33]

The source of the problem in these three cases is the application of reimbursement principles under community property law, rather than principles of ordinary co-ownership. At termination of the community, the former spouses' relationship is that of co-owners. It is a principle of co-ownership,[34] not community property, that "rent or credit is not

---

added).

La. Civ. Code arts. 2360, 2361, 2363 lend lexicological support.

The jurisprudence, however, has not restricted the application of these articles to action taken by a spouse during the existence of the community. See Spaht and Samuel, Equal Management Revisited, 40 La. L. Rev. 83, 141 (1979); Note, Termination of the Community, 42 La. L. Rev. 789 (1982).

28. 509 So. 2d 77, 80 (La. App. 1st Cir. 1987).

29. Id. at 80.

30. 483 So. 2d 1197 (La. App. 4th Cir. 1986).

31. 451 So. 2d 608 (La. App. 5th Cir.), writ denied, 456 So. 2d 166 (1984).

32. Davezac v. Davezac, 483 So. 2d 1197, 1199 (La. App. 4th Cir. 1986); see also Gachez v. Gachez, 451 So. 2d 608, 613 (La. App. 5th Cir.), writ denied, 456 So. 2d 166 (1984).

33. *Davezac*, 483 So. 2d at 1199; *Gachez*, 451 So. 2d at 614.

34. The principle is that each co-owner has a right to possess and occupy the entire co-owned property without owing his co-owners rent (unless he excludes them).

It is the corruption of this principle in Patin v. Patin, 462 So. 2d 1356 (La. App. 3d Cir. 1985), which resulted in amendments to La. R.S. 9:308(B) (Supp. 1989).

owed when one spouse occupies the family home while making mortgage payments, the situation . . . involving movable property is distinguishable."[35] To be consistent, the same rules that would apply to ordinary co-owners of a depreciating movable in a case where one pays the debt but enjoys exclusive use, though not necessarily use to the exclusion of the other co-owners, should apply to the former spouses.[36] Yet, the undeveloped rules governing co-ownership of property contribute to the confusion that results when the former spouses are no longer partners in community, but ordinary co-owners with only one unique responsibility. The subject matter of the relationship of the spouses and the special responsibility of an accounting[37] owed by one spouse to the other after termination will be discussed in the next section of this article.

By raising generally the equities of a set-off against a spouse's claim for reimbursement, the *Davezac* and *Gachez* cases pose a question for the reimbursement provisions even in instances where they are properly applied to actions of a spouse during the existence of the community. Article 2365 fails to contain counterbalancing equities for the reason that if separate property is used to satisfy a community obligation—one for the common interests of the spouses[38]—during the *existence* of the community, the assumption is that both spouses have agreed to a use for that property that does not require an offset, except in one recognized instance.[39] If the husband in *Davezac* had used separate funds during the existence of the community to satisfy an indebtedness on the family automobile (community obligation),[40] he would be entitled to recover one-half of the sum without an offset even though the automobile was used primarily by him. Making assumptions about co-owners', not spouses', agreements as to use presents different legal and policy issues.

Interestingly enough, even if the satisfaction of a community obligation occurred during the existence of the community, the legislation does introduce an equitable consideration. Under Civil Code article 2363 an obligation may be in part community and in part separate—"an

35. *Gachez*, 451 So. 2d at 613.

36. Exclusive use of a depreciating movable may be ordered by the court under La. R.S. 9:308(A) (as amended by 1989 La. Acts No. 800).

37. La. Civ. Code art. 2360: "An obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation."

La. Civ. Code art. 2361: "Except as provided in Article 2363, all obligations incurred by a spouse during the existence of a community property regime are presumed to be community obligations."

38. La. Civ. Code arts. 2360, 2361.

39. La. Civ. Code art. 2363.

40. Cook v. Cook, 457 So. 2d 235 (La. App. 3d Cir. 1984); Willis v. Willis, 454 So. 2d 429 (La. App. 3d Cir. 1984).

obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse, is likewise a separate obligation."[41] The classic example in the jurisprudence is the case in which a spouse uses community property to satisfy an obligation incurred for the benefit of the other spouse's separate property—paying the notes on a house which is separate property of one spouse but occupied by the spouses as the family home.[42] The rationale articulated in the decisions is that use of the property by the "community" is an enjoyment of the fruits of separate property and the cost of the benefit included the payment of interest.[43] Therefore, the spouse against whom reimbursement is sought may only recover one-half of the payments used to discharge the principal amount, not the portion used to discharge interest. As the author has observed elsewhere,[44] Article 2363 is a more direct, legally accurate method of reaching the same result. Regardless of legal reasoning, it is clear that the legislation is sensitive to the issue of an off-set for the use of the property as against a claim for reimbursement.

Yet, in the other instance in which reimbursement is permitted—the use of community or separate property to acquire, benefit, or improve separate or community property respectively—there is no statutory recognition of the need to balance benefits received against a claim for the sum expended. For example, if the wife owns as separate property a duplex apartment that produces rents (community property), and she contracts with a painter to improve it, then uses community funds to pay the painter, it will make a difference if she is entitled to reimbursement under Article 2364 or Article 2366. If, by virtue of her contract with the painter, the wife incurs an obligation and then satisfies it with community funds, Article 2364 with its accompanying equities in Article 2363 applies. If, on the other hand, her use of community funds to pay the painter is considered the use of community funds to improve separate property, there is no statutory authority for recognizing an off-set for benefits the "community" has enjoyed. This disparity has prompted another author to observe:

> No rational basis for the reimbursement disparity is evident. Surely the legislature did not intend that a potentially significant difference in reimbursement be based on the arbitrary decision

---

41. La. Civ. Code art. 2363; see, e.g., *Willis*, 454 So. 2d at 431.

42. K. Spaht and L. Hargrave, supra note 12, § 7.14, at 282-84.

43. La. Civ. Code art. 2339: "The natural and civil fruits of the separate property of a spouse . . . are community property. Nevertheless, a spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged."

44. K. Spaht and L. Hargrave, supra note 12, at § 7.19.

> of whether community funds were used to benefit separate property or to satisfy a separate obligation. This potential problem could be avoided by amending article 2366 in a manner that would take into account the extent to which the community itself was benefitted by use of a community property. The remaining amount by which the separate property of a spouse has benefitted could serve as the basis for reimbursement to the other spouse.[45]

Accounting—Article 2369

The relationship of spouses at termination of the community and the resulting duties of care owed one spouse to the other in the management of former community property continue to vex the judiciary. As this author has written on at least two previous occasions,[46] with only one exception, the two former spouses are ordinary co-owners after termination of the community regime and as a general proposition owe no fiduciary duty to each other to properly manage co-owned assets. However, if a former spouse asserts control over former community assets and begins to manage the assets, he has transformed his relationship from that of an ordinary co-owner to the legal relationship of negotiorum gestor.[47] The one exception previously alluded to is the fiduciary duty to account to the other spouse if a spouse had community property under his control at termination. The duty to account requires the spouse to explain the disposition of the community property under his control at termination, or be responsible to the other spouse for one-half the value of the property.[48]

In *Richardson v. Richardson*[49] the wife sought "in essence . . . an accounting for revenues allegedly due to her from the corporation by virtue of her co-ownership of the corporation's stock."[50] Rejecting the wife's claims for an accounting, the court observed that the payment of sums for which she sought an accounting were property of the corporation and what she owned was simply the stock. Therefore, "[t]he fruits or revenues attributable to this stock, not the direct earnings of the corporation itself, would belong in part to the plaintiff."[51] The court then commented upon what the wife had failed to prove:

---

45. Note, Termination of the Community, 42 La. L. Rev. 789, 803 (1982).

46. Spaht, supra note 3; Spaht, supra note 2.

47. La. Civ. Code arts. 2295-2299.

48. 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 . . . ."

49. 540 So. 2d 1254 (La. App. 3d Cir. 1989).

50. Id. at 1257.

51. Id.

> Plaintiff did not attempt to prove that any diminished value of the corporate stock resulted from any *negligent* management by defendant during his possession and control of the corporate business.[52]

A further illustration of the type of problem that can arise after termination of the community is the case of *Barbin v. Barbin*.[53] The wife complained that the trial court had failed to charge the husband with interest on community funds under his control at termination. To this "novel claim"[54] the court of appeal responded: "We know of no theory of law that requires a former partner in community to invest community funds prior to partition so that they will earn interest in the interim between dissolution of the community and the date of partition."[55] Concluding that her claim was not "based the same as those cases represented by *Hodson v. Hodson*"[56] (later referred to by the court as "the so-called *ex delicto cases*"),[57] the court denied the wife the legal interest claimed. Rather than allege and prove that community funds, which were under the husband's control, no longer existed under Civil Code article 2369,[58] the wife claimed that the community funds were simply idle. The correct answer ultimately lies in the legal relationship of the two former spouses after termination of the community and the determination of the proper legal standard applicable to their conduct. It is an issue that Judge Redmann recognized earlier in his opinion in *Lococo v. Lococo*:[59]

> [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.[60]

---

52. Id. (emphasis added).
53. 546 So. 2d 609 (La. App. 3d Cir. 1989).
54. Id. at 610.
55. Id. at 611.
56. Id.
57. Id.
58. 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 . . . ."
59. Lococo v. Lococo, 462 So. 2d 893 (La. App. 4th Cir. 1984).
60. 462 So. 2d at 896 (Redmann, C.J., concurring).

See comment (c) to La. Civ. Code art. 2369, which has been criticized by the author elsewhere as inaccurate in describing the obligation to account, but it is correct in articulating the duty of co-owner spouses after termination of the community: "Thus, he ought to be accountable for any loss or deterioration of the things under his control attributed to his fault . . . ."

California has chosen to be explicit about the standard of care in its statutory provisions regulating community property after termination. Unlike Louisiana, with the one exception of the obligation to account,[61] and the Uniform Marital Property Act,[62] California imposes the obligation of "good faith" in the management of community assets after termination of the community before the property is partitioned.[63] It is the same obligation imposed on the spouses during the existence of the community,[64] so it is simply a logical extension of the standard of care beyond termination. Under Louisiana law it would be inaccurate to describe the obligation one spouse owes to the other during marriage as one of "good faith." A spouse is liable to the other for loss if he manages community property fraudulently or in *bad faith*.[65] Because the former spouses may feel hostility to each other after legal separation or divorce, their relationship is not in actuality like that of ordinary co-owners. It may be appropriate for the legislature to recognize this fact and impose a special statutory responsibility or standard of care in managing former community assets upon former spouse co-owners even though the same duty would be inappropriate if applied to co-owners generally. At least considering such a proposal would focus attention upon an area of the law that is both ignored and misunderstood.

---

61. See supra note 58 for the text of the article.

62. Uniform Marital Property Act § 17(3), 9A U.L.A. (1983): "Except as provided in Section 16: . . . (3) After a dissolution, each former spouse owns an undivided one-half interest in the former marital property as a tenant in common except as provided otherwise in a decree or written consent . . . ."

63. Cal. Civ. Code § 5125(e) (West 1983 and Supp. 1989):

> Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property in accordance with the general rules which control the actions of persons having relationships of personal confidence as specified in Section 5103, until such time as the property has been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of the existence of assets in which the community has an interest and debts for which the community may be liable, upon request. . . . In no event shall this standard be interpreted to be less than that of good faith in confidential relations nor as high as that established by *former* Title 8 (commencing with Section 2215) of Part 4 of Division 3 . . . .

64. Cal. Civ. Code § 5125(e) (West 1983 & Supp. 1989): "Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property in accordance with the general rules which control the actions of persons having relationships of personal confidence as specified in Section 5103, *until such time as the property has been divided by the parties or by a court* . . . ." (emphasis added).

65. La. Civ. Code art. 2354.