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Matrimonial Regimes

*Katherine Shaw Spaht**

Reimbursement and Accounting Revisited

In last year's review of developments in the law[1] the subjects of reimbursement and accounting were rather exhaustively explored. Furthermore, during the intervening year, the author contributed an article on post-dissolution management of undivided community property for a symposium in the Wisconsin Law Review,[2] which compared the problem in Louisiana to that in Wisconsin under the Uniform Marital Property Act.[3] The Legislature responded conservatively to the serious issues considered by the cases and presented by the statutes governing reimbursement and accounting.[4] At the same time, the Legislature adopted a comprehensive law of co-ownership which failed to address the special relationship of former spouses as co-owners.[5] Corrective legislation is still needed and will require continued energy for the task.

Reimbursement Calculation

The conflict in decisions of the circuit courts of the state[6] concerning whether reimbursement claims are to be deducted from the net com-

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1. Spaht, Developments in the Law, 1988-1989, Matrimonial Regimes, 50 La. L. Rev. 293 (1989).

2. Spaht, Post-Dissolution Management of Former Community Property: An Unresolved Problem, 1990 Wis. L. Rev. 401 (1990).

3. Unif. Marital Property Act § 17(3), 9A U.L.A. 135 (1983): "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."

The text of the Uniform Marital Property Act appears in 21 Hous. L. Rev. 601 (1984).

"Tenancy in common bears a strong resemblance to Louisiana co-ownership, or ownership in indivision. A tenant in common owns an undivided interest in the property and so does a co-owner." Spaht, supra note 2, at 415.

4. During its 1989 Legislative Session, the 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.' (H.R. Res. 6, Reg. Sess. 1989)." Spaht, Developments in the Law, supra note 1, at 293.

5. The comprehensive new law of co-ownership (1990 La. Acts No. 990) will be the subject of a forthcoming commentary in the Louisiana Law Review.

6. See discussion of courts of appeal cases in K. Spaht and L. Hargrave, Matrimonial Regimes § 7.14, at 287-91, in 16 Louisiana Civil Law Treatise (1989); Spaht, Developments in the Law, supra note 1.

munity assets or from the net share of the obligor spouse has been legislatively resolved by the passage of Act No. 991.[7] New Civil Code article 2358.1 provides that reimbursement "shall be made from the patrimony of the spouse who owes reimbursement."[8] The patrimony of a spouse consists of separate property and his or her share of the community property,[9] unless an exceptional provision of the law limits liability to the obligor's share in the community.[10] Two such exceptional provisions are Article 2365 and Article 2367, both of which were amended in the same bill enacting Article 2358.1.[11] If separate property is used

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7. In the Expose des Motifs of 1990 La. Acts No. 991, the conflict is explained:

> Certain Louisiana courts have misunderstood and misapplied the provisions of the Louisiana Civil Code governing partition of the community property and accounting between spouses upon termination of the community property regime. See Spaht and Hargrave, Matrimonial Regimes 281-325 (1989); Spaht, Developments in the Law 1988-1989, Matrimonial Regimes, 50 La. L. Rev. 293 (1989). In order to resolve uncertainties and clarify the law, the Louisiana Legislature has requested the Louisiana State Law Institute to study Articles 2364 through 2369 and related laws dealing with reimbursement and accounting between separated or divorced spouses and determine whether changes to the present language of such articles and laws are necessary. See House Resolution No. 6, May 30, 1989.
>
> The Council of the Louisiana State Law Institute, having studied Articles 2358 and 2364 through 2369 of the Civil Code and related laws, recommends adoption of certain amendments for the purpose of clarification of the law. . . .

8. Comment (a) to La. Civ. Code art. 2358.1 provides in part: " [C]larification of the law is advisable. Article 2358.1 makes it clear that reimbursement is made from the patrimony of the spouse who owes reimbursement, unless the liability of a spouse is limited by exceptional provision of law to the value of his share of the community. . . ."

9. Comment (a) to La. Civ. Code art. 2358.1 provides: "The patrimony of a spouse consists of his share in the community and his separate property. See Yiannopoulos, Civil Law Property §125 (2d ed. 1980)."

10. Comment (a) to La. Civ. Code art. 2358.1.

11. La. Civ. Code art. 2365 (eff. Jan. 1, 1991):

> If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. The liability of a spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations.

Nevertheless, if the community obligation was incurred for the 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, the spouse is entitled to reimbursement from the other spouse regardless of that spouse's share of the community.

La. Civ. Code art. 2367 (eff. Jan. 1, 1991):

> If separate property of a spouse has been used for the acquisition, use, improvement, or benefit of community property, that spouse upon termination of the community is entitled to one-half of the amount or value that the property had at the time it was used. The liability of the spouse who owes reimbursement

to satisfy a community obligation or to improve community property, one-half of the amount or value of the separate property used is due in reimbursement but only from the obligor spouse's share of community property.[12] The comments are abundantly clear that the purpose of the legislation is to overrule jurisprudence misapplying the law as it existed; reimbursement was always due from a spouse's patrimony, not from the net community assets.[13]

During the legislative session, while Act No. 991 was being considered, the second circuit court of appeal repudiated an earlier decision of the court adopting the erroneous jurisprudence. The court in *Oliver v. Oliver*[14] overruled *Nash v. Nash*,[15] also a second circuit decision: "We hereby acknowledge that *Nash, supra*, and its progeny, to the extent that they adopted *Gachez*'s erroneous interpretation of the reimbursement articles, contain error which we can no longer follow."[16] In *Oliver*, the trial court had awarded each spouse reimbursement of one-half of the amount "from the mass of the community estate instead of full reimbursement,"[17] relying on *Nash v. Nash*.[18] The court of appeal reviewed the jurisprudence and commentaries concerning reimbursement calculations and concluded that cases such as *Gachez v. Gachez*[19] and *Nash* literally interpreted the articles "with no analysis of the reasons for the rule or its application in conjunction with C.C. Art. 2358 and prior

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is limited to the value of his share in the community after deduction of all community obligations.

Buildings, other constructions permanently attached to the ground and plantings made on community property with separate assets of a spouse become community property. Upon termination of the community, the spouse whose assets were used is entitled to one-half of the amount or value that the separate assets had at the time they were used. The liability of the spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations.

12. See explanation in K. Spaht and L. Hargrave, supra note 6, § 7.14.

13. La. Civ. Code art. 2358.1, comment (c) (eff. Jan. 1, 1991): "According to the correct interpretation of Article 2364, reimbursement has always been due from the patrimony of the other spouse rather than from the net community assets. See Spaht and Hargrave, Matrimonial Regimes 285 (1989); cf. Devezac v. Devezac (sic), 483 So. 2d 1197 (La. App. 4th Cir. 1986); Patin v. Patin, 462 So. 2d 1356 (La. App. 3d Cir. 1985); Feazel v. Feazel, 471 So. 2d 851 (La. App. 2d Cir. 1985). But see Barry v. Barry, 501 So. 2d 897 (La. App. 5th Cir. 1987); Nash v. Nash, 486 So. 2d 1011 (La. App. 2d Cir. 1986); Gachez v. Gachez, 451 So. 2d 608 (La. App. 5th Cir. 1984). This jurisprudence that has misapplied Article 2364 is legislatively overruled."

14. 561 So. 2d 908 (La. App. 2d Cir. 1990).

15. 486 So. 2d 1011 (La. App. 2d Cir. 1986).

16. *Oliver*, 561 So. 2d at 914.

17. Id. at 911.

18. 486 So. 2d 1011 (La. App. 2d Cir. 1986).

19. Spaht, Developments in the Law, 1984-1985, Matrimonial Regimes, 46 La. L. Rev. 559 (1986); K. Spaht and L. Hargrave, supra note 6, § 7.14 at 285.

jurisprudence."[20] In a paragraph of cogent statutory analysis the court determined:

> Art. 2336 provides that the community of acquets and gains is not a legal entity, but a patrimonial mass. The patrimony of each spouse includes only an undivided one-half of the mass of the community property during the existence of the regime. Furthermore, Art. 2358 provides that the reimbursement claims are made between the spouses, not against "the community."[21]

In *Allbritton v. Allbritton*[22], relying on the accuracy of the figures furnished by the court, the third circuit court of appeal incorrectly deducted reimbursement claims from the total community assets. According to the court, the total community estate was worth $131,854.48 and the unpaid debts (to third persons), $22,491.50. Reimbursement claims due the wife were $48,372.86, and those due the husband, $11,943.11. Properly calculated, the debts due third persons should have been subtracted from total community assets to determine net community assets ($131,854.48 - $22,491.50 = $109,362.98). Then each spouse's net community property share would equal $54,681.49. The reimbursement claims would be subject to judicial compensation, if not legal compensation,[23] leaving a balance due the wife from the husband of $36,429.75 ($48,372.86 - $11,943.11). Ultimately, the wife should receive $54,681.49 (her one-half share of net community assets) plus $36,429.75 (reimbursement from husband's one-half share of community assets) which equals $91,111.24. The husband should receive $18,251.74 representing the difference between his one-half share of net community assets ($54,681.49) minus the reimbursement owed his wife ($36,429.75).

Instead, the court calculated each spouse's share of net community assets as $24,523.50 because it subtracted reimbursement claims due both from the gross value of the community assets. Obviously, the factual situation in the *Allbritton* case would require a different result under

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20. Gachez v. Gachez, 451 So. 2d 608 (La. App. 5th Cir.), writ denied, 456 So. 2d 166 (1984); Oliver v. Oliver, 561 So. 2d 908, 913 (La. App. 2d Cir. 1990).

21. Id. at 914.

22. 561 So. 2d 125 (La. App. 3d Cir.), writ denied, 565 So. 2d 445, 454 (1990).

23. La. Civ. Code art. 1893:

> Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due.
>
> In such a case, compensation extinguishes both obligations to the extent of the lesser amount.
>
> Delays of grace do not prevent compensation.

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

the new legislation from that reached by both the trial court and the court of appeal.[24]

Accounting after Termination Versus Spouses as Co-owners

The addition of Article 2369.1 by 1990 legislation was intended to clarify existing law governing the relationship of spouses to former community assets after termination of the community regime. New Article 2369.1 simply provides: "After termination of the community property regime, the provisions governing co-ownership apply unless there is contrary provision of law or juridical act."[25] This was already the law and a comment to Article 2369 had clearly made the point.[26] Yet, the interrelationship of Article 2369[27] and the law of co-ownership has never been completely understood by the profession.

Simply put, the duty to account is a narrowly defined responsibility specially imposed upon a spouse after termination of the community.[28] Because co-owners do not owe this duty,[29] it is an example of "a

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24. See also Spaht, Developments in the Law, supra note 1, at 295-96, detailing the erroneous calculation and distribution made by the court in Kaplan v. Kaplan, 522 So. 2d 1344 (La. App. 2d Cir. 1988) and the correct calculation of the distribution of the community in the *Gachez* case in K. Spaht and L. Hargrave, supra note 6, § 7.14.

25. 1990 La. Acts No. 991, § 1.

26. La. Civ. Code art. 2369, comment (c): "A spouse having control of community property at the termination of a community property regime occupies the position of a coowner under the general law of property."

27. 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."

28. This author has written about the special duty on numerous occasions: K. Spaht and L. Hargrave, supra note 6, § 7.19; Spaht, supra note 2, at 401 (1990); Spaht, Developments in the Law, 1986-1987, Matrimonial Regimes, 48 La. L. Rev. 371 (1987); Spaht, Developments in the Law, supra note 19.

29. Under La. Civ. Code art. 3439, "[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." The second paragraph of the article makes it clear that a co-owner may possess property adversely to his co-owner with a lesser requirement of notice than must be given by other possessors. See also La. Civ. Code art. 3478, comment (c).

See 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.), writ denied, 247 La. 1086, 176 So. 2d 145 (1965). See also Comment, Ownership in Indivision in Louisiana, 22 Tul. L. Rev. 611, 617-20 (1948). See generally 2 Aubry and Rau § 221, Nos. 340-54 (La. St. L. Inst. trans. 1966).

But see Guillot v. Dossat, 4 Mart. (o.s.) 203 (La. 1816), where the court described joint ownership as a quasi-contract: "So the only question for the decision of this Court is whether the quasi-contract of joint ownership imposes the obligation of exercising ordinary diligence on the property, which is the object of it, or whether fraud alone renders the joint owner liable?"

contrary provision of law" referred to in new Article 2369.1.[30] The obligation to account as set forth in Article 2369 is significantly narrower than its predecessor, a jurisprudentially developed duty owed by the husband to the wife at termination of the community regime[31] and most recently described in *Due v. Due*,[32] a case which involved a community terminated in 1974 and partitioned by agreement: "[T]he husband must be truthful and honest, he must not hide or fail to give any information to his wife, or stated another way, the wife must receive a true, honest, and full picture of the community."[33] Now Article 2369 simply requires that a spouse explain what happened to community assets under his control at termination of the community or be responsible to the other spouse for one-half of their value.[34]

Despite having correctly analyzed the issue of reimbursement calculation, the second circuit court of appeal in *Oliver v. Oliver*[35] demonstrated that when to apply Article 2369 remains a mystery. An issue was whether the wife's claim for an accounting had prescribed. The Olivers' community property regime had terminated on September 23, 1982, the date of filing suit for separation from bed and board.[36] The husband had made a bank withdrawal on September 20, 1982. Relying on *Huckabay v. Huckabay*,[37] criticized by the author elsewhere,[38] " the trial court held that the three year prescriptive period provided in [Article 2369] applied only to acts occurring before the termination of the community of acquets and gains:"[39] In fact, the three year prescriptive period applies to the situation where one spouse has control of community assets at termination and owes the duty to account, not to acts occurring during the existence of the community.[40]

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30. Other examples include La. Civ. Code art. 2357 (rights of pre-termination creditors to former community assets now co-owned by the spouses) and arts. 2358-2368 (rights of reimbursement for acts occurring during existence of community).

31. See K. Spaht and L. Hargrave, supra note 6, § 7.19. See also Hodson v. Hodson, 292 So. 2d 831 (La. App. 2d Cir.), writ denied, 295 So. 2d 177 (1974); Troxler v. Troxler, 255 So. 2d 240 (La. App. 1st Cir. 1971); Pitre v. Pitre, 247 La. 594, 172 So. 2d 693 (1965).

32. 560 So. 2d 917 (La. App. 1st Cir. 1990).

33. Id. at 919.

34. See discussion in K. Spaht and L. Hargrave, supra note 6, § 7.19.

35. 561 So. 2d 908 (La. App. 2d Cir. 1990).

36. La. Civ. Code art. 155. The article was amended by 1990 La. Acts No. 1009, a comprehensive revision of the law of divorce. Even though separation from bed and board was eliminated, the retroactive termination of the community to the date of filing suit continues to be an effect of divorce. See La. Civ. Code art. 159 (eff. Jan. 1, 1991).

37. 485 So. 2d 165 (La. App. 2d Cir. 1986).

38. K. Spaht and L. Hargrave, supra note 6, § 7.19.

39. Oliver v. Oliver, 561 So. 2d 908, 914 (La. App. 2d Cir. 1990).

40. See comment (c) to La. Civ. Code art. 2369. See also discussion in K. Spaht and L. Hargrave, supra note 6, § 7.19.

Seemingly, by applying the *Huckabay* rationale, the three year prescription would apply to the withdrawal by the husband; thus, the wife's claim had prescribed. However, because "[t]he trial court found that, more probably than not, Mr. Oliver still had this money in his possession after the termination of the community on September 23, 1982,"[41] the court of appeal reasoned that the ten year prescriptive period applied[42] and the claim of the wife had not yet prescribed.

If the trial court was correct about the money being in the husband's possession at termination of the community, the three year prescriptive period of Article 2369 applied and the claim of the wife had prescribed. If the trial court was incorrect and the money was not in his possession at termination of the community but only during its existence, the wife would have to prove the husband had been guilty of fraud or bad faith in the management of the funds,[43] a claim subject to a one year prescriptive period.[44]

In the absence of the applicability of Article 2369 the spouses or former spouses are ordinary co-owners, now explicitly provided for in Article 2369.1. Louisiana has not previously had detailed provisions directly regulating co-ownership.[45] To address this problem, during its 1990 session and on recommendation of the Louisiana Law Institute, the Legislature enacted a comprehensive statutory scheme governing co-ownership. The new co-ownership articles comprise an entire title of Book II of the Civil Code.[46] These articles assume significance for community property due to the simultaneous enactment of Article 2369.1, clarifying that the rules of co-ownership apply after termination of the community regime.[47] Some recent cases involving former community property illustrate the application of these articles.

Burford v. Burford[48] demonstrates the importance of identifying, in the first instance, the applicable regime, whether community property

41. *Oliver*, 561 So. 2d at 914.

42. La. Civ. Code art. 3499.

43. La. Civ. Code art. 2354.

44. See Auger v. Auger, 434 So. 2d 492 (La. App. 2d Cir. 1983).

45. Only La. Civ. Code art. 480 addresses the concept of co-ownership directly; the remainder of the rules regulating co-ownership are extrapolated from the articles governing partition among coheirs (La. Civ. Code arts. 1289-1414).

In fact in comment (b) to La. Civ. Code art. 480 the author makes the following observation: "Modern civil codes contain detailed provisions dealing with co-ownership. . . ."

46. 1990 La. Acts No. 990. The new title created is Title VII of Book II, comprised of Articles 797 through 818 (eff. Jan. 1, 1991).

47. La. Civ. Code art. 2369.1 (eff. Jan. 1, 1991): "After termination of the community property regime, the provisions governing co-ownership apply unless there is contrary provision of law or juridical act."

48. 541 So. 2d 341 (La. App. 2d Cir. 1989).

or co-ownership. An issue to be resolved was the characterization of proceeds under a dairy buyout agreement executed by both spouses after termination of the community. The former spouses sold their cows (former community property). The contract contained a promise not to engage in the dairy business for five years. The buyer paid a lump sum and made subsequent yearly payments. The trial court had characterized the lump sum proceeds as community property and the subsequent yearly payments as the husband's separate property. The court of appeal found it unnecessary to characterize the funds before distributing them since "[t]he contract provided that each was to receive fifty percent of the funds."[49] At least as to the portion of the price attributable to the dairy herd (sold at public auction for $70,572.69), the funds were co-owned, not community. Once the community terminates, the regime of co-ownership applies to former community assets.

Identification of the applicable law after termination of the community regime is fundamental to the resolution of more difficult issues, such as the responsibility of one co-owner to the other for income produced from co-owned property (such as income in the nature of rentals from community property)[50] and the liability of one co-owner to the other for acts of management of co-owned property. The jurisprudence has always recognized the obligation of a co-owner "to account" for fruits produced from co-owned property.[51] The new legislation does, too;[52] but it also provides that if a co-owner produces the fruits or products[53] he may deduct the costs of production. However, according

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49. Id. at 346.

50. Marshall v. Marshall, 551 So. 2d 6 (La. App. 4th Cir. 1989); Roberts v. Roberts, 542 So. 2d 517 (La. App. 5th Cir. 1989).

51. See La. Civ. Code art. 2369, comment (c). See also Juneau v. Laborde, 228 La. 410, 82 So. 2d 693 (1955), which carefully distinguished the obligation to account for rents and profits received, from the obligation to account for the occupancy of common property. Vance v. Sentell, 178 La. 749, 152 So. 513 (1933); Scott v. Hunt Oil Co., 152 So. 2d 599 (La. App. 2d Cir. 1962).

As to former community property that remains undivided, see La. R.S. 9:374(C). (eff. Jan. 1, 1991). A former spouse who occupies or obtains a court order permitting occupancy of the family home shall not be liable for rent to the other spouse, unless otherwise agreed to by the spouses or ordered by the court.

52. La. Civ. Code art. 798 (eff. Jan. 1, 1991).

53. Comment (b), La. Civ. Code art. 798 (eff. Jan. 1, 1991): "Fruits are defined in Civil Code Articles 551 and 552 (Rev. 1976). They are things that are produced by or derived from another thing without diminution of its substance. In contrast, products are things that are produced by or derived from a thing as a result of the diminution of its substance. . . . For a discussion of fruits and products in the framework of community property legislation, see Civil Code Arts. 2338, 2339 (Rev. 1979)."

Within the context of community property legislation, products include in kind minerals, royalties, bonuses, delay rentals and shut-in payments attributable to mineral leases. See La. Civ. Code art. 2339.

to the comment to Article 798 explaining the meaning of "costs of production" "[a] co-owner does not have the right to claim compensation for his own labor or services."[54] Even though the co-owner who has produced the fruits or products may not claim compensation for his services under the law of co-ownership, the comment continues, "[n]evertheless, he may be entitled to such compensation under the law of unjust enrichment."[55]

In a third circuit court of appeal case the issue concerned "the accounting to be made by [the husband] for [the wife's] one-half share of the net profit derived from the 1986 sugar cane crop"[56] harvested after termination of the community. The husband in *Dugas v. Dugas*[57] who had produced the sugar cane crop sought to deduct a sum for his time and effort in producing and harvesting the crop (a salary), in addition to other legitimate farm expenses. The wife argued that he was not entitled to any sum. The trial court had awarded the husband $24,000, permitting its deduction from gross profits, and that conclusion was affirmed on appeal: "He is entitled to reasonable compensation for his efforts and such compensation is certainly a farm expense chargeable against gross farm income."[58]

Under the new legislation the salary attributable to the co-owner husband could not be deducted as a production expense. He instead would have to urge a quasi-contractual claim for the value of his services either in unjust enrichment or in negotiorum gestio,[59] if both remedies are not excluded by the provisions of the article itself.[60] A quasi-

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54. Comment (c) to La. Civ. Code art. 798 (eff. Jan. 1, 1991).

55. Id. See La. Civ. Code art. 2055 for the expression of the principle of unjust enrichment. The best explanation of the five elements of proof of the cause of action for unjust enrichment appears in J. Smith, Louisiana and Comparative Materials on Conventional Obligations (4th ed. 1973). See also Edmonston v. A-Second Mortgage Co., 289 So. 2d 116 (La. 1974).

See infra note 60, where the author discusses the argument that general principles of quasi-contract do not apply if there is a more specific provision of the law of co-ownership governing the rights of co-owners.

56. Dugas v. Dugas, 544 So. 2d 111 (La. App. 3d Cir. 1989).

57. 544 So. 2d 111 (La. App. 3d Cir. 1989).

58. Id. at 113.

59. La. Civ. Code arts. 2293-2299. The argument can be made that La. Civ. Code art. 798 (eff. Jan. 1, 1991) is very specific and contemplates the co-owner acting to manage the other's interest, yet denies the managing co-owner the value of his services. The more specific article should prevail. See infra note 60.

60. A convincing argument may be made that the general principles of unjust enrichment or negotiorum gestio do not apply when there is a specific article governing the rights and responsibilities of a co-owner, since the articles on co-ownership are the more specific and thus should prevail over the more general. It is only if there is no specific provision of the co-ownership law governing a situation that the rules of quasi-contract may apply. The comment to La. Civ. Code art. 800 (eff. Jan. 1, 1991) supports this

contractual remedy, if afforded the co-owner who seeks a monetary award for his time and effort, requires him to bear a relatively difficult burden of proof in establishing his entitlement to such a sum. A more complicated legal issue—the standard of care owed by one co-owner to another in the management of co-owned property—remains unelucidated. Article 799 of the new co-ownership legislation provides: "A co-owner is liable to his co-owner for any damage to the thing held in indivision caused by his *fault*."[61] The official comment refers the reader[62] to Article 576,[63] imposing a standard of care upon a usufructuary to the naked owner, and 2315,[64] imposing general delictual and quasi-delictual responsibility.

The duty of a usufructuary to the naked owner is described as the usufructuary being "answerable for losses resulting from his fraud, *default*, or *neglect*."[65] The comment to Article 576 characterizes the duty as that of a "prudent owner or administrator" which requires that he exercise "the diligence that an attentive and careful man exercises in the management of his own affairs."[66] Consistent with the duty of a "prudent administrator," the usufructuary is specifically responsible for ordinary maintenance and repairs[67] and for all expenses that are necessary for the preservation of the thing.[68] By contrast, the duty owed by one human being to another, which is recognized in general tort liability, depends ultimately upon whether the alleged tortfeasor owed a particular duty to the victim.

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conclusion: "This provision is new. It expresses the principle that necessary steps for the preservation of the thing held in indivision may be taken by any of the co-owners acting alone. This is not unauthorized management of the affairs of another under Civil Code Article 2295 (1870). . . ."

61. 1990 La. Acts No. 990, § 1 (emphasis added).

62. La. Civ. Code art. 799, comment (eff. Jan. 1, 1991): "This provision is new. It expresses a principle inherent in the Louisiana Civil Code of 1870. *Cf.* C.C. Arts. 576 (Rev. 1976) and 2315 (1870)." (emphasis added).

63. "The usufructuary is answerable for losses resulting from his fraud, default, or neglect." La. Civ. Code art. 576.

64. La. Civ. Code art. 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. . . ."

65. La. Civ. Code art. 576 (emphasis added).

66. La. Civ. Code art. 576, comment (b). The author of the comment explains that the prudent owner and prudent administrator standard, as well as the *bon pere de famille* in the French Civil Code, actually reflect the notion of *homo diligens et studiosus paterfamilias* of the Roman law.

67. La. Civ. Code art. 577: "The usufructuary is responsible for ordinary maintenance and repairs for keeping the property subject to the usufruct in good order, whether the need for these repairs arises from accident, from the normal use of the things, or from his fault or neglect. . . ."

68. La. Civ. Code art. 581: "The usufructuary is answerable for all expenses that become necessary for the preservation and use of the property after the commencement of the usufruct."

Because Article 799 expresses the responsibility of one co-owner to the other in terms of "fault", it is reasonable to assume that no *special* duty of care is owed by one co-owner to the other. Article 799 simply reiterates the general principle enunciated in Article 2315 but directs the responsibility to damage to the co-owned thing. Two of the new co-ownership articles support this conclusion. Article 806 merely permits a co-owner who has already incurred expenses for ordinary maintenance and repairs to recover reimbursement from other co-owners but does not require that he make the repairs in the first instance.[69] Article 800, likewise, merely permits but does not require a co-owner to take necessary steps to preserve the thing.[70] Neither article imposes an affirmative duty upon the co-owner to act, unlike articles imposing such responsibilities upon a usufructuary. A reason for the distinction is that the usufructuary, as a general rule, is not motivated to preserve or enhance the property since his interest is terminable. The naked owner, furthermore, has no ability to manage or administer the property himself. On the other hand, the co-owner has an undivided interest in the co-owned property, which can suffer by his actions adverse to the other co-owners or can prosper by his own wise and prudent decisions. The assumption the law makes is that the usufructuary may be motivated to waste or cause deterioration to the thing, but that the co-owner will be motivated to maintain and preserve the thing, if not enhance it.

Before the enactment of the new co-ownership legislation, the law governing the standard of care owed by former spouses after termination of the community regime was accurately described as follows:

> Only if a spouse affirmatively assumes the management of undivided community assets does general Louisiana law impose a standard of care. The general law of quasi-contract through the institution of negotiorum gestio, obligates the person who assumes the management of the affairs of another to act as a prudent administrator.[71]

Consistent with prior law, the new legislation does not impose a special standard of care upon co-owners due solely to their relationship. Furthermore, to the extent the new law of co-ownership contains an explicit provision concerning acts or omissions by a co-owner, it may

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69. La. Civ. Code art. 806 (eff. Jan. 1, 1991): "A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares. . . ."

70. La. Civ. Code art. 800 (eff. Jan. 1, 1991): "A co-owner may without the concurrence of any other co-owner take necessary steps for the preservation of the thing that is held in indivision."

71. Spaht, supra note 2, at 409-10.

well preclude the application of most, if not all, of the provisions governing *negotiorum gestio*. The result in that event is a lessening of the standard of care owed by one former spouse to the other in the management of former community assets.

The problem of the standard of care owed by one spouse to the other in the post-dissolution management of former community assets still exists. On two previous occasions,[72] the author has urged the adoption of an explicit, relatively rigorous standard of care.[73] The reason a more rigorous standard of care should be imposed upon former spouses than that imposed on ordinary co-owners derives from the origin of the co-owner relationship. "When the relationship (husband and wife) terminates by a separation or divorce—usually a traumatic, life-altering event—it is then that the spouses become co-owners. In contrast to other co-owners, former spouses become so when they no longer want to share a personal or property relationship."[74] Even the duty of a *negotiorum gestor* may have been insufficiently rigorous because the *gestor* is acting much as a "'good samaritan,' who after all is performing a favor for the master in managing her affairs."[75] The *gestor* is not motivated, as some former spouses may be, by a desire to injure the interests of the master.

California has adopted a standard of "good faith"[76] in the management of undivided community assets, which strikes a balance between the most and the least rigorous standards of care owed by persons in

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72. Spaht, supra note 2; Spaht, Developments in the Law, supra note 1.

73. In Louisiana, there is no general fiduciary standard applicable to all persons who administer the property of others. Therefore, if the prudent administrator standard is a standard governing the behavior of a fiduciary, it is at the low end of the spectrum of conduct expected of a fiduciary. The trustee is at the high end of the spectrum and a partner ('good faith') is somewhere in the middle. Spaht, supra note 2, at 412-13.

74. Spaht, supra note 2, at 402 n.4.

75. Id. at 413.

76. Cal. Civ. Code § 5125 (e) (West 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. . . . The case law defining the standard of care applicable to Section 5103, but not the case law applicable to former Title 8 . . . applies to this section. . . . 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 . . . of Part 4 of Division 3 of this Code . . . or Division 9 . . . of the Probate Code.

The historical note accompanying the 1986 legislation states: "The amendments also extend the case law . . . by expressly maintaining the standard of care that controls management of community property prior to separation to the period after separation or dissolution of marriage so long as the property remains undivided by the parties or a court." 1986 Cal. Stat. 1091, § 3 (c) (comment).

a confidential relationship: "The spouse who is a cotenant in common does not have the same exacting duty as that of a trustee, yet does owe the duty of 'good faith' owed by one in a confidential relationship."[77]

> When the partnership of husband and wife dissolves by divorce, the law can no longer assume that management decisions concerning common property will be made weighing the same considerations as during the partnership. General property principles of . . . co-ownership . . . are inadequate to address the management of common property. The inadequacy is due at least in part to the underlying assumptions made about the relationship of . . . co-owners.[78]

It is time for Louisiana law to resolve this issue in a direct, explicit and responsible fashion.

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77. Spaht, supra note 2, at 423.
78. Id. at 425.