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Matrimonial Regimes

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CLASSIFICATION OF ASSETS

I. PENSIONS

Frazier v. Harper[1] continues the supreme court trend of making pension benefits an important element of the community's shared assets. In *Frazier*, the ex-husband's employee pension rights remained co-owned by him and his former wife.[2] That plan was then replaced by the employer with a new (ERISA qualified[3]) plan. The court of appeal concluded that the co-owned asset ceased to exist, with both spouses losing their interests in that lost asset. It concluded further that the wife had no interest in the new plan formed after their divorce because she was not married to the employee at that time. This conclusion was reached even though the new plan gave the husband credit for the years of employment during his earlier marriage.[4]

A unanimous supreme court reversed and held the wife had an interest in the new plan.[5] The court reasoned that the old pension rights were converted into new ones and that the wife acquired an undivided interest in the new plan under a novation theory.[6] The former spouses

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1. 600 So. 2d 59 (La. 1992).

2. Under the formula of Sims v. Sims, 358 So. 2d 919 (La. 1978). *See* Katherine S. Spaht and W. Lee Hargrave, *Matrimonial Regimes* § 3.28, at 94, *in* 16 Louisiana Civil Law Treatise (1989).

3. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988). *See* Elizabeth Alford Beskin, Comment, *Retirement Equity Inaction: Division of Pension Benefits Upon Divorce in Louisiana*, 48 La. L. Rev. 677 (1988).

4. The court of appeal characterized the issue as one of classification "when the plan itself was initiated after the community was terminated but some of the employee's years of service during the community counted toward his entitlement to retirement benefits." Frazier v. Harper, 582 So. 2d 868, 870 (La. App. 5th Cir. 1991), *rev'd*, 600 So. 2d 59 (1992).

5. *Frazier*, 600 So. 2d at 59. Under the *Sims* formula, "the court divided the interests in the pension according to time: the period of time the employee was married divided by the total time contributed would determine the community portion of the interest." Spaht and Hargrave, *supra* note 2, at 94.

6. "Novation is the extinguishment of an existing obligation by the substitution of a new one." La. Civ. Code art. 1879.

were co-owners of the pension rights and both of them, under the court's approach to the law of novation, would normally have to consent to the novation for it to be effective. The wife's consent was not clear from the record, but the court concluded that if the change in the plan was not actually within the husband's authority to act alone, the wife ratified the transaction "by commencing and prosecuting this lawsuit"[7] and could benefit from the novation.

The equities of the decision are apparent, although the reliance on a ratification theory is problematical. Ratification occurs when a person consents to an obligation incurred *on his behalf* by another.[8] It is not at all clear that the husband was acting on his co-owner's behalf,[9] and in future cases the covered employee could prevent the ratification theory from being used by clearly contracting only on his own authority and not on the other's behalf.

The court did offer additional reasons for its conclusion, citing Aubry and Rau[10] to support a "de facto agency" concept and the Louisiana Civil Code *negotiorum gestio* concept.[11] The latter two theories are preferable because they do not depend on the consent of both parties to produce the result.

A more direct analysis, however, is available to support the court's basic real subrogation approach. Indeed, part of the problem in this area of the law is that of conceptualizing it in terms of co-ownership. Co-ownership rules were developed in light of and apply clearly to *things*, but not to *rights* such as the claim against a pension fund administrator. Under normal rules, *things* are substituted for other things under real subrogation concepts, and *rights* are replaced by other rights under novation concepts. However, the Louisiana Civil Code has adopted the notion of ownership of incorporeals and governs what it calls their co-ownership. Fortunately, however, in doing this, the Code provides some flexibility, which justifies the decision in the case.

The key article is Louisiana Civil Code article 818, which applies the laws governing co-ownership to rights only "to the extent compatible with the nature of those rights," allowing some deviation from the strict

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7. *Frazier*, 600 So. 2d at 62. A loose construction of the ratification concept was also used in Garrett v. Walker, 407 So. 2d 1309 (La. App. 3d Cir. 1981) (husband's filing suit for ownership of half the property bought by wife without his knowledge was a ratification of the wife's mortgaging the property to secure repayment of the funds borrowed to purchase the property).

8. La. Civ. Code art. 1843.

9. Confirmation under La. Civ. Code art. 1842 is also not applicable because the obligation—the novation—would not be a relatively null one.

10. Charles Aubry & Charles Rau, *Property* § 331, at 387-88, *in* 2 Droit Civil Francais (Louisiana State Law Institute trans., 7th ed. 1961).

11. La. Civ. Code art. 2295. Alain A. Levasseur, Louisiana Law of Unjust Enrichment in Quasi-Contracts, Louisiana Civil Code Series, at 74 (1991).

laws of co-ownership that are designed to govern things. When the rights involved are claims to performance by third persons under a contract, protection of the third person's interests from conflicting demands of co-owners would require that only the party in privity be able to manage or alienate the contractual right.[12] Under this analysis, the consent of the ex-wife in *Frazier* was unnecessary. The husband could exchange the pension plan for another acting on his own authority, and real subrogation would occur to make the new right co-owned according to the community and separate interests in the old plan.

This approach is not inconsistent with the novation concept, which is in effect real subrogation under another name. Louisiana Civil Code article 1879 does not require that a novation be contractual. Comment (a) to Article 1879 states, "It changes the law only insofar as it does not define novation as a contract. Indeed, novation is not in itself a transaction but the legal effect of certain acts. Novation may even result by operation of law." In other words, by operation of law, real subrogation of the co-owned right occurs. Putting it another way, a novation occurs when the new obligation replaces the old one. In any event, the replacement occurs by the consent of the parties in privity, and the consent of the other party is not necessary.

In terms of basic policies, this result accommodates the interests of the ex-spouses and the third party. The approach would seem to be necessary here when only one of the co-owners has management rights with respect to the co-owned intangible asset. It is analogous to the situation during the community regime when only one spouse has management rights to a community asset consisting of a claim against a third person.[13]

Still to be decided is the case of a pension plan instituted after divorce which gives service credit for work by an ex-spouse during a prior community regime. The fourth circuit court of appeal in *Taylor v. Taylor*[14] concluded that such retirement benefits would be prorated, with the ex-wife having an interest based on the years of service during the community. It relied primarily on basic equitable sharing policies reflected in *Sims v. Sims*[15] and *T. L. James & Co., Inc. v. Montgomery*[16] and on the theory that the benefit is one attributable to effort by spouses during the community. In an earlier case, applying its understanding of then existing Louisiana law, the federal Fifth Circuit Court of Appeals

12. Spaht and Hargrave, *supra* note 2, § 5.4, at 154.

13. *Id.* Janis Lynn Kile, Comment, *Management of Community Assets: Incorporeal Movables*, 42 La. L. Rev. 770, 774 (1982); La. Civ. Code art. 2346, comment (b).

14. 473 So. 2d 867 (La. App. 4th Cir.), *writ denied*, 477 So. 2d 1126 (1985).

15. 358 So. 2d 919 (La. 1978).

16. 332 So. 2d 834 (La. 1976).

in *United Association of Journeymen v. Myers*[17] held otherwise, relying primarily on the approach that no partitionable property right existed at the time of the divorce.

The basic problem is the tension between an underlying equitable sharing policy, and the rules of community property, which govern ownership of things, rights, or assets that have an existence during the community. The concept of the types of "property" or "rights" that are shared has been expanded in modern times, but still, some kind of thing must exist.[18] Here, the "thing" or "right" would have to be the expectancy of a future retirement plan being adopted by an employer, a plan that would give credit for work performed during the community. It is a step beyond *Due*,[19] where contracts existed, or *Michel*,[20] where written drafts or outlines of books existed. It may be more akin to the personal attributes or knowledge that follow an education, or akin to professional good will, none of which have been recognized in Louisiana as community assets.[21]

In more practical terms, the problem also involves the policy question of whether ex-spouses should be forced to continue as co-owners, as opposed to their divorce being a clean break from which they both can reorder their lives without further litigation or disputes. Forced ownership in indivision of pension rights, adopted in *Sims*[22] as an equitable necessity, is a concept from which the supreme court has withdrawn in *Hare v. Hodgins*[23] in favor of a more flexible handling of such rights. Especially if one or both of the spouses were to remarry, the expectations of the new spouses would also be at stake. The method of partitioning such unknown (perhaps unknowable) assets at the time of the divorce, when those assets ought best be divided, is also a serious problem.

II. Fruits or Earnings or Both?

In its initial decision in *Kyson v. Kyson*,[24] the second circuit court of appeal classified rental income from the husband's separate property pro rata. It determined that part of the income was a fruit (and thus separate property[25]) and that part was income from effort, skill, or

17. 645 F.2d 532 (5th Cir. 1981).
18. Spaht and Hargrave, *supra* note 2, § 2.1, at 25.
19. Due v. Due, 342 So. 2d 161 (La. 1977).
20. Michel v. Michel, 484 So. 2d 829 (La. App. 1st Cir. 1986).
21. Spaht and Hargrave, *supra* note 2, §§ 2.5, 2.6, at 32-39.
22. Sims v. Sims, 358 So. 2d 919 (La. 1978).
23. 586 So. 2d 118 (La. 1991). *See* Lee Hargrave, *Developments in the Law—Matrimonial Regimes*, 52 La. L. Rev. 655, 664 (1992).
24. 596 So. 2d 1308 (La. App. 2d Cir. 1991), *writ denied*, 599 So. 2d 314 (1992).
25. La. Civ. Code art. 2339.

industry (and thus community property[26]). On rehearing, it reversed on the basis that the facts did not support its initial conclusion. Presumably the case remains as some authority for prorating rental income that results both from a spouse's labor and from a return on a separate property investment.

In *Kyson*, the husband had filed a declaration to keep the fruits of his separate property as separate assets, which ostensibly would make, as the trial judge held, the rental income all his separate property.[27] The wife had argued that the income should be entirely community as the product of his effort, skill, and industry,[28] based on the husband's testimony that his occupation was a rental manager of his properties. The court of appeal took a middle view, concluding that some of the income should be considered compensation for his labor in finding renters, making repairs and otherwise tending to his rental property, but that some of it should be considered a return on his separate property investment and a fruit to that extent. It remanded for determination of the appropriate pro rata division.

On rehearing before five judges, the court focused on the factual issues and concluded, "We are unable to discern from the record sufficient quantification of Mr. Kyson's time and labor associated with the disputed rental income from which we can draw any meaningful conclusion. The trial court made no factual finding in this regard."[29] It then concluded that all the rental income was separate and stated that the husband's "personal management efforts toward these four properties during the marriage cannot be viewed on this record as so extraordinary as to result in his abdication of the rentals he expressly reserved unto himself."[30] The supreme court denied writs.[31]

Interestingly, the court did not consider the presumption of community.[32] Since the husband possessed the money during the existence of the community regime, the funds are presumed to be community property. Had the court pursued that analysis, it would then have put the burden on the husband to prove the separate property classification. In the case of the normal passive investment, proving the source of the income (*i.e.*, that the money is a fruit) after the filing of a declaration would be enough to overcome the presumption. However, if the issue is the *nature* of the funds (*i.e.*, whether the money is a fruit or earnings),

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26. La. Civ. Code art. 2338.
27. La. Civ. Code art. 2339.
28. La. Civ. Code art. 2338.
29. Kyson v. Kyson, 596 So. 2d 1308, 1315 (La. App. 2d Cir. 1991), *writ denied*, 599 So. 2d 314 (1992).
30. *Id.* at 1316.
31. *Kyson*, 599 So. 2d 314.
32. La. Civ. Code art. 2340.

the person asserting that the income is separate should have the burden of proof. In any event, that issue of the burden of proof was not clearly addressed in *Kyson* and remains an open matter.

More to the point, however, is the continuing validity of the court's approach on original hearing. *Paxton v. Bramlette*,[33] in light of the authorities it cites, can be used to support proration of the rental income between the two patrimonies.[34] *Paxton*, however, can also be seen as supporting classification of all the rental income based on the majority component.[35] Indeed, the result in *Paxton* was to classify all the wife's payments from a corporation as community property because it was salary, or reward for her effort, skill, or industry. However, proration had not been urged as an alternative in the case.

At one time, the all or nothing approach to classifying such funds may have been preferable. Until 1980, the husband could not reserve the fruits of separate property to his separate estate.[36] His energies, whether producing wages or producing fruits from separate or community assets, would produce community income. Only the wife could choose to make the fruits of her separate property separate, and at one point in the past, only if she reserved to herself the administration of that property. The implication was that if she performed works of administration that produced fruits from her property, the whole profit was a fruit. The court of appeal suggested as much in *Hill v. Abell*:[37]

> It would be conceded, we think, that in case a wife living in community with her husband but who retained the administration of her paraphernal property devoted her time and energies as an overseer or manager of her plantation and produced crops, the crops would not fall into the community and become subject

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33. 228 So. 2d 161 (La. App. 3d Cir. 1969), *writ denied*, 230 So. 2d 92 (1970).

34. The court stated,

> The Law Review Articles found in 25 La. Rev. 95 at pg. 104 and 34 Tul. Law Rev. 3 discuss the problem of what income represents "fruits," which become the wife's separate property, and what income represents "earnings" which fall into the community, under LSA-CC Article 2386, after the affidavit is filed. The authors suggest the courts should use the ratio of labor to capital as a criterion for classifying the income as fruits or earnings.

Id. at 163. If one considers such ratios of labor to capital, the analogy is to similar imputations of income for tax purposes, and supports proration. Spaht and Hargrave, *supra* note 2, § 3.5, at 49.

35. "'Thus if the revenue received was the result of substantial capital investment with relatively little labor, it would be a fruit governed by Article 2386; but if the revenue represents the return on substantial labor with relatively little capital investment, it would be earnings governed by Article 2334.' 25 La. Law Rev. at pg. 104." *Paxton*, 228 So. 2d at 163.

36. La. Civ. Code art. 2386 (1870) (as amended by La. Acts 1979, No. 709).

37. 5 La. App. 497 (2d Cir. 1927).

> to the husband's debts.
>
> Then why should crops produced on her property under like circumstances with the labor of her own hands be subject to a different rule?[38]

However, proration would seem to be permitted by the current code articles and would be the most equitable solution. This is especially true since adoption of the equal right of both spouses to keep the fruits of their separate estates separate. The code articles refer simply to "fruits"[39] at one point and then to property "acquired by the effort, skill, or industry of either spouse"[40] at another, thus leaving open the question of whether particular funds are one or the other. Also, one is not dealing with a determined item, but with fungible sums of money which are easily apportioned.

An analogy can be made to the Louisiana Civil Code's treatment of fruits that are produced by the labor of a person who does not own the soil. The landowner owns the fruits but owes the producer the value of the labor and the expenses of production.[41]

Another potential analogy is to co-owners of property which produces fruits. Under Louisiana Civil Code article 798, the co-owners divide the fruits in proportion to their ownership without regard to whose labor produced the fruits. If one co-owner does produce the fruits, the others are entitled to their shares only "after deduction of the costs of production." Under that language, one would at first argue that the labor of the co-owner who produced the fruits should be compensated. But Comment (c) to Article 798 suggests, without stating authority, "A co-owner does not have the right to claim compensation for his own labor or services." Immediately afterwards, however, the comment continues somewhat cryptically, "Nevertheless, he may be entitled to such compensation under the law of unjust enrichment." In any event, the strong implication is that of some equitable apportionment of the fruits, considering the value of the labor that produced the fruits.

To the extent this recent legislation is relevant to co-owners in community, it would perhaps reinforce the notion that compensation for one's labor which enriches the other's patrimony is property under equitable concepts. The separate estate would be enriched unjustly at the expense of the community if a spouse used his or her labor to produce "fruits" rather than "earnings."

The possible injustice in this area is that once a spouse has filed the declaration to keep separate the fruits of separate property, that

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38. *Id.* at 500.
39. La. Civ. Code art. 2339.
40. La. Civ. Code art. 2338.
41. La. Civ. Code art. 485.

spouse will then attempt to convert earnings to fruits so as to deprive the other spouse of what normally would be community income. If this occurs, the result would be increasing the value of one's separate estate in general through the uncompensated community labor. In such a case, Louisiana Civil Code article 2368 might apply and provide compensation to the other spouse for one-half the increase in value attributed to the uncompensated labor. However, some doubt exists as to whether Article 2368 covers the situation since the separate *estate* in general would have increased in value rather than a separate property *asset*.

In any event, a pro rata division of the rental income would seem to be a simpler and more equitable approach since it does not depend on the enhanced value of the separate property, but on the amount of income produced.

Pro rata division, disfavored early in matrimonial regimes law, has been adopted in many areas[42] and is the trend in legislative and judicial developments because it is a fairer and more equitable approach than an all-or-nothing classification with some possibility of reimbursement.

III. The Cemetery Plot

Keller v. Schilling[43] is a seemingly simple, fact-oriented case, but it raises some questions about the basic sharing policies involved in community property. The factual record in the case was thin, no doubt leading to the ambiguity in the opinion, but it appears that substantial community funds were used[44] to pay for what the court calls a tomb (apparently in a developed cemetery and including a cemetery plot) in which "the wife's family members"[45] were buried.

In a partition of community property following a divorce, the trial judge concluded that the tomb was worth about $25,000, almost twenty percent of the value of the community property. He allocated it to the wife and assigned other property of equal value to the husband. The court of appeal reversed, concluding that the tomb had no value because there was no proof of any market in used tombs. The disposition of the case thus seems to be that the rights to the tomb were allocated to the wife, but no offsetting property was assigned to the husband.[46]

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42. Including pensions, incorporeal movable rights, and inherited property under Louisiana Civil Code article 2341.1. *See* Spaht and Hargrave, *supra* note 2, § 3.22, at 75; Hargrave, *supra* note 23.

43. 593 So. 2d 926 (La. App. 4th Cir. 1992).

44. The circumstances surrounding the expenditure were not detailed, and in light of the court's factual conclusions, were not needed.

45. *Keller*, 593 So. 2d at 927.

46. The court also found that other items, including a doubloon collection and two old motorcycles, had no value but were assigned to whichever spouse had possession of them.

Absent other information, the result is intuitively inequitable; a substantial expenditure of community funds produced a thing that benefitted the ex-wife and for which the husband received no corresponding compensation.

In analyzing the problem, it ought to be recognized that the rights attached to the tomb and the rights against the cemetery corporation are patrimonial rights that are community property if purchased with community funds. Ownership interests in cemetery plots and rights to additional burials are established and regulated by statute, including the provision that "every right of interment and cemetery space shall be subject to the laws of Louisiana pertaining to community property. . . ."[47] Though the rights of use of such plots and tombs may be limited because of the nature of cemeteries,[48] they are nonetheless patrimonial rights subject to being included in the mass of community assets.[49] If these rights are acquired with community funds, they become community assets under Louisiana Civil Code article 2338.

In *Keller*, the court states that the tomb was used for burial of the wife's family members. Perhaps this use was pursuant to a management decision made by both spouses. If so, it may be argued that the husband intended to donate his interest in the tomb to his wife, making it her separate property.[50] That argument, however, is unsatisfactory because nothing indicates that the form requirements for such a donation were met. To the extent the plot and tomb are immovables,[51] an authentic act of donation would be required.[52] To the extent that incorporeal rights and obligations with a cemetery corporation are involved, an authentic act would also be required.[53] In some cases, the laws of donations and the laws of property were stretched to allow landowners to "dedicate" land to the public for cemeteries without the formalities

47. La. R.S. 8:803 (1986); *see also* La. R.S. 8:805-806 (1986).

48. See Charrier v. Bell, 496 So. 2d 601 (La. App. 1st Cir.), *writ denied*, 498 So. 2d 753 (1986) (Indian burial grounds not subject to occupancy); Vidrine v. Vidrine, 225 So. 2d 691 (La. App. 3d Cir.), *writ refused*, 227 So. 2d 594 (1969) (landowner could charge for burials in dedicated cemetery); Roberts v. Stevens, 389 So. 2d 782 (La. App. 3d Cir. 1980) (landowner could landscape dedicated cemetery area).

49. Rhodes v. Congregation of St. Francis, 476 So. 2d 461 (La. App. 1st Cir. 1985) (title to servitudes or easements for burial); Succession of Rolling, 229 La. 727, 732, 86 So. 2d 687, 688 (1956) (will left to daughter "one half of my double tomb in Metairie Cemetery, the half in which her father is buried the other half I leave to my four sons. . . ."); City of New Orleans v. Christ Church Corp., 228 La. 183, 81 So. 2d 855 (1955) (expropriation of cemetery and reinterment of remains).

50. La. Civ. Code art. 2341.

51. A plot of ground and a permanent structure embedded in or on it would be immovable under Louisiana Civil Code articles 462 and 463.

52. La. Civ. Code art. 1536.

53. *Id.*

of an authentic act.[54] However, that exception has not been extended to husbands and wives, and there is no apparent need to do so, especially since the recent matrimonial regimes revision did not adopt the concept of informal transmutations of property by donation.[55]

Keller, of course, is not inconsistent with these conclusions that the plot and tomb are community property. Indeed, it appears that the court of appeal affirmed the partition which designated the tomb as the wife's property. The problematic aspect of the case is the appellate court's reversal of the trial judge on the issue of the value of the tomb.

The court supports its conclusion that the tomb had no value with the statement that "there is no market for tombs other than new ones."[56] But this is beside the point. The court's premise is mistaken because things have value even if there is no market for them, and such things are routinely valued in community property partitions. For example, a lawyer's contingency fee contracts were not salable in a market, but they were community assets subject to valuation;[57] lease rights may not be salable, but they are often valued in condemnation proceedings;[58] pension rights may not be marketable, but they are routinely valued.[59] In the same way, rights associated with additional burials or rights to control the tomb could be detailed, and the cost of such rights could be determined. More facts about the nature of the rights involved would be required to make the determination, but if those facts were not available to the court of appeal, the appropriate determination was to remand for consideration of those facts.

Basic policy analysis would also support a more rigorous approach to the valuation issue, for it is clear that substantial community funds were expended. They produced an asset, and the basic theory of community property is that both spouses should share in such acquisitions. Granted that the value of the gain at the time of the divorce is the issue rather than how much was spent, but more effort would be wisely spent on determining what that gain actually was. Even if determining value is difficult, rough justice is preferable to none.[60]

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54. A.N. Yiannopoulos, *Property* § 98, at 209, *in* 2 Louisiana Civil Law Treatise (3d ed. 1991).

55. See Hargrave, *supra* note 23, at 672; Noel Joseph Darce, Note, *Interspousal Contracts*, 42 La. L. Rev. 727 (1982).

56. Keller v. Schilling, 593 So. 2d 926, 927 (La. App. 4th Cir. 1992).

57. Due v. Due, 342 So. 2d 161 (La. 1977).

58. *E.g.*, Columbia Gulf Transmission Co. v. Hoyt, 215 So. 2d 114 (La. 1968); Holland v. State, 554 So. 2d 727 (La. App. 2d Cir.), *writ denied*, 559 So. 2d 125 (1989).

59. *See* Gerald LeVan, *Allocating Deferred Compensation in Louisiana*, 38 La. L. Rev. 35 (1977); Appendix to Justice Dennis' opinion in Hare v. Hodkins, 586 So. 2d 118, 129 (La. 1991).

60. Judge, later Justice, Cole pointed to the necessity of making hard valuations:

IV. Renewal Premium Commissions

In *Williams v. Williams*,[61] the third circuit court of appeal first concluded that an ex-husband's renewal commissions attributed to insurance policies sold during the community but paid after termination were not to be shared with his ex-wife. Then it determined that even if the funds were produced in part from a community right, the former wife's interest was so speculative that it had no value at all. The case is questionable on both counts. It conflicts with the decision of the first circuit in *Michel v. Michel*,[62] with the approach of the fourth circuit in *Boyle v. Boyle*,[63] and with dictum from the second circuit in *Tobin v. Tobin*.[64] The court did concede that the former husband had a right to a commission upon the renewal of insurance policies and that this right was acquired as a result of labor performed during the community. It should follow that this right was a community asset that should be portioned, or if not, that remained owned in indivision by the parties. Instead, the court concluded that the right was not a community asset, apparently on the basis that it was not a vested right. The court said, "However, the services performed by Ronnie during the existence of the community created no vested right in him, i.e., property interest acquired during the community, in the renewal premiums because of their conditional nature."[65]

The Louisiana Civil Code, however, does not require "vesting" before a right can be a patrimonial asset subject to the community

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"In determining the amount of enhancement, any reasonable method may be used, even, in difficult cases, to the extent of averaging the conflicting and exaggerated estimates of witnesses." Michel v. Michel, 484 So. 2d 829, 834 (La. App. 1st Cir. 1986) (*quoting* Deliberto v. Deliberto, 400 So. 2d 1096, 1101 (La. App. 1st Cir. 1981)). *Also see* Babin v. Nolan, in which, after three trips to the supreme court, "the court accepted the testimony of all witnesses 'notwithstanding their inconsistencies and exaggerations' and simply used the average of all values given." *Deliberto*, 400 So. 2d at 1100 (*quoting* Babin v. Nolan, 10 Rob. 373, 382 (La. 1845)). For a primer on valuation, see the bibliography in the appendix to Justice Dennis' opinion in Hare v. Hodkins, 586 So. 2d 118, 129 (La. 1991).

61. 590 So. 2d 649 (La. App. 3d Cir. 1991).

62. 484 So. 2d 829 (La. App. 1st Cir. 1986). *Accord*, *In re* Marriage of Skaden, 566 P.2d 249 (Ca. 1977) (termination benefits from State Farm Mutual Ins. Co. held community).

63. 459 So. 2d 735 (La. App. 4th Cir. 1984), *writ denied*, 462 So. 2d 651 (1985) ("The trial court awarded Rita one-half of the renewal on policies written as of November 13, 1978, although the funds would not be collected until a future time. Due v. Due, 342 So. 2d 161 (La. 1977)"). Id. at 736.

64. 323 So. 2d 896 (La. App. 2d Cir. 1975), *writ denied*, 325 So. 2d 613 (1976). The court referred in passing to the fact that the surviving widow of an insurance agent "receives $450 to $500 per month from renewal premiums on policies her husband sold before his death." *Id.* at 898. It apparently was willing to consider this as a patrimonial asset that had been inherited by the surviving spouse.

65. Williams v. Williams, 590 So. 2d 649, 652 (La. App. 3d Cir. 1991).

regime. The pension cases disregarded vesting in holding that conditional rights can be community assets.[66]

> In the course of this case development, the courts rejected a number of arguments that would have limited the scope of assets to be shared. Rejected were the view[s] that only tangible assets could be shared; that only "vested" as opposed to conditional rights could be included; that an asset had to be capable of joint management to be included; that only salable or transferable assets were to be shared; and that the asset had to have an ascertainable value at the time of separation or divorce.[67]

Indeed, in *Williams*, the former husband continued his relationship with the insurance company and collected more than $100,000 in renewal premiums over a five year period; the right was certainly a substantial and valuable one even if not vested. It was one that did in fact mature into a determined sum of money. Even if not vested at the time of termination in 1984, it had produced specific sums at the time of the partition in 1989.

The court tried to distinguish *Due* by stating that a contingent fee contract, "although aleatory and revocable at the will of the client or by death, creates a *vested* interest in the attorney to recover for the services performed prior to termination of the contract."[68] But nowhere in the *Due* opinion does one find a statement that the attorney's rights were "vested" or had to be "vested" to be a community asset. It was the trial judge who concluded that contingent fee contracts were not community assets "because no interest is vested in the attorney until the contract is completed by successful disposition of the case."[69] He was reversed. To the contrary, Justice Albert Tate wrote that vesting was irrelevant and that a conditional right could be a patrimonial asset: "Accordingly, we find no merit to the defendant's argument that, somehow by reason of technical characterization, no economic value should be attributed to an attorney's interest in a contingent fee contract until the successful prosecution of claim entitles him to actual compensation for his services."[70]

An alternative rationale in *Williams* emphasized testimony by insurance company officials that "it was impossible to translate the gross number of policies renewed into an exact money figure received as

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66. *See* LeVan, *supra* note 59; Larsen v. Larsen, 583 So. 2d 854 (La. App. 1st Cir. 1991).

67. Spaht and Hargrave, *supra* note 2, § 2.3, at 27.

68. *Williams*, 590 So. 2d at 651 (emphasis added).

69. Due v. Due, 342 So. 2d 161, 163 (La. 1977).

70. *Id.* at 165.

renewal premiums because of the varying nature of some premiums."[71] That conclusion is hard to fathom since the company was at least able to determine the renewal premiums it owed the agent for each policy that was renewed.

More to the point, the court stated that it was impossible to determine the proportion of the renewal premium commissions attributable to services performed during the community's existence and to services performed after termination to keep the policies in force. That observation is no doubt accurate, but it does not require allocating all the money to the ex-husband. The right to renewal premiums was a community asset. If it was not divided at the time of termination of the community, the spouses remained co-owners of equal parts of that right. Co-owners under Louisiana Civil Code article 798 each own a share of the fruits and products of the thing held in indivision in proportion to their ownership. If the ex-husband co-owner expended funds to produce the fruits, he would be entitled to his costs of production under Article 798. While Comment (c) to Article 798 suggests he would not be entitled to compensation for his labor or services, it also states he could be entitled to compensation under the law of unjust enrichment. If he claimed such compensation, he would have the burden of proving the amount of his expenses or the value of his services to be able to collect those funds. The result in *Williams*, if the proof is not available to determine the value of those expenses or services, should be that the co-owners share equally in the renewal commissions.

Even if one somehow concludes that the rules of co-ownership are inapplicable because the co-owners are spouses, the equitable approach would be to pro-rate the income between the community right and the now-separate labor contributed by the husband to keeping the policies in force. Since it is the husband who would be urging that he produced the income, the burden should be on him to establish that labor and its contribution.

In any event, the problem the court perceived is a factual one, and its inability to make a perfect division should not be the basis to totally exclude one of the owners of a right from enjoying its benefits. Equity would require some approximate division, as the third circuit itself recognized in the celebrated case of *Placide v. Placide*.[72] There, the court apportioned the pain and suffering award attributable to surgery and sexual dysfunction between the short period of the marriage (community) and the rest of the ex-husband's life (separate).[73]

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71. *Williams*, 590 So. 2d at 652.

72. 408 So. 2d 330 (La. App. 3d Cir. 1981).

73. *Id.*

It is clear that at least some part of the general damages awarded to appellant

V. DONATIONS

In *Ackel v. Ackel*,[74] the husband incorporated the community drugstore business and then had the corporation issue all of the stock to one son. In a dispute over the stock after his death, the court found the stock issuance was an attempt to donate community property that lacked the concurrence of both spouses. "Whatever George Ackel, Sr.'s intent, he was without the legal right to dispose of the corporation in favor of one child, to the detriment of the other heir. He could not donate the whole of a community property asset without consent of his wife."[75]

The same result should follow whether the attempt was to donate the whole of the community property or not. Louisiana Civil Code article 2349 requires concurrence of both spouses to donate any community property to a third person. The only exception is that one spouse acting alone can only make "a usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation." It should also follow that even if the formalities for transfer of stock were met, the donee son would not have acquired ownership of the stock as against the mother's community interest. Only a "bona fide purchaser for value" is protected by transfer formalities, and a donee is not a purchaser for value.[76]

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was intended to compensate him for his pain and suffering resulting from the injury to his penis and back and from the four surgeries. It is equally clear, however, that the greater part of the award for general damages was intended to compensate the appellant for the loss of normal sexual function which he will suffer for the remainder of his life. Although there was evidence at trial that the appellant could perform sexual intercourse as often after the accident as he did before, there was also evidence that the use of the prosthesis was a source of embarrassment and inconvenience to the appellant and that intercourse after the implant was not very satisfactory. Accordingly, on an equitable basis, we find that the general damages of $207,713.71 compensates the appellant for $20,000 of pre-dissolution losses and $187,713.71 of post-dissolution losses. That portion which compensates for post-dissolution losses falls into the separate estate of the husband, and that portion for pre-dissolution losses falls into the community.

Id. at 335-36.

74. 595 So. 2d 739 (La. App. 5th Cir. 1992).

75. *Id.* at 742-43.

76. La. R.S. 10:8-302 (1983).