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Matrimonial Regimes

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I. CLASSIFICATION: THE CONFUSION OF COMMINGLING[1]

A search of the Lexis and Westlaw databases confirms that the terms *commingle, commingling, or commingled*[2] do not appear in the text of the Louisiana Civil Code. The words also do not appear in any provision of the Louisiana Revised Statutes relating to classification of assets as separate or community. One hears the terms, of course, and some courts use them to support classifications of assets as community. However, there exists no simple, general substantive rule that provides that just because community funds or assets are combined with separate funds or assets, the resulting mass is a community asset. The imprecise use of the concept masks much more complex considerations and rules.[3] Its use can produce results that, despite attempts to promote what a judge or court may consider equitable, are bizarre and often inequitable. If not bizarre, the results are at least inconsistent with the legislation. An example of the problem this term is *Jones v. Jones*.[4]

A. *The Decision in Light of the Legislation*

Two quotations from the *Jones* opinion state the problem succinctly:

> Prior to the marriage Mr. Jones had a piece of property that he paid less than $26,000.00 for. After the renovation and addition, completed over the course of the marriage, the property appraised for $240,000.00,[5] [and]
>
> [w]e find that the record supports a finding that the Valmont Street property changed classification from separate property to community property as a result of a pattern of commingling and treating the property as a community asset throughout the marriage.[6]

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1. The basic term, mingle, should be enough to indicate mixing of things. However, the term co-mingle (to mingle together) developed presumably to emphasize the complexity of the process. The modern spelling is "commingle." *See* Bryan A. Garner, A Dictionary of Modern Legal Usage 125 (Oxford 1987).

2. Both computerized services were searched on October 4, 1993, for the terms "commingle," "commingled," and "commingling."

3. Katherine S. Spaht and W. Lee Hargrave, *Matrimonial Regimes* §§ 3.23, 3.28, 3.40, *in* 16 Louisiana Civil Law Treatise (1989).

4. 611 So. 2d 193 (La. App. 4th Cir. 1992), *writ denied*, 614 So. 2d 193 (1993).

5. *Jones*, 611 So. 2d at 196. The house was purchased by the husband-to-be in May, 1974, and the parties were married in 1979. The petition for separation was filed in October, 1981.

6. *Id.* at 195.

The court concedes that the husband's house was a separate asset acquired before marriage. The court does not point to any contract between the spouses that would have transformed the house into community property.[7] The standard solution thus is simple. The house remained separate property, and if any community funds or common labor were used to improve it, equity is accomplished by requiring compensation in money to the wife. Louisiana Civil Code article 2366 applies to the use of community funds, providing reimbursement for half the funds used. Article 2368 applies to the uncompensated common labor of either spouse, setting the compensation at one-half of the value of the increase attributable to the common labor. The 1980 reform legislation does not change the prior law's basic concept of providing fairness and equity[8] by allowing a personal claim against the other spouse, rather than by changing the classification of the asset.

Under these legislative principles, it should make no difference that the wife-to-be in *Jones*, an architect, spent substantial time before the marriage planning and assisting in the remodeling of the house. One or both of the parties may have had desires to make the house co-owned property, as was argued. But at that time, no documents were executed that would meet the form requirements for donation of an immovable.[9] Indeed, the records of the case do not support an assertion of the theory that the asset changed classification by operation of law. The wife's initial request was to enforce an oral contract to compensate her for the work she did. It was a request for a money judgment rather than a declaration of co-ownership.[10] She also alleged that she worked on remodeling the house during the marriage. However, her main argument was that the property became community by virtue of a donation from the husband. She testified that she threatened not to marry him if he did not make her a co-owner, and, "[s]he married him based on his assurance that he would make her a co-owner."[11] The husband did not follow through with an agreement that would clearly meet the formalities required for a donation of immovable property. Some argument was made that the formalities were met, but the court nonetheless does not rest on them, maintaining that issue was moot in light of its finding the property a community asset.

Thus, the court's rationale is that a separate asset became a community asset by operation of law because of the use of community funds and common labor

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7. The lower court had found that the former husband's execution of a document purporting to correct the title to the property by including the ex-wife's name was effective as a donation to her of half of the property. The court of appeal determined that this conclusion was moot in light of its holding that the house was community property.

8. La. Civ. Code art. 2408 (1870).

9. La. Civ. Code art. 1536.

10. Even if a long time period passed before the assertion of such a claim, liberative prescription was suspended during the marriage. La. Civ. Code art. 3469.

11. Jones v. Jones, 611 So. 2d 193, 196 (La. App. 4th Cir. 1992), *writ denied*, 614 So. 2d 193 (1993).

to improve the asset. No Civil Code authority supports this proposition. The court does make a general reference to Article 2388, saying the article "states that the effort, skill or industry of either spouse is a factor in determining whether to classify property as a community asset."[12] True enough, it is a factor in some cases, but only if, in the terms of the same article, the thing is "acquired during the existence of the legal regime."[13] Title to the house was acquired before the existence of the legal regime, and thus the house is not within the scope of Article 2338. The court also states that Article 2341 "makes the classification of separate property as measure of whether the value of community things used in its acquisition inconsequential as compared to the value of separate things used."[14] However, that provision applies only if the mixture of funds occurs at the time of acquisition. Comment (b) of Article 2341 explains, "The value of the community things at the time of acquisition should be used for determining whether it is 'inconsequential' in comparison with the value of the separate things used."[15] At the time of the acquisition of the house, no community assets were used. None could have been used because there was no community regime existing at the time.

B. The Decision in Light of Equitable Sharing Concerns

One could try to defend the *Jones* decision as a "creative" one that produces a more equitable result, or what the court perceives as a more equitable result, than the rule supplied by the Code; however the court does not pursue such an analysis and does not present enough facts to indicate why the traditional solution would not be equitable.

For example, substantial uncompensated common labor was devoted to improving the separate property, entitling the wife to half the enhanced value of the house attributable to that labor.[16] Under this analysis, both her work and his work on the house could be determined and valued, not according to its hourly value, but according to the extent that it enhanced the value of the house. In this rather diffuse inquiry, one involving substantial discretion on the part of a judge or a court, there is room to reach an equitable valuation without having to classify the asset as community.

To the extent that equity requires compensating the wife for her work before marriage, there is an adequate basis to find, as the wife argued, that there was a contract to compensate her for her work. If no such contract existed, then unjust enrichment principles could be called into play.[17]

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12. *Id.* at 197.
13. La. Civ. Code art. 2338.
14. *Jones*, 611 So. 2d at 197.
15. La. Civ. Code art. 2341, cmt. (b).
16. La. Civ. Code art. 2368.
17. *See* La. Civ. Code arts. 1757, 2295.

A more realistic equitable problem occurs when community *funds* are used to improve the separate asset. Beginning in 1980, the Civil Code provides that reimbursement is half the community funds used and treats the transaction like an interest free loan.[18] Thus, in a case in which substantial inflation contributes to the increase in value of the thing, the separate estate benefits from the inflation, while the community funds dedicated to improving the separate asset retain the same value. However, there is in *Jones* no clear analysis of the amount of community funds used and no determination of inflationary increase. Indeed, the Jones marriage was not a long one. Married in 1979 and separated in 1981, the marriage hardly seems to be one in which there existed long term reliance between husband and wife on each other's representations and informal habits. Moreover, a substantial inflationary increase in the separate asset seems unlikely to have occurred within as short a time period as two years.

At the least, principled decision making requires that a court explain clearly its justification for departing from a clear statutory command, especially when the court had available other devices to promote equity and was dealing with a recent statutory change. Before 1980, if community funds were used to improve a separate asset, the community reimbursement was not based on the funds used, but on the amount of the enhanced value of the separate asset attributable to those funds. In such a case, the increase in value attributable to inflation could be apportioned between the two patrimonies involved. The change in 1980 was a deliberate one to treat such use of community funds as an interest free loan. If the result is inequity, it seems to be statutorily compelled inequity based on a clear policy choice.[19]

C. Why Worry About It?

Decision making such as that employed in the *Jones* case raises basic jurisprudential questions about the powers of judges and their obligations to follow legislation. On a more practical, structural level, the approach in *Jones* results in serious difficulties. These difficulties result from the fact that Louisiana, unlike some marital property states,[20] has a true community property system in which classification of assets affects more than division of the community at divorce. A divorce was at issue here, and it can be argued that even some community property states might decide in accord with *Jones*.[21] But

18. La. Civ. Code art. 2366, cmt. (b).

19. Spaht & Hargrave, *supra* note 3, § 7.15.

20. *Id.* § 24.

21. *See* Stephen S. Case, *Property Owned by the Decedent and Powers of Appointment*, C804 ALI-ABA 29 (1993); Joseph W. McKnight, *Family Law: Husband and Wife*, 46 SMU L. Rev. 1475 (1993); Thomas R. Andrews, *Separate Property: Towards a Theoretical Foundation*, 56 SPG Law & Contemp. Probs. 171 (1993); Richard W. Mollerup, *Improvements to Real Property During Marriage: It's Time for Idaho to Make a Decision*, 28 Idaho L. Rev. 1021 (1992).

in Louisiana, classification of assets also affects management of the property during the existence of the regime and affects disposition of property at death.

For example, if one takes the analysis in *Jones* literally, there was a point when the separate house became community by operation of law. This transformation would be so even though the title to the asset was in the husband's name alone, the sale indicating correctly that the acquisition occurred before the marriage. The long established conveyancing practice in this state and the strong public records doctrine[22] would lead third persons to conclude that the asset was the husband's separate property and could be alienated or encumbered by the husband acting alone. Any change in the ownership of the asset, under the legislation, would have to be by agreement, which could not affect third persons unless it was recorded.[23] If the decision in *Jones* is followed, and it is accepted that the asset changed classification by the operation of community property law, that change in classification would not have to be recorded to affect third persons. Only written agreements must be recorded to affect third persons, and such changes accomplished without a writing do not have to be recorded.[24] Thus, the risk of harm to third persons is serious.

If the *Jones* court's analysis is accepted, the question arises as to how a court should determine the point at which the asset became community. That point did not have to be ascertained in *Jones* because the issue was the division of the asset upon divorce. It becomes relevant in cases involving management powers. Determining the point at which the asset became community property leads to an uncertain and amorphous analysis. Presumably, the court would look at the value of the community labor and funds in comparison with the separate labor and funds. Again, the third person would be at risk.

More fundamentally, a rule allowing such transmutations of separate assets could lead to an increasing departure from the community system. Would-be spouses who legitimately want to keep their separate assets separate would be encouraged to adopt separate property regimes. If they, and their lawyers, cannot rely on statutes to provide the clear rules for keeping a separate asset from becoming community, they will tend to adopt more separate property agreements to avoid the possibility of such informal transmutations. Post hoc individualized searches for equity could hurt the community ideal more than help it.

The consequences are also problematic when the *Jones* analysis is applied in a case involving the death of a spouse. *Jones* would allow a separate house inherited by one spouse to become community through this informal commingling. When the spouse who owned the separate asset died, he could leave only a one-half interest to his heirs. In the case of a second or third marriage, upon the death of the surviving spouse, the house could then be co-owned by

22. *See* William F. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul. L. Rev. 49 (1965).

23. *Id.* at 492.

24. *Id.* at 502-05.

stepchildren and thus owned by persons not members of the original family.[25] Such a result occurred in *Martinez v. Martinez*[26] and provoked the legislative reaction to keep such familial transfers from occurring.[27]

D. What Was the Court's Authority?

The only case authority the *Jones* court offers to buttress its conclusion is the second circuit court of appeal's troublesome decision in *Luffey v. Luffey*,[28] a decision in which two judges dissented and would have granted a rehearing. The supreme court denied writs, with two justices dissenting.[29] The problem in *Luffey* was the classification of stock acquired with the husband's separate funds. The stock was in a closely-held corporation whose success hinged largely on the husband's effort and skill and the transfer of a community asset to the corporation. Under the traditional approach, the funds used to capitalize the corporation and acquire the stock were the husband's separate property, primarily consisting of donations from his father. Thus, the stock was separate. No authority would come into play to change that classification absent some juridical act so providing.

However, the court in *Luffey* concluded that "the contributions made by the community regime were ultimately of greater value."[30] These contributions, in the court's view, included the husband's specialized knowledge, business contacts, effort, skill and industry. It is difficult to understand how knowledge can be considered a community asset. The amendment of Civil Code article 161 (now renumbered 121–124) and the comments indicate that knowledge or a degree is not considered property subject to be shared with a spouse.[31] Effort, skill and industry produce property that is community (wages), but that fact does not make the enterprise by which one is employed a community asset. If one attempts to use one's common labor to increase the value of a separate asset, the Civil Code provides a remedy in Article 2368, as stated earlier.

Another difficulty with the court's analysis is that it finds a mixture of separate funds and "community" contributions over a period of time as the corporation developed. But under Civil Code article 2341, commingling is relevant only if the separate and community elements are contributed at "the time of acquisition."

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25. Cynthia A. Samuel et al., *Successions and Donations, Developments in the Law, 1982-1983*, 45 La. L. Rev. 575 (1984).

26. 602 So. 2d 725 (La. App. 4th Cir.), *writ denied*, 605 So. 2d 1129 (1992).

27. La. Civ. Code art. 2341.1. *See also* Lee Hargrave, *Matrimonial Regimes, Developments in the Law, 1990-1991*, 52 La. L. Rev. 655 (1992).

28. 572 So. 2d 1045 (La. App. 2d Cir. 1990), *writ denied*, 577 So. 2d 50 (1991). *See* Spaht & Hargrave, *supra* note 3, § 3.40, at 52 (Supp. 1992).

29. Luffey v. Luffey, 577 So. 2d 50 (1991).

30. *Luffey*, 572 So. 2d at 1050.

31. La. Civ. Code art. 121, cmt. (f).

The court in *Luffey* refers to equitable concerns, such as the fact that the couple bought land anticipating a future business being established, and that the land was later sold to the corporation. The court considers these acts to be the use of some type of community resources. In the same way, the spouses both obligated themselves when $50,000 was borrowed to use in the corporation. Again, if these obligations are relevant, they involve community funds or community labor that are used to improve a separate asset. The Civil Code's mechanism again is reimbursement rather than a change in classification of what was initially a separate asset.[32]

Perhaps the court's strongest argument in *Luffey* comes from its conclusion that the wife did not know the corporate stock was to be the husband's separate asset and that she was not represented by counsel when she executed documents transferring community land to the corporation and when she obligated herself to loans. These facts might constitute the basis to argue fraud or bad faith by the husband in the management of community property. If so, the remedy of Civil Code article 2354 normally is damages, not classification of the asset as community. As stated earlier, "[i]f [*Luffey*'s analysis were] taken seriously, it would be virtually impossible for a spouse to maintain the separate character of a business interest when that spouse devotes most of his time and effort to developing that business."[33]

Jones is probably more difficult to justify than *Luffey* because in *Luffey*, there was at least an alternate theory based on fraud or bad faith management of a community asset. Moreover, *Jones* involves immovable property subject to joint management, whereas *Luffey* does not present as serious a management problem. The registered owner of stock has the authority to manage the asset, and it is not necessary to obtain the concurrence of both spouses to protect third persons.[34]

The court in *Jones* does not cite its previous decision in *Curtis v. Curtis*,[35] a case in which the fourth circuit's earlier attempt to depart from the Code rules in the name of equity was rejected by the supreme court. In *Curtis*, the panel reasoned that the combination of separate and community funds over time (separate down payment, community payments on the note) produced an immovable with a mixed title (52.5% community, 47.5% separate). Though the supreme court decision goes off on other grounds (the payments on the notes were found to be community funds), the supreme court rejected the appellate court's analysis. It stated:

> The Court of Appeal was in error in holding the property part community and part separate. While other community property states may

32. *See* La. Civ. Code art. 2366.
33. Spaht & Hargrave, *supra* note 3, § 3.40, at 54 (Supp. 1992).
34. Spaht & Hargrave, *supra* note 3, § 5.6.
35. 403 So. 2d 56 (La. 1981).

> categorize property paid for in part with separate funds and in part with community funds as mixed, Louisiana does not do so.[36]

The court also stated:

> These cases, among others, also establish that property declared to be separate at acquisition does not change character if a subsequent credit payment is made with community funds. Proof that the community contributed to the purchase of separate property would only created [sic] a debt on the part of the wife's separate estate to the community for the amount of community funds used. It would not convert the property or any portion of it to community property. Only when community and separate funds are mingled in the initial acquisition may the property be regarded as community.[37]

II. MATRIMONIAL AGREEMENTS DURING MARRIAGE

In re Boyer[38] is an important decision confirming the ease and simplicity of the process for contracting a matrimonial agreement during marriage. The court gives a straightforward application of Article 2329's provision that spouses "may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules."

The lower court granted a summary judgment that the agreement was invalid because of (1) the failure of the judge to hold a hearing with the parties present and (2) the signing of the agreement by the parties before it was approved by the court. The court of appeal reversed and held the procedure used was sanctioned by Article 2329.

In *Boyer*, both the husband and wife were represented by independent counsel at the time they executed, before a notary and two witnesses, an agreement terminating their community regime and establishing a separate property regime. (They also executed a partition of their existing community assets, an agreement that is not subject to the requirements of Article 2329 because it is not a matrimonial agreement.[39]) The attorneys submitted the

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36. Id. at 57-58.

37. *Id.* at 59.

38. 616 So. 2d 730 (La. App. 1st Cir.), *writ denied*, 620 So. 2d 882 (1993). The author of this article assisted counsel for Mr. Boyer early in the process of this case but did not participate in the briefing or arguing of the case at trial or on appeal.

39. The first agreement partitioning community property is valid without court approval, and as between the spouses, it was effective when executed under the terms of Louisiana Civil Code article 2336:

agreement signed by the spouses and a joint petition to the judge. In an affidavit, the spouses stated "that they had sought legal counsel, they had read the petition and the agreement, they understood the rules and principles involved, and that the agreement was in their best interests. Neither party requested a hearing or appeared before the court."[40] The district judge read the documents and found that the spouses understood the document and that it was in their best interests.

Stating that the legislative goal of Article 2329 was that of protecting the less worldly spouse and preventing that spouse from entering into disadvantageous agreements that were not fully understood,[41] the court reasoned that the presence of the attorneys advising the spouses was adequate to meet that goal. The policy did not require a full-fledged hearing to determine the issues. Also, because the article does not specify a time sequence, it was not required that the parties wait until after judicial approval to sign the documents.

The court's holding is supported by the text of the legislation and the basic policies it reflects. The totality of the law governing this problem is Article 2329. It states the whole of the procedural and substantive requirements: (1) joint petition; and (2) finding (of fact) by a court that (a) the agreement serves the spouses' best interests, and (b) that they understand it. Nothing is stated about the order in which documents must be executed, before or after the judicial finding. The article does not deal with the time of execution, but with the necessary steps for validity. For example, comment (b) refers to the fact that before the marriage, "spouses may enter into a matrimonial agreement." But, of course, the agreement is not valid until the marriage. The agreement can be executed, but its effectiveness is dependent on the subsequent condition occurring.

It was important under the prior law to complete the documents before marriage because once married spouses could not contract with each other. To be consistent, one should conclude that because agreements during marriage are allowed, the parties can execute the documents at any time, but the agreement will not be valid until the judicial finding is made. Certainly, there is no prohibition against obtaining court approval first and then executing the documents. The Civil Code simply states the substantive standard, and the only procedural rules comprise the reference to a joint petition and a judicial finding.

> During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property. The partition is effective toward third persons when filed for registry in the manner provided by Article 2332.

Regardless then of when the document was executed, and regardless of when the judge made his findings, the partition of then existing assets is valid and enforceable. Spaht & Hargrave, *supra* note 3, § 8.10; Noel J. Darce, Comment, *Student Symposium—Analysis and Interpretation of the New Matrimonial Regimes Law—Interspousal Contracts*, 42 La. L. Rev. 725, 733-34 (1982).

40. *Boyer*, 616 So. 2d at 731.

41. Katherine S. Spaht & Cynthia Samuels, *Equal Management Revisited: 1979 Modifications of the 1978 Matrimonial Regimes Law*, 40 La. L. Rev. 83, 90-91 (1979).

There is no requirement of a personal appearance before the judge. There is no requirement of a particular kind of order or kind of judgment. Article 2331 further demonstrates the flexibility contemplated. A matrimonial agreement can be by act under private signature duly acknowledged by the spouses. That procedure contemplates execution of the agreement by the parties at one time, and then at a later time, the acknowledgment before a notary making it valid.[42]

More basically, the text does not refer to a court "authorization" to give the parties some kind of "capacity." All it requires is a "finding by the court" that the parties understand the agreement and that it serves their best interests. Indeed, the dispositive event is not the court's order or judgment. At bottom is the contract of the parties. That contract is the juridical act that changes the regime. The court's finding simply supplies the formality that allows the contract to produce its effects.

III. CLASSIFICATION—TAX PLANNING MEETS MATRIMONIAL REGIMES

Reeves v. Reeves[43] rests so heavily on facts—respecting the fact finding of the lower court that the presumption of community was not overcome—that it is likely to have little precedential value. However, it is worth some attention because the problems it raises are serious and likely to recur. Indeed, it was perhaps inappropriate for the court of appeal to have relied so heavily on a fact-based analysis. The dispute involved little uncertainty about the facts that did occur, and the problem involved legal and policy issues more than factual ones.

In *Reeves*, parents engaged in estate planning and tax avoidance transactions desired to transfer a farm to their four children. Rather than executing a simple donation of the property, they executed a credit sale, transferring to each child a one-fourth interest in the farm in exchange for a series of $6,000 promissory notes payable annually. In subsequent years, the parents forgave part of the debt by canceling the notes at a rate of $6,000 per year to take advantage of the maximum gift tax annual exclusion then in existence.[44] After several years, all of the notes were canceled and the children received the farm without having paid anything to their parents. The transfer was accomplished without payment of any gift tax. The transaction also accomplished the transfer to the children of any appreciation in the property, as is often contemplated in this type of estate planning transaction.

The trial court found that the presumption of community was not overcome, presumably because the form of the transaction was a sale. However, the normal approach in this kind of case is not based on form, but on the intent of the donors. The issue is whether the parents' cause or motive was a spirit of liberality, or

42. La. Civ. Code art. 1833; Spaht & Hargrave, *supra* note 3, § 8.6.

43. 607 So. 2d 626 (La. App. 2d Cir.), *writ denied*, 608 So. 2d 1010 (1992).

44. I.R.C. § 2503 (1978).

whether it was to engage in an onerous transaction.[45] Although the facts of the case are not described at length in the opinion, usually the cause or motive of elderly persons engaging in estate planning transactions is to minimize taxes. Accomplishing that goal normally requires transfers of property to heirs. An onerous transfer that keeps an equivalent value in the donor's estate defeats that goal. Only a gratuitous transfer of some kind satisfies it. Indeed, the amount and timing of payment of the notes should be almost conclusive proof of an intent to transfer the property also without payment of gift tax by taking advantage of the annual exclusion.[46] In *Reeves*, the proof of this intent was even stronger because the parents treated their four children equally, such equality normally being evidence of desiring to benefit the children individually and not the children's spouses.

Under this analysis, a court would not be bound by the form of the act or the designation of the transaction as a sale rather than a donation.[47] Overlooking the formal designation and focusing on the real substance of the transaction is common practice in litigation in this area. Donations, especially, are treated as valid if they meet the form requirements for such transfers, even though they are couched as sales.[48] Such "simulations" were common practice for many years to protect third persons in good faith from forced heirship claims.[49]

Perhaps one might be inclined to apply a type of "dirty hands" estoppel against persons who hide their intent by the use of a different form. Common and widespread acceptance of such practices, however, would seem to preclude a moral condemnation of them. Even so, that notion should not govern under the *Reeves*-like fact scenarios. It is highly likely that the donors and their lawyers choose the form of transaction, and not the children who are the beneficiaries of it.

If one turns away from the technicalities of cause and its role in classifying transactions and looks perhaps to more realistic policy concerns, one might speculate about policies related to spousal sharing that might have influenced the *Reeves* court. The basic policy notion of spousal sharing is that spouses share the accumulations of their work and skills exercised during their marriage under a community regime. At the same time, they do not share that which comes to them without such work. The Civil Code's primary examples of such unshared assets are inheritances and donations. In *Reeves*, there were no facts indicating use of the spouses' labor, their funds, or their skill to produce the interest in the farm.

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45. *See* Allen v. Allen, 539 So. 2d 820 (La. App. 3d Cir.), *writ denied*, 541 So. 2d 840 (1989).

46. I.R.C. § 2503 (1993).

47. *Cf.* Comeaux v. Noel, 251 So. 2d 94 (La. App. 3d Cir.), *writ refused*, 259 So. 2d 68 (1971). The lower court looked at the intent of the transferors and held it was a donation although it was in the form of a sale. The court of appeal looked at the intent, found it was to compensate for the daughter caring for the parents, and held it was actually a sale. In neither analysis did the court focus on the form. Instead, they pursued the inquiry into the intent of the donors. Also, in Roberts v. Roberts, 304 So. 2d 839 (La. App. 2d Cir. 1974), the form of the name on the credit union account was not decisive.

48. Bordelon v. Bordelon, 499 So. 2d 1050, 1055 (La. App. 3d Cir. 1986).

49. *See* La. Civ. Code arts. 1502, *et seq.* (1870).

It might be argued that their common "creditworthiness" was used in acquiring the asset, inasmuch as if the notes, admittedly valid, were sought to be enforced, they could be enforced against community assets. Presumably, the parents could have changed their minds, or their creditors or a bankruptcy court could have enforced the notes. However, as the facts developed, these events did not occur, and it would appear that the community contribution in this regard was "inconsequential" in the terms of Article 2341. Indeed, the same court, in dealing with another item in dispute in *Reeves*, held that a much more substantial community contribution was inconsequential.[50]

Another policy concern might be management of the asset until the notes were all forgiven. As a sale, even if it was to the wife, it could have been designated to be her separate asset. Her obligation would have been a separate one. If the husband concurred in the acquisition, he would be estopped from claiming otherwise. If it was a simple sale to her, third persons might be concerned about whether it was community and whether she had the power to alienate or encumber it. That inconvenience would be rather small though, and cured by the husband's participation in transfers. In any event, this inconvenience was not a serious problem in *Reeves* because the asset was an undivided interest in property with three siblings, resulting in little likelihood of transfers of this asset in the ordinary course of affairs. There was little chance of harming third persons by considering this a separate asset of the wife.

Another strong policy concern violated by *Reeves* is the policy of keeping family-derived property in the family. The result in *Reeves* involves the donee spouse's losing half of her interest in the family farm and making the ex-husband a possible co-owner with the former wife's siblings. This result would seem to be inconsistent with the supreme court's recent emphasis on the nature of family property and forced heirship in *Succession of Lauga*.[51] It also seems inconsistent with Civil Code article 2341.1, adopted in order to prevent a *Martinez v. Martinez*-type result when an inherited interest in property was transmuted into a community asset, and the property was put in the hands of the ex-wife and out of the husband's family.[52]

In any event, *Reeves* is a beginning of an analysis of these problems and not the final solution. The supreme court denied writs in the case, and it remains an open question.

IV. FRAUD OR BAD FAITH MANAGEMENT

In *Landry v. Landry*,[53] a husband received 110,000 shares of stock as compensation for his work for a small corporation. Apparently before and after

50. Reeves v. Reeves, 607 So. 2d 626 (La. App. 2d Cir.), *writ denied*, 602 So. 2d 1010 (1992).
51. Succession of Lauga, 624 So. 2d 1156 (La. 1993), *reh'g denied.*
52. *See* Hargrave, *supra* note 27.
53. 610 So. 2d 1045 (La. App. 3d Cir. 1992).

some shares had been issued, the employer proposed and the husband signed a restrictive agreement that provided that if the employee separated from his wife or left the company, the company could repurchase all the stock for ten cents per share for each year of the husband's employment with the company.

> When presented with the agreement, defendant took it home and discussed it with plaintiff. She was fully aware of the terms of the agreement and only requested that defendant try to get an unrelated provision changed by American [the corporation] before he signed it. Defendant had the provision changed and then signed the agreement.[54]

There was no suggestion that the changes in the restrictions were proposed by the husband or for his benefit. Presumably, the agreement was a device for the company to insulate itself from the domestic problems of its employees and to encourage the employees to stay with the company. There was no showing that the husband, upon the company's exercising its rights, unfairly benefitted. The money produced by the repurchase was a community asset subject to partition. The court implicitly concluded that execution of such agreements, at least with the spouse's knowledge and apparent failure to object, is not sufficient to constitute fraud or bad faith management. Indeed, though not discussed, there was no indication of any damage suffered by the wife. She claimed to be damaged to the extent of the difference in the amount received and the market value of the stock. However, it would be difficult to prove the value of stock subject to such restrictive transfer agreements. Perhaps fraud or bad faith could be involved if it could be shown that such agreements, when triggered by divorces, could be used to harm the interest of the non-employee, while granting the employee some other, perhaps disguised, increased benefits.

In *Landry*, marital difficulties resulted in the husband's not being in possession of the stock certificates, "and [he] was apparently unable to obtain them from plaintiff."[55] The corporation then canceled those certificates in the husband's name[56] and reissued them. At that point, the husband turned in those new certificates and received $88,000. The proceeds were invested by the husband in a certificate of deposit in the names of both parties. However, he did not tell the wife of the repurchase or the existence of the certificate. The court also stated that it was not fraud or bad faith for the husband to fail to tell his wife about the events. "Failure to disclose this transaction to plaintiff simply does not amount to fraud or bad faith by the defendant."[57]

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54. *Id.* at 1050.

55. *Id.*

56. Since he was the registered owner, he would have the exclusive right to manage the shares of stock. *See* La. Civ. Code art. 2351.

57. *Landry*, 610 So. 2d at 1050.