So You've Married a Mismanager: The Inadequacy of Louisiana Civil Code Article 2354

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So You’ve Married a Mismanager: The Inadequacy of Louisiana Civil Code Article 2354

So, you’ve married a mismanager? Oh yes, that’s the type. Spending lots of money on lots of nothing? Investing in recycled breakfast cereal as the next big thing? I bet when you first started dating it was refreshingly impulsive—perhaps even charmingly madcap. What can you do about it now? You could go ahead and get the divorce. If that’s not for you then maybe just a separation of property, but that won’t help the stuff already gone. And then there’s article 2354, oh wait, that won’t work either . . . .

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I. INTRODUCTION

Under Louisiana Civil Code article 2354, a spouse may recover damages due to the other spouse's fraud or bad faith management of community property during marriage. One spouse's poor management decisions, made without malicious intent but certainly without thought, are not covered by the duty imposed upon spouses during marriage. However, the management standard imposed upon spouses is heightened as soon as the spouses divorce. Suddenly, a spouse may be liable for his fault, default, or neglect. Unlike during marriage, during the interim period between divorce and court partition of community property, a spouse may be liable for poor business decisions even without a showing of malicious intent. Thus, for example, a spouse investing imprudently in the stock market using community funds will be liable to the other for damages for substandard investment decisions made after the divorce but not during marriage.

Copyright 2007, by LOUISIANA LAW REVIEW.
1. LA. CIV. CODE ANN. art. 2354 (2007).
2. See discussion infra Part II.D.1.
3. LA. CIV. CODE ANN. art. 2369.3 (2007).
4. Although no court has dealt with irresponsible or imprudent accrual of community debt under article 2354, a heightened management standard could arguably include such action. A newly married couple without many assets to mismanage may have the ability to incur a large mass of community debt.
By imposing a heightened standard after divorce until partition of community property, the law sets up an artificial distinction based on a presumption that during the marriage, including the time up to divorce, a spouse will have the other spouse’s best interest at heart when dealing with community property. This presumption is not necessarily true and does not take into account the volatile period leading up to the divorce, a period during which either spouse may feel ambivalent toward management of community property.

Not only do the standards imposed during and after the marriage use a questionable presumption regarding when spouses stop thoughtfully managing the community property, but the low standard during marriage is also insufficient when compared to the management standards imposed upon other relationships contemplated by the Louisiana Civil Code. For business partners, mandataries, and curators, the standard imposed is much higher.  

Some critics of raising the management standard in the marriage context may suggest that courts should not involve themselves in the intimate workings of domestic relations during the marriage, but such involvement is already sanctioned by the Louisiana Civil Code. Article 2355 allows a spouse to obtain judicial authorization to individually manage community property that would normally require the concurrence of the other spouse. Further, another community property state, California, has already addressed the need for a higher management standard during marriage and now imposes a fiduciary duty upon spouses.

Raising the standard imposed upon spouses in the management of community property during marriage would give spouses experiencing management difficulties an additional option when dealing with their community property. Allowing spouses an

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5. See infra Part III.C.
7. CAL. FAM. CODE § 1100(e) (West 2007).
option within both marriage and the community property regime would emphasize the idea that marriage is a long-term investment and commitment.

Louisiana should raise the duty owed by spouses during marriage to be commensurate with the duty imposed between divorce and partition, the standards of care expected of business partners and mandataries, and the duty imposed upon spouses in other community property states. Part II of this comment discusses the history of management of community property in Louisiana, beginning with the management standard articulated in the original Louisiana Civil Code and ending with the current management standard under Louisiana Civil Code article 2354. Part III discusses various reasons for moving toward a heightened management standard, including the need for a continuous management standard throughout the marriage until partition of community property and the need to establish consistency with standards dictated in other relationships of trust. Part IV concludes the article.

While many of the problems that arise within the community property system could be avoided if the spouses opted for a separate property regime, under the default system of community property, a spouse’s management of community property is subject only to the low standard set forth in article 2354. In order to recover damages from a spouse during the marriage, the spouse seeking to recover must meet the high bar of proving fraud or bad faith on the other’s part. This standard is especially low when considered in conjunction with the management duty imposed upon spouses during the interim between termination of the community regime and partition of the community property. Likewise, the management standard during marriage is insufficient when compared to standards imposed on other relationships in the Louisiana Civil Code. For a spouse who has married a mismanager and wishes to address that mismanagement within both the marriage and the community property regime, the current standard set forth in Louisiana Civil Code article 2354 offers inadequate relief.
II. HISTORY OF COMMUNITY PROPERTY MANAGEMENT IN LOUISIANA

Louisiana is a community property state. As such, it recognizes that both a husband and a wife contribute to their marriage. This recognition of equally valuable yet different contributions to the marriage was seen in Louisiana as early as the eighteenth century through the "custom of Paris." As the Louisiana Supreme Court explained in West v. Ortego, "one of the major considerations behind the community property system is to recognize and reward a wife's industry and labor (or the husband's . . . where the wife may be the principal breadwinner) which may only indirectly serve to enhance the community financially." In a community property regime, each spouse is recognized as "equally contributing by his or her industry to [the marriage's] prosperity, and possessing an equal right to succeed to the property after its dissolution." Community property states thus recognize that different, but valuable, contributions are made to the marriage by both the working and non-working spouse. "There is nothing more fundamental in our law," the Louisiana Supreme Court noted in 1956, "than the rule of property which declares that this


10. 325 So. 2d 242, 245 (La. 1975).


12. Community property based on the equality of the spouses has its roots in the laws of the Visigoth tribes: "[T]he wife fully shared the danger and vicissitudes of daily life with her husband. . . . [T]he mutual loyalty of the spouses, the mutual sharing of the burdens of marriage—was the operative force which created a community of goods between the husband and wife." Michael J. Vaughn, The Policy of Community Property and Inter-spousal Transactions, 19 BAYLOR L. REV. 20, 33 (1967).
community is a partnership in which husband and wife own equal
shares."\(^{13}\)

Recognition of equality is one of many benefits of a
community property system. From a psychological perspective,
the shared ownership of property may in itself lend stability to the
marriage. In *Coming Apart: A Prognostic Instrument of Marital
Breakup*, John N. Edwards and other sociology professors linked
marital property ownership to marital stability.\(^{14}\) The acquisition
of property that a state recognizes as community-owned\(^{15}\) not only
promotes recognition of equality between the spouses but also
promotes marital stability through common ownership. In both
these aspects, the state underscores social beliefs about marriage as
a lasting and joint commitment.

A. Management in 1870 Under Louisiana Civil Code Article 150

Although the community property regime recognizes equality
between the spouses, this equality was, for a time in Louisiana,
derived by the use of the "head and master" rule.\(^{16}\) This rule,
existing in tandem with the theory of inherent equality in the
ownership of community property, established a management
scheme for such property. While Louisiana theoretically
recognized both spouses as equals, practically speaking, the
husband was placed in the position of manager of the community
property.\(^{17}\) As the manager of the community property, the
husband was deemed head and master of the community property.

The husband's role as head and master resulted in a duty on the
part of the husband to manage the community property
responsibly. Article 271 of the Code Napoleon enforced the
husband's responsibility,\(^{18}\) and the idea made its way into the 1870
Louisiana Civil Code as article 150, which read:

\(^{13}\) Messersmith v. Messersmith, 86 So. 2d 169 (La. 1956).
\(^{14}\) John N. Edwards et al., *Coming Apart: A Prognostic Instrument of
\(^{15}\) "Each spouse owns a present undivided one-half interest in the
\(^{16}\) LA. CIV. CODE art. 2404 (1888) (repealed 1980).
\(^{17}\) LA. CIV. CODE art. 2404 (1888) (repealed 1980).
\(^{18}\) As the Code stated:
[F]rom the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it was proved that such alienation was made with the fraudulent view of injuring the rights of the wife.\(^19\)

Because the husband was charged with the management of community property under the head and master doctrine, he owed a heightened duty to his wife to not alienate community property \textit{after} the filing date of an action for separation, if such alienation was done with a view toward fraudulently injuring his wife. The husband could do nothing to fraudulently deplete the community during the interim between filing for separation and court partition of community property. The remedy for such fraudulent action was high, since the article dictated that such an alienation would be deemed a nullity.

Although the duty and the remedy under article 150 were high, the duty only existed after the institution of separation proceedings. In \textit{Davis v. Davis}\(^20\) for instance, a former husband sold community property to a third party purchaser, Miller. Even though the purchaser was in good faith, the former wife sought to annul the sale. She argued that the sale was fraudulent, asserting that her husband knew of her intention to file for divorce, which "prompted him to hastily dispose of the land to the Millers" in order to destroy her community interest.\(^21\) While the court noted that these were suspicious circumstances it refused to annul the sale because the purchasers were in good faith and the sale took place \textit{before} a suit

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Every obligation contracted by the husband at the expense of the community, every alienation made by him of immovable property dependent upon it, subsequently to the date of the order mentioned in article 238, shall be declared void, if proof be given moreover, that it has been made or contracted in fraud of the rights of the wife.

\textit{Code Napoleon} art. 271 (1824).

20. 23 So. 2d 651 (La. App. 2d Cir. 1945).
21. \textit{Id.} at 653.
for separation or divorce was filed. Because the disposition happened before the institution of formal proceedings to end the marriage, the husband was not yet subject to scrutiny under article 150.

Thus under article 150, a wife not only had to prove that her husband had the requisite intent to defraud her, but also that the sale happened after she filed for divorce or separation. The court in Davis indicated that if the wife could have made such a showing, the sale as to third parties would have been a nullity. The remedy under article 150, then, was nullity rather than the recovery of damages.

B. Management in 1888 Under Louisiana Civil Code Article 2404

Former Louisiana Civil Code article 150 allowed for the husband’s fraudulent transaction to be deemed null, but the article was replaced in 1888 with Louisiana Civil Code article 2404, which no longer allowed an explicit nullity action if community property was alienated with the fraudulent intent to harm the wife’s interest. As the article stated,

The husband is the head and master of the partnership or community of gains . . . . But if it should be proved that the husband has sold the common property, or otherwise disposed of [it by] fraud, to injure his wife, she may have her action against the heirs of her husband . . . .

Although the Louisiana Supreme Court held that under article 2404, the husband as head and master could “administer [community property] alone and as he please[d],” the husband

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22. Id. at 654.
23. The court in Hall v. Allred held that the husband did intend “to deprive plaintiff of her community interest by disposing of property at a time when dissolution of the community was imminent.” 385 So. 2d 593, 597 (La. App. 3d Cir. 1980). Even though the court believed the sale of immovable property from the husband to his uncle was done in an attempt to deprive the wife of her part of the community, the sale itself remained valid. Id. Unlike former article 150, the wife could no longer annul a sale because of her husband’s fraudulent intent. Rather, she only had an action for damages. Id.
24. LA. CIV. CODE art. 2404 (1888) (repealed 1980).
25. Frierson v. Frierson, 114 So. 594, 595 (La. 1927).
could not defraud his wife. For example, he could not sell community property by simulation\textsuperscript{26} before filing for divorce and then reacquire the property after the divorce.\textsuperscript{27}

The remedy available to a wife changed, but the high duty imposed by former article 150 upon the husband as manager of the community property continued under article 2404. But unlike article 150, article 2404 did not limit the fraudulent action to the time after filing. The Louisiana First Circuit Court of Appeal found that a husband breached his duty when three days before the wife filed for separation, the husband sold by simulation six community-owned lots to his brother.\textsuperscript{28} In \textit{Oliphint v. Oliphint}, the plaintiff-wife sought an accounting of community assets, asserting that on the day before suit for separation, her husband withdrew $5,000.00 from their community bank account and deposited it into his separate corporation.\textsuperscript{29} The Louisiana Supreme Court in that case stated that while the husband could administer the community assets as he wished during the marriage, the defendant had "intentionally disturbed, damaged, and diminished the community estate to plaintiff's detriment" and for that he was liable to his wife for the amount withdrawn from the community bank account.\textsuperscript{30}

The court in \textit{Oliphint} found the husband breached his fiduciary duty to his wife by intentionally disturbing and damaging community property, but other courts described the husband's duty as a fiduciary one stemming from the power imbalance between the spouses and the husband's position as manager.\textsuperscript{31} In \textit{Lee v. Lee}

\begin{itemize}
  \item \textsuperscript{26} A simulation is defined as "[a] contract [that] by mutual agreement . . . does not express the true intent of the parties." LA. CIV. CODE ANN. art. 2025 (2007).
  \item \textsuperscript{27} Luquette v. Floyd, 228 So. 2d 177 (La. App. 3d Cir. 1970).
  \item \textsuperscript{28} Gay v. Martinolich, 271 So. 2d 689 (La. App. 1st Cir. 1972).
  \item \textsuperscript{29} 54 So. 2d 18 (La. 1951).
  \item \textsuperscript{30} \textit{Id.} at 25.
  \item \textsuperscript{31} Black's Law Dictionary defines "fiduciary" as:
    \begin{enumerate}
      \item A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor. 
      \item One who must exercise a high standard of care in managing another's money or property.
    \end{enumerate}
\end{itemize}
for instance, a wife successfully sought to set aside a community property settlement based on the fraudulent activity of her husband.\textsuperscript{32} The wife asserted that she had made statements that she was going to leave her husband, and the day after she physically left the home, her husband removed stock from their safe deposit box and withdrew money from a community bank account.\textsuperscript{33} The court held that the husband had not discharged his fiduciary duty to the wife and that the relative positions of power between the two parties dictated the court’s high degree of scrutiny.\textsuperscript{34}

However the husband’s duty was described, courts looked for proof of fraud or bad faith when interpreting article 2404 and determining whether a husband breached his fiduciary duty to his wife.\textsuperscript{35} In \textit{Thigpen v. Thigpen}, the Louisiana Supreme Court held that a wife had an action for damages after her husband fraudulently disposed of community property.\textsuperscript{36} The court felt the sale was “inspired with hostility” and was done with the “deliberate intent to injure . . . [his] wife at a time when dissolution of the community estate was imminent.”\textsuperscript{37}

The combination of Louisiana Civil Code article 2404, the head and master scheme, and jurisprudence yielded a fiduciary duty during the marriage\textsuperscript{38} as well as a duty to account to the wife at the end of the marriage. The need for such an accounting arose

\begin{itemize}
\item \textsuperscript{32} 38 So. 2d 66 (La. 1948).
\item \textsuperscript{33} \textit{Id.} at 67.
\item \textsuperscript{34} \textit{Id.} at 69.
\item \textsuperscript{35} For example, in \textit{Burger v. Burger}, the fourth circuit held that a husband could spend his income, which would fall into the community without having to account to his wife, as long as there was no fraud or intent to injure the wife. 357 So. 2d 1178 (La. App. 4th Cir. 1978).
\item \textsuperscript{36} 91 So. 2d 12 (La. 1956). The court noted that the spouses’ relationship was deteriorating rapidly in the year of the sale; the son to whom husband sold the farmland was not a farmer himself; the husband continued to manage the property after the sale; and the husband admitted that as between he and his wife, a “state of animosity existed with all that the word connotes and in its strongest meaning . . . .” \textit{Id.} at 17.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} Unlike article 150, article 2404 did not limit the fraudulent action to the time after filing an action for separation. \textit{Compare} LA. CIV. CODE ANN. art. 150 (1870), \textit{with} LA. CIV. CODE ANN. art. 2404 (1888).
\end{itemize}
at the end of the marriage when a husband could alienate property without his wife’s consent, making it relatively easy for him to conceal community property from her. The husband’s accounting ensured that all the community property was properly considered by the court at the time of partition. While both husband and wife owned the community property, only the husband had the power to manage that property. Because of the husband’s management power, he owed a fiduciary duty to his wife.

C. Equal Management Under the 1980 Revision: Louisiana Civil Code Article 2354

The husband’s position as exclusive manager of the community property did eventually come to an end. In 1980, the matrimonial regimes articles were overhauled and an equal management system was introduced. Under equal management, both husband and wife are managers of the community property. Louisiana Civil Code article 2346 allows “either spouse acting alone” to “manage, control, or otherwise dispose of community property unless otherwise provided by law,” and the comments to that article state that the provision establishes an equal management system. Unlike the head and master rule, in which both spouses owned community property in indivision but the husband was the exclusive manager of the property, equal management allows both spouses to manage community property.

The management duties to be imposed between spouses under this equal management scheme with regard to community property were reconsidered during extensive revisions. Included in the revision was Louisiana Acts number 709, in which former

40. See LA. CIV. CODE ANN. art. 2354 (2007) (effective Jan. 1, 1980). Shortly after the revision of the matrimonial regimes articles, which discarded the head and master rule, the United States Supreme Court deemed the provision unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. Kirchberg v. Feenstra, 450 U.S. 455 (1980).
41. LA. CIV. CODE ANN. art. 2346 (2007).
42. Art. 2346 cmt. a.
Louisiana Civil Code article 2404 was used to create article 2354.\textsuperscript{43} Article 2354 allowed a spouse to recover damages for the other spouse's fraudulent or bad faith management of community property during the marriage.

In addition to considering the duty imposed upon managing spouses during the marriage, the duty imposed upon spouses during the period between divorce and partition was considered. During the revision process, Professor Katherine Spaht advocated a statutory duty which treated former spouses differently from ordinary co-owners during the interim between termination of the marriage and partition of community property, since "former spouses may feel hostility to each other after legal separation or divorce."\textsuperscript{44} Although such a duty was not imposed in the 1980 revision, Representative Dimos introduced House Bill number 1667 in 1995, which passed as Louisiana Acts number 433, to "provide for the standard of care regarding former community property under a spouse's control and the duty to preserve former community property . . . ."\textsuperscript{45} Representative Dimos' bill became Louisiana Civil Code article 2369.3, which heightened the management duty between spouses during the period between divorce and partition of community property.\textsuperscript{46} Unfortunately, the duty between managing spouses during the marriage was not similarly heightened.

\textit{D. Current Community Property Provisions in Louisiana: The Standard Governing Management}

Under current law, the management duties imposed upon spouses depend upon whether the spouses are married or are in the interim period between termination of the marriage and partition of community property. During the marriage, Louisiana Civil Code article 2354 applies and a spouse may only recover damages from the other spouse upon a showing of bad faith or fraudulent

\begin{itemize}
\item \textsuperscript{43} 1979 La. Acts No. 709.
\item \textsuperscript{44} Katherine Shaw Spaht, \textit{Matrimonial Regimes}, 50 LA. L. REV. 293, 302 (1989).
\item \textsuperscript{45} 1995 La. Acts No. 433.
\item \textsuperscript{46} LA. CIV. CODE ANN. art. 2369.3 (2007).
\end{itemize}
mismanagement of community property. After termination of the marriage but before the partition of community property, a spouse’s management duty is higher than that imposed by article 2354: article 2369.3 applies and a spouse must manage prudently and preserve all of the community property.

1. Management of Community Property During the Marriage

Although current Louisiana law sanctions equal management of community property, spouses are not free to manage that property in any way they desire. Louisiana Civil Code article 2354 establishes a duty by one spouse to the other in managing community property during the marriage. Article 2354 is the current equivalent of articles 150 and 2404 and explicitly allows a spouse to recover damages for actions of the other spouse during marriage only upon a showing of fraud or bad faith. Although the matrimonial regimes articles set forth a management duty not to act fraudulently or in bad faith, the articles in that section do not define the terms.

While article 2354 does not define fraud, Louisiana Civil Code article 1953 states that fraud is “a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.” This is a high bar to pass. “At least in Louisiana, the general assumption is that by virtue of the partnership between husband and wife during marriage . . . management decisions will be made cautiously and deliberately. . . . [T]he remedies presuppose rather serious commissions or omissions.”

In Auger v. Auger, the court found such a serious commission and awarded damages to the former wife after her husband fraudulently disposed of community property by selling it to his

47. LA. CIV. CODE ANN. art. 2354 (2007).
48. Art. 2369.3.
49. Art. 2354.
father and brother. In finding a fraudulent disposition, the court considered a number of factors, including the fact that the spouses were having marital difficulties and were physically separated a few days before the transfer, the suit for divorce was imminent, the husband sold the property to his close relatives for cash which was never paid, and nothing was ever reduced to writing.

Unlike the court in Auger, the court in Cabral v. Cabral did not find proof of fraud. There, a wife asserted that her husband mismanaged property in Orleans Parish. The husband admitted he could have been more attentive to the management of the community property, but he also pointed to the large sums of his separate property invested into the community project. The court refused to find bad faith management or fraud, stating that there was "simply no evidence to show that Mr. Cabral continued to impoverish the community or take advantage of it in any way."

During marriage, recovery of damages for fraudulent mismanagement of community property is difficult to obtain. Even though the spouse in Auger was able to make an adequate showing, the court pointed out suspicious circumstances with particularity. The court in Auger only allowed recovery of damages after articulating a laundry list of factors, any of which alone could have indicated the managing spouse's less than sincere interest in managing the community property.

To recover under article 2354, a spouse can also show the other spouse's action was in bad faith. Although the matrimonial regimes articles do not define bad faith, comments found within

52. 381 So. 2d 879 (La. App. 2d Cir. 1980).
53. Id. at 882.
54. 543 So. 2d 952 (La. App. 5th Cir. 1989).
55. Id. at 954.
56. Id. at 955.
57. Id. See also Pellerin v. Pellerin, 550 So. 2d 1250 (La. App. 4th Cir. 1989), in which a wife was unsuccessful in her attempt to show her husband mismanaged the stocks of a community-owned laundry machine sales company, because testimony indicated that it was typical in small family corporations to not pay dividends on common shares.
58. See supra text accompanying note 57.
the obligations section of the Louisiana Civil Code, which also make use of the phrase, indicate a definition. The comments to article 1997 state that "[a]n obligor is in bad faith if he intentionally and maliciously fails to perform his obligation," and distinguish between fraud and bad faith. Fraud is "a stratagem or machination to take unfair advantage of another party"; bad faith is "an intentional and malicious failure to perform." Using these definitions, a spouse who makes a bad or stupid decision will not violate the standard set forth by article 2354: "Either spouse can do as he or she will with equal management community property, subject only to the flimsy limitation that such spouse not defraud [or act in bad faith vis-à-vis] the other." Further, a duty not to act in bad faith is not the same as a duty to not use bad judgment: "A spouse who takes a risk on the stock market may have exercised bad judgment, but she has not acted in bad faith."

Just as acting with bad judgment will not be considered bad faith, neither will acting in one's own self-interest. In McClanahan v. McClanahan, a husband, during his second marriage, appointed his children from a previous marriage as partners in his company. The court found no evidence that this was done in an attempt to divert money away from the community and strictly required a showing of bad faith or fraud. It explained, "It seems that acting out of self interest is not enough to constitute fraud or bad faith under Article 2354. Rather, a subjective element, the intent to injure or the intent to reduce a spouse's community interest, must be established." Other courts have also required evidence of the intent to injure the non-

62. Id. at cmt. c.
65. 868 So. 2d 844 (La. App. 5th Cir. 2004).
66. Id. at 858.
67. Id. at 848.
managing spouse.\(^{68}\) In order for the non-managing spouse to recover, he must prove bad faith or fraud.\(^{69}\)

During the marriage, and under Louisiana Civil Code article 2354, a spouse must prove fraud or bad faith in the management of the community property. In short, the spouse must prove malicious intent. Unlike the duty owed by the husband to his wife in the days of the head and master scheme,\(^{70}\) current article 2354 does not impose a fiduciary duty upon the managing spouse.\(^{71}\) Rather than a fiduciary duty or an affirmative duty to act in good faith, the duty imposed by article 2354 is a “negative duty” not to act in bad faith.\(^{72}\) And while good and bad faith make for an interesting dichotomy, the mandate not to act in bad faith does not necessarily equal a duty to act in good faith. There is a gray area between the two poles, and it is in this gray area that the law allows for concepts like negligence and neglect.\(^{73}\) As Professor

\(^{68}\) See *Katz v. Katz*, 423 So. 2d 1277, 1279 (La. App. 4th Cir. 1982), in which the court held that the wife did not have a cause of action for mismanagement of a community-owned furniture store because there was no evidence of fraud and “no evidence of a disposition of property intentionally designed to injure the wife by reducing her community interest.”

\(^{69}\) In *Cooper v. Cooper*, the court held that absent the plaintiff-wife specifically alleging and proving fraud or bad faith management, she could not hold the husband accountable for a “secret bank account” into which he had deposited community funds. 619 So. 2d 1210 (La. App. 1st Cir. 1993).

\(^{70}\) See *supra* Part II.A–B.

\(^{71}\) To impose a fiduciary duty upon spouses in Louisiana, some argue that something more than equal management of community property must exist. One commentator has noted in relation to the current duty:

If a duty of prudent administrator exists, it is because one spouse has asserted control over the interest of the other spouse and thus undertaken its management as gestor. The reasons offered in support of a fiduciary obligation [between spouses] . . . are incorrect. The law regulating negotiorum gestio applies.


\(^{73}\) *Black’s* Law Dictionary defines negligence as:

The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against
Spaht noted, "There is a range of behavior not considered to be fraudulent or bad faith, yet such conduct is also not ‘good faith.’ Therefore, it is clear that the obligation imposed during the existence of the community is not a fiduciary obligation . . ."74 The low standard imposed upon spouses during the marriage to not act with malicious intent is especially inadequate when considered contemporaneously with the heightened duty imposed during the interim period between termination of the community regime and partition of community property.

2. Management of Community Property Between Divorce and Partition

Even though a court will only consider a spouse’s bad faith or fraudulent acts of management during the marriage as worthy of allowing a cause of action for damages, a court will impose a broader duty of management of community property after the marriage is dissolved.75 Once the marriage is over, the Louisiana Civil Code contemplates the court entering the fray and scrutinizing many more transactions involving community property. Suddenly, the duty to manage community property is heightened. The article 2354 responsibility to not act in bad faith or fraudulently is supplanted by Louisiana Civil Code article 2369.3, which states that “a spouse has a duty to preserve and manage prudently former community property under his control.”76 The comments to article 2369.3 state that it imposes an affirmative duty distinguished from the duty imposed upon regular co-owners.77 The comments also give insight as to why the duty is suddenly heightened, indicating that “after the termination of the community property regime, the law no longer assumes that a spouse who has former community property under his control will

unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of other’s rights.

BLACK’S LAW DICTIONARY 1061 (8th ed. 2004).
74. Spaht, supra note 51, at 709.
75. See LA. CIV. CODE ANN. arts. 2369.1, 2369.3 (2007).
76. LA. CIV. CODE. ANN. art. 2369.3 (2007).
77. Art. 2369.3 cmt. a.
act in the best interest of both spouses in managing it."78 A spouse who breaches this affirmative duty is "answerable for any damage caused by his fault, default, or neglect."79

The language in article 2369.3, that a former spouse is "answerable for any damage caused by his fault, default, or neglect," is very similar to the language used to describe the duty imposed upon a usufructuary.80 The usufructuary is also "answerable for losses resulting from his fraud, default, or neglect."81 The Louisiana Supreme Court, in interpreting the standard to which a usufructuary would be held, stated that the usufructuary was to take care of the property subject to the usufruct "as though it were his own."82 The management standard imposed upon a former spouse during the period following divorce but prior to partition under article 2369.3 is just as high as the standard to which the usufructuary is held. Indeed, a former spouse must do more. In addition to a spouse's duty to "manage prudently," he also must account for and preserve former community property in accordance with articles 2369 and 2369.3.83

During the period between filing for divorce and partition of community property, the duties imposed upon the managing spouse are threefold. Two of these duties, (1) to account, and (2) to preserve, ensure that the community property partitioned is the same property that existed at the termination of the marriage. By imposing a duty to account, former spouses have the opportunity to force disclosure regarding management aspects of former community property. In effect, one spouse can force the other to engage in a type of "exit interview" in which the management of property under his control is documented. The duty to preserve likewise ensures that the community property remains intact until

78. Id.
79. Art. 2369.3.
80. A usufructuary is a person who has rights to the use and fruits of a thing while another holds its "naked" ownership. For more information, see LA. CIV. CODE ANN. arts. 535–629 (2007).
83. LA. CIV. CODE ANN. arts. 2369, 2369.3 (2007). Under article 2369, a former spouse has a "duty to account." Additionally, under article 2369.3, a former spouse has both a "duty to preserve" and a duty to "manage prudently."
partition. Both of these duties result in the former community property being placed in a type of "stasis." Keeping the former community property in this sort of stasis reflects the pragmatic concern voiced in the comments of the matrimonial regimes articles—that during this period, the law assumes the spouses no longer have each other’s best interests at heart. During the period between filing for divorce and the partitioning of community property, spouses presumably will not be thinking primarily about the good of the community property.

The "freezing" of community property through the duty to account and the duty to preserve not only ensures that spouses do not dispose of property that should be subject to court partition, but also results in the managing spouse having no obligation to increase the former community. Louisiana Civil Code articles 2369 and 2369.3 do not impose a duty upon a spouse to benefit the former community during the interim. Thus, in Barbin v. Barbin, a wife asserted that she was entitled to interest that would have been earned if community funds had been invested during the period preceding partition. The court rejected this argument, stating that the husband did nothing wrong in “allowing community funds to be idle prior to the partition.” Allowing community funds to be “idle” in this instance ensured that the community property remained as it was at the time of divorce until the court had an opportunity to partition the property.

While the line drawn at filing for divorce is arbitrary, from a pragmatic perspective, it is the most outwardly visible line to draw. At the point that a spouse petitions for divorce, the community assets are preserved until partition. As long as the community property in existence at the termination of the marriage remains

84. Art. 2369.3 cmt (a).
85. Although an action increasing or benefiting the community during this interim period would result in an increase in the managing spouse’s patrimony, the law reflects a concern that divorcing spouses will mismanage or deplete former community property (either out of spite or ambivalence), despite the fact that such mismanagement or depletion also harms the managing spouse’s share of the former community property.
86. 546 So. 2d 609 (La. App. 3d Cir. 1989).
87. Id. at 611.
available for court partition later, a spouse has fulfilled his or her duty to preserve.\textsuperscript{88}

3. \textit{Comparison of the Management Standards During and After Marriage}

When compared to the standard set forth by article 2369.3, the standard set forth for management of community property during marriage seems especially low. A look at several cases involving bad business decisions by spouses reveals the difference between the standard imposed on a managing spouse during the marriage and that imposed during the period in between filing for divorce and the partition of community property.

In \textit{Aymond v. Aymond}, a husband claimed his wife left the marital domicile and prematurely cashed in community certificates of deposit for half a million dollars.\textsuperscript{89} In doing so, the community incurred withdrawal penalties. The court declined to award the husband damages under article 2354, stating that “[a]lthough Mrs. Aymond’s actions were somewhat ill-advised, we do not find they were fraudulent.”\textsuperscript{90}

On the other hand, in \textit{Gibson v. Gibson}, the court analyzed similar facts under article 2369.3 and found that the wife could recover damages based on her husband’s post-divorce management.\textsuperscript{91} After the spouses’ divorce, the former husband withdrew funds from a community retirement plan without the knowledge or consent of his former wife.\textsuperscript{92} The withdrawal of the funds resulted in a twenty percent reduction of the fund by the

\textsuperscript{88} The duty to preserve imposes upon a spouse the duty to continue the existence of the formerly community-owned thing in a manner consistent with its condition during the community. The managing spouse must do what is necessary to maintain the thing until the court can partition assets. In \textit{Bordenave v. Bordenave}, the court reasoned that a former spouse was entitled to reimbursement of half the mortgage payments made during the interim, because such payments were necessary to prevent foreclosure on the former community home. 869 So. 2d 249, 253 (La. App. 4th Cir. 2004).

\textsuperscript{89} 758 So. 2d 886 (La. App. 3d Cir. 2000).

\textsuperscript{90} \textit{Id.} at 891.

\textsuperscript{91} 692 So. 2d 708 (La. App. 3d Cir. 1997).

\textsuperscript{92} \textit{Id.} at 709.
husband's former employer. The court held that the husband breached his duty and that under article 2369.3, bad faith was not required; merely a showing of neglect or that one acted imprudently was sufficient.

Thus, while the wife in Gibson was able to recover because of her husband's "imprudent" actions under article 2369.3, the husband in Aymond could not be reimbursed for his wife's "ill-advised" actions under article 2354. One might attempt to reconcile the cases by arguing that it is not as great of a decision to withdraw early from a short-term investment, such as a certificate of deposit, as it is to withdraw early from a long-term investment, such as a retirement fund. However, in both cases the managing spouse withdrew from a community investment and that withdrawal was characterized as merely a bad business decision. Only the timing of the bad business decision, and thus which article dealing with management of community property applied, dictated whether the spouses were able to recover.

Early withdrawal from a retirement fund is the type of management decision that affects the community property of spouses across the economic spectrum. From the least affluent to the embarrassingly rich, articles 2354 and 2369.3 dictate the ability to recover damages for mismanagement of extremely common community assets, such as retirement funds.

As demonstrated in Gibson, when analyzing the duty owed under article 2369.3 to manage prudently, courts look for a spouse's fault, neglect, or imprudence. The court affirmed a finding of imprudent mismanagement in Norman v. Norman. There, the trial court found a "dramatic drop" in the managing husband's rent collection as well as a failure to list available apartments for rent or to make "minimal repairs." The trial court determined "that Mr. Norman breached his duty of prudent administration by failing to properly manage the properties and allowing them to deteriorate." Under the heightened standard of

93. Id.
94. Id. at 710.
95. 775 So. 2d 18 (La. App. 4th Cir. 2000).
96. Id. at 21.
97. Id. at 23–24; see also Kyson v. Kyson, 596 So. 2d 1308, 1319 (La. App. 2d Cir. 1991); Smith v. Succession of Smith, 298 So. 2d 146, 148 (La. App. 1st
management imposed by Civil Code article 2369.3, Mr. Norman breached his duty to his wife. However, if such actions had taken place during the community regime and under Civil Code article 2354, no such breach would have been found.

The difference in management duties imposed upon spouses during marriage and during the interim produces inconsistent results. The same ill-advised action will not yield recovery during the marriage but will during the interim period. Such inconsistency produces illogical results and affects the community property of all spouses—from those with few assets, such as retirement funds, to those with many, such as rental properties.

III. MOVING TOWARD A HEIGHTENED MANAGEMENT STANDARD

The management standard imposed upon spouses during marriage should be raised in order to be consistent with the standard imposed upon spouses during the period following termination of the marriage and before partition of community property. Allowing court involvement during the marriage would also be consistent with what courts already do when granting judicial authorization for one spouse to manage community property that normally would require the concurrence of the other spouse. Raising the standard during marriage would likewise be consistent with the standards imposed on other relationships in the Louisiana Civil Code and the duty imposed upon married spouses in another community property state, California.

A. The Need for a Continuous Management Standard

Raising the duty imposed on spouses managing community property during the marriage to the standard imposed during the interim, the period between termination of the marriage and partition of the community property, would better fit into the concept of creating a stasis period between divorce and partition. Community assets are frozen during this interim through the duty to preserve and the duty to account, yet management duties are

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Cir. 1974) (both describing the managing spouse’s duty as that of a prudent administrator).
heightened. Former spouses should be subject to the heightened management standard throughout the marriage until the partition of community property, and the duty to preserve and to account should be added in order to ensure that the community property that existed at the time of the dissolution of the marriage is the community property available to the court at the time of partition.

As comparison of the cases indicates, the distance between the management duty imposed during marriage and that imposed during the interim is vast. Instead, the management standard imposed upon spouses should be uniform throughout their relationship up until the final partition of community property. Allowing such an artificial distinction based on dissolution of the marriage fails to take into account the period preceding filing for divorce. Spouses should be held to the same standard throughout when it comes to management of community property, because it is impossible for the law to truly determine when the spouses no longer have each other’s best interests at heart. Having the same management standard throughout would also be simpler on the spouses themselves, who would be able to continue managing the property as they were during the marriage rather than suddenly being subjected to a heightened standard.

Holding spouses to the same management standard throughout their marriage recognizes the artificial nature of the date spouses file for divorce. Recognition of some date that marks the end of the community is necessary for the freezing of community assets until the time of partition, but it is not necessary for imposing a management duty. The decision to divorce does not come upon spouses suddenly; rather, there is a pre-filing period that the current law does not sufficiently protect.

Regarding this pre-filing period, Lytal v. Lytal is instructive. There, the court affirmed the trial court’s injunction, which stopped the husband from disposing of community property during the interim period between divorce and partition. It found the husband had a “preplanned divorce strategy” and that he had engaged in a pattern of preparation for the divorce before filing for

98. See discussion supra Part II.D.
99. 818 So. 2d 111 (La. App. 1st Cir. 2001).
100. Id.
termination of the marriage. In his concurrence and partial dissent, Judge Kline quoted the lower court, which had found the husband's exit strategy to be the "corporate equivalent of a roughneck's wife cleaning out all the family assets while he's offshore."  

Those outside the legal community have also recognized that spouses engage in preplanning for an imminent divorce. The "pre-divorce decision period," as one researcher pointed out, "may last weeks, months, or years." In an article discussing British families, Robert Chester noted that the "legal duration of marriage does not properly depict the time which marital unions effectively endure." Recognizing a period before spouses actually file for divorce in which separation has already begun, Chester drew a distinction between the de jure period of the marriage, that which spans the wedding date to the date of the divorce decree, and the de facto period, which spans from the wedding day to the date of separation or break-up of the marriage. As he went on to note, "in the majority of cases there is considerable time lapse between parting and petitioning . . . ." Chester also pointed out that spouses could view the period leading up to a divorce very differently; one spouse may foresee the end of the relationship, and the other spouse may be oblivious.  

If there is a long road from marital strife to marital end, it stands to reason that an unhappy spouse will begin asserting his identity apart from and possibly against the other spouse before the marriage legally ends. Raising the management standard during

101. Id. at 114.
102. Id. at 116 (Kline, J., concurring in part and dissenting in part) (quoting the lower court).
103. Kenneth Kressel, Patterns of Coping in Divorce and Some Implications for Clinical Practice, 29 FAM. REL. 234, 237 (1980).
105. Id. at 172.
106. Id. at 176.
107. "Sometimes also the couple may have asymmetrical attitudes towards the situation, with one partner regarding the marriage as still existing, and declining to adopt a pattern of life based on the fact of separation." Id. at 180.
108. See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 957 (1982) ("The premise underlying the personhood perspective is that to
the marriage would protect spouses going down the road toward
divorce. As one author notes in advocating consensus
requirements for all property decisions between spouses, “cruelty
is a part of human nature as well as love, and the family, with its
intense attachments, dependencies, and power imbalances is a
breeding ground for all kinds of private cruelties.”1

Because the
time of true separation is so difficult to define, the law should
protect spouses equally during both marriage and the interim
period between divorce and partition by imposing a continuous
heightened management standard.

While imposition of the law during marriage could be seen as
an impermissible interference and entry into the private realm of
marriage, for spouses headed toward an inevitable divorce, the
concern that spousal litigation will erode and facilitate a
breakdown of trust is misplaced. In these situations, the intimate
trust between the spouses has broken down before the law’s
intervention. For spouses who genuinely wish to work through a
property dispute during marriage and do not foresee the end of
their marriage, the concern about litigation widening the breach
between spouses is arguably more appropriate. In these cases,
however, the spouses will be making a diligent effort to mend the
breach caused by a management dispute and will look to the law
for facilitation of that mending. Only in situations in which
spouses are intent on remaining married and one spouse uses the
ability to litigate a greater number of management decisions with
the benefit of hindsight does the concern regarding the limits of
law remain. Despite this concern, in these situations the breach of
trust has happened with or without the law’s intervention.

B. Consistency with Court Involvement During Marriage in
General

While critics of imposing a higher standard during the marriage
may argue that the courts should not become involved in the

achieve proper self-development—to be a person—an individual needs some
control over resources in the external environment. The necessary assurances of
control take the form of property rights.”).

109. De Armond, supra note 63, at 256.
spouses' management of community property during the marriage and that only after the break-down of marriage should courts get involved in such private disputes, the critics fail to recognize that the Louisiana Civil Code requires such involvement in other situations. Louisiana Civil Code article 2355 already contemplates just such an intervention during the marriage.\textsuperscript{110} The article allows a spouse to petition the court for authorization in order to circumvent the requirement of concurrence the Code imposes on particular management decisions.\textsuperscript{111} Although the article applies only to situations in which the concurrence of both spouses is required for certain management decisions, it does indicate a level of willingness to examine management issues during the marriage as opposed to after the dissolution of the marriage. Under the article, a spouse may be able to get judicial authorization through summary proceeding to act without the other spouse's consent if the other spouse is refusing arbitrarily and the petitioning spouse can show that the act would be in the "best interest of the family."\textsuperscript{112} Such a determination requires the court to scrutinize the petitioning spouse's desired act and to consider management decisions affecting community property while the marriage is still intact. Raising the duty under article 2354 would result in the same sort of court intervention at the same period of the marriage's life cycle.

\textsuperscript{111} \textit{Id.} A spouse must obtain the concurrence of the other spouse in order to alienate, lease, or encumber community immovables as well as furniture or furnishings in the family home, "all or substantially all of the assets of a community enterprise, and movables issued or registered as provided by law in the names of the spouses jointly." \textit{La. Civ. Code Ann.} art. 2347 (2007). Unless a gift is deemed customary or usual, concurrence is also required for donations. \textit{La. Civ. Code Ann.} art. 2349 (2007). If concurrence is required and a spouse fails to obtain such concurrence, the transaction is relatively null. \textit{La. Civ. Code Ann.} art. 2353 (2007). While the court will grant the petitioning spouse authorization, it will not force the refusing spouse to act. In \textit{Allen v. Allen}, the court explained, "nothing in this article permits the court to order the dissenting spouse to agree and comply with the management decisions being undertaken by the other spouse." 611 So. 2d 790, 792 (La. App. 4th Cir. 1992).
\textsuperscript{112} Art. 2355.
C. Consistency with Standards of Care Imposed by the Louisiana Civil Code on Other Relationships

In addition to heightening the management standard during marriage in order to be consistent with the standard imposed during the period between termination of the marriage and partition of community property, the standard imposed during marriage also should be raised to be consistent with standards of care imposed by the Louisiana Civil Code in other relationships. The relationships between business partners, curators and interdicts, as well as mandataries and principals all share the common thread of being based upon foundations of confidence. In these relationships, the law expects a certain level of trust to attach. Similarly, a relationship of confidence and trust should be presumed between spouses during marriage. Just as the law protects parties in other relationships of confidence, so too should the law protect married spouses.

1. Business Partners: A Fiduciary Duty

According to Louisiana Civil Code article 2809, business partners owe each other a fiduciary duty.\textsuperscript{113} As that article states, a partner “may not conduct any activity . . . that is contrary to his fiduciary duty and is prejudicial to the partnership.”\textsuperscript{114} The comments to that article further explain this duty, stating, “The relationship of the partners is fiduciary and imposes upon them the obligation of good faith and fairness in their dealings with one another.”\textsuperscript{115} Further, the same duty that exists during the partnership is also imposed until the partnership is liquidated; the law does not heighten the standard after the partnership decides to dissolve.\textsuperscript{116}

In the \textit{Louisiana Civil Law Treatise} on \textit{Business Organizations}, Glenn G. Morris and Wendell H. Holmes discuss the fiduciary duty between partners:

\begin{enumerate}
\item \textsuperscript{113} \textsc{La. CIV. Code Ann.} art. 2809 \textsc{(2007)}.
\item \textsuperscript{114} \textit{Id}.
\item \textsuperscript{115} \textit{Id.} at cmt. b.
\item \textsuperscript{116} \textit{Id}.
Their duties may be described under generalized headings of “care,” “loyalty,” “good faith” and the like, but none of these generalized headings is much more helpful than the label “fiduciary” itself in determining the precise content of a particular, concrete duty to do or refrain from doing some specific thing. The content and scope of these more particular forms of duty—the actual duties being enforced—should depend heavily on the reasonable expectations of the parties to the relationship.\(^{117}\)

Whatever the details of a partner’s particular fiduciary duty, however, breach of that duty does not require actual intent to deceive. In *Barksdale v. Lincoln Builders, Inc.*, the court remanded and held that limited partners had a cause of action against general partners for a breach of the general partners’ fiduciary duty after the general partners decided to pay themselves fees during a period when there was very little positive cash flow.\(^{118}\) The court explained:

> The standard of a fiduciary’s duty to his beneficiary, depending on the facts of the case, lies somewhere between simple negligence and willful misconduct or fraud with the intent to deceive; the actual intent to deceive is not required where one party is placed in such an advantageous position to the other.\(^{119}\)

The duty imposed upon partners here is reminiscent of the duty previously imposed upon the husband when he was head and master of the community.\(^{120}\) There, as with the relationship between partners, the duty arose because one party was in a position which, if abused, could be used to take advantage of the other. While the husband is no longer head and master of the community, under equal management\(^{121}\) the ability to abuse the power to manage community property still exists. Even though


\(^{118}\) 764 So. 2d 223 (La. App. 2d Cir. 2000).

\(^{119}\) Id. at 230–31.

\(^{120}\) See supra Part II.A–B.

\(^{121}\) See supra Part II.C.
spouses are sometimes referred to as “partners” in marriage, unlike a real partnership, they do not produce a distinct juridical person.\textsuperscript{122} Despite this difference, the level of confidence present between spouses in a marriage and partners in a business venture is strikingly similar; in both relationships, one party depends upon the other to make decisions affecting both parties’ interests. If the cases arising out of a partner’s fiduciary duty during the partnership were resolved under the standard imposed upon spouses in the management of community property during the marriage, however, no partner would be able to recover unless he or she could prove the other’s bad faith or fraud.

2. Mandataries: Prudence and Diligence

Like the duty imposed upon business partners, a duty arising out of a position of power and trust also is imposed upon mandataries in Louisiana.\textsuperscript{123} Louisiana Civil Code article 3001 states that the “mandatary is bound to fulfill with prudence and diligence the mandate he has accepted. He is responsible to the principal for the loss that the principal sustains as a result of the mandatary’s failure to perform.”\textsuperscript{124}

The standard imposed upon a mandatary is a high one; he “owes to his principal a duty to act with due care and diligence, a duty of loyalty to avoid conflicts of interest, and a duty to account.”\textsuperscript{125} While the “duty of loyalty is not directly imposed by the mandate articles, it is said to derive from the general obligation of good faith.”\textsuperscript{126} As further definition of this duty, Leonard Oppenheim and Sidney Pugh Ingram refer to the “prudent man rule,”\textsuperscript{127} which originated in the New York case of \textit{King v.}

\begin{itemize}
\item \textsuperscript{122} "A partnership is a juridical person distinct from its partners . . . ." \textit{LA. CIV. CODE ANN. art. 2801 (2007).}
\item \textsuperscript{123} The mandate in the civil law is the equivalent of agency in the common law.
\item \textsuperscript{124} \textit{LA. CIV. CODE ANN. art. 3001 (2007).}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{LEONARD OPPENHEIM & SIDNEY PUGH INGRAM, TRUSTS § 352, in 2 LOUISIANA CIVIL LAW TREATISE 357 (1977).}
\end{itemize}
In that case, Judge Woodruff held that a trustee should not have invested in stocks using funds intended for his beneficiaries. The court held that a trustee could not invest in risky ventures, even if he would do so with his own money because of the speculative nature of the investment and the trustee’s primary responsibility to the beneficiaries. As Judge Woodruff explained, “the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters, employ in their own affairs.”

In 1975, the Louisiana Supreme Court discussed the mandatary’s duty in Noe v. Roussel. There, the defendant-mandatary was the sole liquidator of a corporation which owned a 15,000 acre tract of land. Plaintiff-principal sought to rescind the sale of the tract, asserting that the defendant sold the property for an inadequate consideration. The court agreed that the defendant breached his duty, especially since he failed to have the property appraised before the liquidation sale.

The Louisiana Supreme Court willingly held the mandatary to a high standard, stating that the fiduciary “must zealously, diligently, and honestly guard and champion the rights of his principal against all other persons whomsoever, and is bound not to act in antagonism, opposition or conflict with the interest of the principal to even the slightest extent.”

A mandatary may also breach his duty to his principal by failing to “act with complete candor . . . .” Like the duty imposed upon business partners nuanced by the specific understanding between them, the mandatary’s duty to the principal

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128. 40 N.Y. 76 (N.Y. 1869).
129. Id. at 89.
130. Id. at 86, 89.
131. Id. at 85–86.
132. 310 So. 2d 806 (La. 1975).
133. Id. at 808.
134. Id. at 809.
135. Id. at 819.
136. Id. at 818–19.
is further colored by the particular relationship between the parties. Courts look to the precise nature of the relationship between principal and mandatary to determine exact duties. Whatever the particularized nature of the duty between mandatary and principal, that duty stems, like the duty between business partners, from a presumption of trust. In *Gerdes v. Estate of Cush*, the court explained the duty of the mandatary as "loyalty which results from the position of trust . . ." The Louisiana Supreme Court also characterized the relationship as one arising out of the trust between principal and mandatary in *Cuggy v. Zeller*. Just as the duty between mandataries and principals arises out of the trust between the two parties, so too should the duty one spouse owes the other in the management of community property during the marriage be heightened because of the trust between husband and wife. While the comments to the current matrimonial regimes articles explicitly state that spouses are not mandataries of one another, cases involving old article 2404 routinely defined the relationship between husband and wife as a fiduciary one. Indeed, the imposition of a fiduciary duty upon spouses is not contingent on the characterization of the spouses as mandataries of one another. In order to be consistent with the standard imposed upon mandataries, however, the duty found in article 2354, to not act in fraud or bad faith when managing community property, should be raised.

3. Curators: The Highest Duty

The duty owed between spouses should be raised in order to be consistent with the duty imposed upon business partners and mandataries, but the duty under article 2354 should not rise to that imposed upon the curator. Perhaps the highest duty of care imposed upon anyone in the Louisiana Civil Code is the one owed

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139. 953 F.2d 201, 205 (5th Cir. 1992).
140. 61 So. 209, 210 (La. 1913).
141. LA. CIV. CODE ANN. art. 2346 cmt. b (2007).
142. See *supra* Part II.B.
by the curator to her interdict. Louisiana Civil Code article 392 states that “[i]n discharging his duties, a curator shall exercise reasonable care, diligence, and prudence and shall act in the best interest of the interdict.”143 The comments to the article go on to state that the “curator should consider the interdict’s preferences, religious beliefs, and values to the extent known to the curator.”144

In reviewing a curator’s decision, courts will analyze deeply the particular relationship involved. In Interdiction of Rodrigue, a husband acting as his wife’s curator after she was interdicted due to Alzheimer’s and other forms of dementia sought to relocate her to a care facility in Texas.145 The court allowed the relocation, believing that it would be in the wife’s best interest even though her daughters, who were opposed to the move, lived in Louisiana.146 The Texas facility was better; it offered more and cost less. Even though the wife’s daughters lived in Louisiana, the court found they were not part of her daily life.147 In making its decision, the court stated “[c]learly, a curator at all times must act exclusively in the best interest of the interdict.”148

Not only are courts willing to analyze deeply what is in the best interest of the interdict in situations such as the one in Rodrigue, they also impose upon a curator the duty to gain knowledge of important happenings in the interdict’s affairs. In Hebert v. Wise, the plaintiffs sought to annul a tax sale of immovable property, asserting that they did not receive notice of the sale.149 The owner of the property had been interdicted, but there was nothing in the conveyance records indicating as much.150 The court held that it fell to the curator to know of the sale and that he should have made an effort to obtain the interdict’s mail.151 According to the court, if he had fulfilled his duties, the curator would have “take[n] steps to receive the interdict’s mail and learn of proceedings pending

143. LA. CIV. CODE ANN. art. 392 (2007).
144. Id. at cmt. c.
145. 927 So. 2d 421 (La. App. 1st Cir. 2005).
146. Id. at 426.
147. Id.
148. Id. at 423.
149. 666 So. 2d 409 (La. App. 1st Cir. 1995).
150. Id. at 413.
151. Id. at 414.
against the interdict’s property . . . .”\textsuperscript{152} The court set forth an extremely high standard, stating that a “curator at all times must act exclusively in the best interest of the interdict. He must scrupulously administer the affairs of the interdict and explore every avenue available for fulfilling his duty to the interdict.”\textsuperscript{153}

To impose a standard as high as the one imposed upon curators in the context of management of community property during marriage would not be feasible. Spouses, as owners of an undivided half interest in the community property,\textsuperscript{154} necessarily cannot act in the best interest of the other spouse exclusively. While there is logic behind imposing such a high duty upon curators, this logic does not translate to duties between spouses. The duty imposed upon curators is high because interdicts have been deemed by the court “unable consistently to make reasoned decisions regarding the care of [their] person or property, or to communicate those decisions . . . .”\textsuperscript{155} The interdict cannot be expected to protect his own interests in the least; he is totally at the mercy of the curator. This transcends the relation of trust seen between business partners, mandates and principals, and spouses; it instead becomes a relationship of dependence. Spouses do not and should not depend upon one another in this way. Spouses, as owners of their community property, should be capable of making reasoned management decisions.

Therefore, while the standard imposed upon spouses in the management of community property should never rise to the level of that imposed upon curators, it should be raised to correspond with the duty imposed upon partners and mandataries. These relationships share a common thread of trust and confidence. In all except the relationship between spouses, the law recognizes that this trust and confidence carries with it the potential for abuse and indiscretion and imposes fiduciary duties in recognition of that risk. Although some critics argue that raising the standard during marriage to a level consistent with the standards defined in other relationships would result in an insurmountable flood of litigation,

\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} LA. CIV. CODE ANN. art. 2336 (2007).
\textsuperscript{155} LA. CIV. CODE ANN. art. 389 (2007).
one community property state, California, has raised the management standard between spouses during marriage and has not experienced such inundation.

D. Consistency with California: A Fiduciary Duty

It is possible and practical for Louisiana to recognize the potential for abuse and indiscretion and to impose a heightened standard during the marriage. Other community property states have led the way in requiring such a duty. California sets forth an explicit duty between spouses during marriage: "Each spouse shall act with respect to the other spouse in the management and control of community assets and liabilities in accordance with the general rules governing fiduciary relationships." California law further explains, "This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of non-marital business partners." California, then, imposes not only a fiduciary duty, but also defines that duty as subject to the same dynamics as business partners. It has been a long road to California’s articulation of this standard. While California started out in the same place as Louisiana, the law in California has ended up much more progressive.

1. Development of a Need for an Articulated Standard

California, like Louisiana, began with a community property management scheme "largely characterized by male management." Like under Louisiana’s head and master rule, the husband was

156. Although Wisconsin also imposes a higher duty between spouses in the management of community property—that of “good faith”—the adoption of this standard is new and does not yet add much insight. Wis. Stat. § 766.15 (2007).
160. See supra Part II.A–B.
deemed to stand in a fiduciary relationship to his wife. In determining what this fiduciary duty entailed, California courts considered the confidential nature of the relationship between spouses. In *Fields v. Michael*, for example, the husband allegedly made large, clandestine gifts of community property to fictitious people. As the court explained, “It is clear that, being a party to the confidential relationship of marriage, the husband must, for some purposes at least, be deemed trustee for his wife in respect to their community property.” The court thus analyzed the management duty of the husband to his wife through recognition of the confidential relationship between the spouses.

California courts continued to recognize the confidential nature of the spouses’ relationship but questioned whether a husband’s fiduciary duty arose from both this confidence and the husband’s position as manager of the community property. In *Vai v. Bank of America National Trust and Savings Association*, a widow sought to rescind a property settlement agreement, asserting that her dead ex-husband had fraudulently failed to inform her of the actual value of their community property. The court, in discussing the duties the decedent owed to his wife, stated that those duties arose from the husband’s management and control of the property and distinguished these duties from those arising purely out of the confidential nature of the relationship between the two. One judge dissented from the majority opinion in *Vai*, disagreeing with such a distinction and characterizing the fiduciary relationship between spouses as a function of both the confidential relationship between them as well as the fact that one was in control of the community property. In his view, “When a confidential relationship exists, the spouses are held to a very high degree of fiduciary duty.”

Despite the disagreement regarding the source of husband’s fiduciary duty, the court in *Vai* noted the similarity between

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162. *Id.* at 404.
163. *Id.* at 405.
165. *Id.* at 252.
166. *Id.* at 259 (Traynor, J., dissenting).
167. *Id.*
dissolution of a partnership and dissolution of a marriage and held that whatever the management duty of the husband, the rules governing that duty "should be no fewer or less rigorous than those imposed upon business partners." 168

Other California cases relied on Vai to distinguish the husband's fiduciary duty arising from his management of community property from the confidential relationship between the spouses. In one case, the court found that while the husband, as manager of the community property, owed a fiduciary duty to his wife, that duty was not increased because of the existence of a confidential relationship. 169 In Marriage of Modnick, the court held that a husband committed fraud when he failed to disclose the existence of community property and took deliberate steps to conceal the property. 170 The court seemed to find the husband's duty as arising from neither his management position nor the confidential nature of marriage but rather from both. The "duty stem[med] in part from the confidential relationship. It also [arose] from the fiduciary relationship that exist[ed] between the spouses with respect to the control of community property." 171

Regardless of whether California courts viewed the duty as stemming only from the husband's position as manager or from his position as manager as well as the confidential nature of marriage, courts imposed a duty upon the managing spouse and were willing to recognize marriage as a confidential relationship. Disagreement about the source and nature of this duty indicated a need for an explicit standard.

2. The Standard Imposed Upon Managing Spouses

While courts imposed some sort of duty upon the managing spouse of community property, the question arose as to where that duty came from and exactly what it entailed. In 1986, Senator Lockyer introduced Senate Bill 1071 at the request of the California Commission on the Status of Women, whose articulated goal was to "set a standard for married partners requiring the same

168. Id. at 253 (majority opinion).
171. Id. at 191 (citations omitted).
kind of honesty and openness in dealing with property and finances during the marriage that society demands of business partners.\textsuperscript{172} Although this sort of standard—one compared to the duties owed by business partners—had been established by prior jurisprudence, the Commission sought to set out such a duty explicitly.\textsuperscript{173} As one proponent of an articulated and explicit standard noted, "it reduces the incentive to divorce as a solution to problems of property management. . . . California's recognition that divorce is not necessarily the answer for many couples with financial disputes reflects what may be a more realistic appraisal of both [marriage and divorce]."\textsuperscript{174}

The amendment set forth an explicit duty of good faith,\textsuperscript{175} and in \textit{Marriage of Baltins}, the court had an opportunity to discuss this standard.\textsuperscript{176} In \textit{Baltins}, a wife successfully sought to set aside property and support agreements on the grounds of duress, which the court referred to as "psychological coercion," after her husband threatened her with bankruptcy and no contact with their child.\textsuperscript{177} As the court explained, "[e]ach party is bound in transactions with the other to the highest and best of good faith and is obligated not to obtain and retain any advantage over the other resulting from concealment or undue pressure."\textsuperscript{178}

In 1991, the California Third Circuit Court of Appeal again used the mandate that a spouse act in good faith in the management and control of community property to find that a husband had abused his management right and owed his wife reimbursement.\textsuperscript{179} During the separation period, a community-owned company had paid "the insurance, maintenance, and principal and interest payments" on a new Porsche as well as other personal expenses

\textsuperscript{172} Bruch, \textit{supra} note 159, at 736.
\textsuperscript{173} \textit{Id.} at 731.
\textsuperscript{174} \textit{Id.} at 761.
\textsuperscript{175} "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 action of persons having relationships of personal confidence . . . ." \textit{Id.} at 763.
\textsuperscript{176} 260 Cal. Rptr. 403 (Cal. Ct. App. 1989).
\textsuperscript{177} \textit{Id.} at 417.
\textsuperscript{178} \textit{Id.}
including meals and vacations.\textsuperscript{180} Additionally, the company "hired" the husband's new girlfriend as a marketing director, despite the fact that she had no experience.\textsuperscript{181}

In 1992, an amendment changed the California duty from one of good faith to a fiduciary duty.\textsuperscript{182} As one court noted, good faith had no definite meaning and the fiduciary duty imposed would be higher than a duty to act in good faith.\textsuperscript{183} Courts imposed a duty of full disclosure based on the managing spouse's "superior position" to obtain information regarding the community asset.\textsuperscript{184} In \textit{Marriage of Walker}, the court held that a wife would have breached her duty of disclosure under the new, higher standard when she failed to tell her husband about withdrawals from a community IRA and the subsequent tax consequences of those withdrawals.\textsuperscript{185} However, the duty of disclosure imposed by the amendment was not retroactive.\textsuperscript{186}

After 1992, the duty owed between spouses under the new amendment was also described as a "reciprocal fiduciary duty."\textsuperscript{187} In changing the management duty owed between spouses from one of good faith to a fiduciary duty, the California legislature raised the duty and imposed a standard even further from that imposed upon spouses in Louisiana.

3. Relation to Louisiana

The trajectory of California in defining and refining the duty owed between spouses lends insight into how Louisiana should redefine its standard. California and Louisiana started from the same point, with both granting management power over

\textsuperscript{180} \textit{Id.} at 484.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} In 1994, section 5125 was repealed and replaced with California Family Code article 1100, which was merely a continuation of section 5125 without substantive change. \textit{CAL. FAM. CODE} § 1100 (West 2007).
\textsuperscript{184} \textit{In re Marriage of Brewer & Federici}, 113 Cal. Rptr. 2d 849, 858 (Cal. Ct. App. 2001).
\textsuperscript{185} 42 Cal. Rptr. 3d 325 (Cal. Ct. App. 2006).
\textsuperscript{186} \textit{Id.} at 339–40.
\textsuperscript{187} \textit{In re Stanifer}, 236 B.R. 709, 719 n.12 (B.A.P. 9th Cir. 1999).
community property to the husband and each looking to the other’s jurisprudence for guidance. Legal developments in Louisiana did not go unnoticed by California courts. As Harriet Spiller Daggett noted, “[t]he community regime of the State of Louisiana bears a close resemblance to that of California. . . . The courts of California have cited Louisiana cases in their decisions with some frequency . . . ” While both states subsequently established equal management, California has moved further down the path of recognizing that some sort of affirmative duty during marriage should be imposed upon both spouses. As California courts have recognized, the marital relationship is a relationship of confidence. A function of this confidential relationship should be a higher management duty, something more demanding than that currently found in Louisiana Civil Code article 2354. A spouse in Louisiana who makes expensive and spontaneous purchases with community funds or who gambles on risky stocks with those funds would not be held liable, but a spouse engaging in the same activities under California law could be held liable. In allowing a spouse to recover under such circumstances, California law sends a positive message about the responsibilities marriage carries with it and the importance of considering the other spouse’s community interest.

E. Recognizing the Psychology Behind Management Duties

Raising the standard during marriage in Louisiana would allow spouses an additional option when dealing with property disputes that do not constitute fraud or bad faith. Spouses unhappy with their partner’s management of community property during the marriage currently have limited options under the Louisiana Civil Code. Perhaps the most obvious option is divorce, which would

188. See supra Parts II.A–B, III.D.1.
189. DAGGETT, supra note 9, at 175. Similarly, the Louisiana Supreme Court made use of California jurisprudence when defining the fiduciary duty owed by husband to his wife under Louisiana Civil Code article 2404 (2007). Quoting a California case, the court noted that “the fiduciary duties and rules governing their performance by a husband should be no fewer or less rigorous than those imposed on business partners.” Pitre v. Pitre, 172 So. 2d 693, 695 (La. 1965) (quoting Vai v. Bank of Am. Nat’l Trust & Sav. Ass’n, 364 P.2d 247, 253 (Cal. 1961)).
eventually result in a partition of community property and a heightened standard of care in the management of community property during the interim period between termination of the marriage and partition. For some couples, however, community property disputes do not bring with them the death knell of the marriage itself. For couples with management problems who wish to remain married, the law sets forth the option of a judgment of separation of property.\textsuperscript{190}

Louisiana Civil Code article 2374 allows broadly for a judgment of separation of property "when the interest of a spouse in a community property regime is threatened to be diminished by the fraud, fault, neglect, or incompetence of the other spouse, or by disorder of the affairs of the other spouse . . .."\textsuperscript{191} This standard is broader than that imposed by article 2354; however, a judgment of separation of property necessarily carries with it the dissolution of the community property regime, and such a judgment only affects future management of property. For spouses who wish to either continue their marriage within the community property regime or who seek to address past management decisions, Louisiana Civil Code article 2354 is the only resort. This article, as previously discussed, carries with it the difficult burden of showing malicious intent.\textsuperscript{192}

When California researchers advocated the inclusion of an affirmative management duty between spouses during the marriage, one strong argument was that doing so would allow spouses to deal with property disputes without divorcing. As one commentator noted, not allowing spouses a remedy during marriage "removes from them . . . the option of limited warfare."\textsuperscript{193} While providing such a remedy within the marriage may not be the most pursued option, "a system that guarantees relief only in the divorce court surely enhances marital breakdown."\textsuperscript{194}

\textsuperscript{190} LA. CIV. CODE ANN. art. 2374 (2007).
\textsuperscript{191} Id.
\textsuperscript{192} See supra Part II.D.
\textsuperscript{193} Bruch, supra note 159, at 739.
Although the concerns voiced by advocates in California may not resonate as forcefully in Louisiana given the possibility of a judgment of separation of property, these concerns speak to a deeper issue about how courts, the legislature, and society view marriage and the responsibilities that go along with it. Law certainly has some ability to influence social behavior, and the law can be viewed as both a reflection and a promoter of certain social policies. As Professor Karl Llewellyn noted, "It is Law which sets a goal, contains a threat, and urges to a process . . . . To deny power to it in producing some of what it symbolizes would be to deny power to the flag or the Constitution in producing national feeling and unity." Because of the law's power in setting goals and urging processes, legislators in particular should be highly aware of the social messages laws send.

The messages that laws concerning marriage send should be of particular concern, because they affect so many people and because they have "an important bearing upon how society understands marriage . . . ." Those who are not legally sophisticated enough to know about other aspects of the law still may have first-hand experience with the realm of family law. Even more importantly, many couples may enter into marriages in Louisiana unaware of the legal regime of community property suddenly and automatically imposed upon them. Legally sophisticated couples may avoid the management scheme imposed by articles 2354 and 2369.3 by opting out of the community property regime, but many couples may marry without any awareness of the legal regime of which they are automatically a part.

197. See Sean E. Brotherson & Jeffrey B. Teichert, Value of the Law in Shaping Social Perspectives on Marriage, 3 J.L. & FAM. STUDIES 23, 33 (2001) ("In a democratic society, the law articulates agreed upon rights and moral obligations that serve as tools of social and moral persuasion and provide direction for individual conduct to members and leaders of society.").
198. Id. at 36. See also Carolyn J. Frantz & Hanoch Dagan, Properties of Marriage, 104 COLUM. L. REV. 75, 98 (2004) ("[T]o the extent that law can affect social understandings, marital law is at the center of public awareness and debate.").
While raising the standard between spouses in Louisiana could be analogized to a similar duty seen between business partners, carrying this analogy too far may have dangerous consequences. Spouses, unlike business partners, do not form a separate legal entity through their marriage; rather, they become owners of the community property in indivision. To require a standard exactly the same as that imposed on business partners would send the message that a spouse could view their mate as a professional manager; such a standard "obliterates the important distinction between professional managers, who are paid for their management, and active spouses . . ."199

However, if we wish to promote marriage as a long-term investment, spouses should be able to deal with property disputes within both the marriage and the community property regime. As the Louisiana Supreme Court noted in the context of allowing judicial establishment of a separate property regime, article 2374 enables a "spouse to terminate the community regime without having to end the marriage, thereby protecting the sanctity of the family unit, evidently one of the goals of the legislature . . ."200

After the termination of the marriage there is, unsurprisingly, much less chance of reconciliation. As one researcher noted, "[t]here is likely to be a precipitous drop in the probabilities of reconciliation of an estranged couple once the state has formally dissolved the marriage."201 Not only is there much less of a likelihood of reconciliation after formal dissolution of the marriage, but many couples also regret divorce. In one study, "[f]ully 70% of the wives and 60% of the husbands said that the [now divorced] spouse was the first person they would contact in a personal crisis and that the divorce ha[d] either been a mistake or that they should have tried harder to resolve their differences."202

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202. Kenneth Kressel, Patterns of Coping in Divorce and Some Implications for Clinical Practice, 29 FAM. REL. 234, 235 (1980). Further, this regret did not dissipate quickly: "[T]wo years later one-fourth of the women and one-fifth of the men still expressed strong regret about the divorce." Id.
Any preventative legislation that can be proposed may allow a potentially divorcing couple another option. Introducing a heightened standard sends the message that marriage is a commitment. Any way of encouraging people to deal with marital problems without resorting to divorce should be favored by the law. Indeed, it is this spirit of teamwork that underlies the regime of community property in the first place.

IV. CONCLUSION

The management duty imposed upon a spouse during the marriage, to not act fraudulently or in bad faith, is simply too low. While it is logical to impose additional duties on spouses upon termination of the marriage, specifically, a duty to preserve and a duty to account in order to ensure the court’s ability to partition the entirety of the community property, no such reason exists for suddenly heightening the duty one spouse owes the other in management of that property. Moreover, the duty imposed upon spouses during the marriage is especially low when compared to the duties imposed upon business partners, mandataries, and curators—all relationships which are based, like marriage, on trust and confidence.

While Louisiana and California answered management questions similarly at first, California has ended up in a much better place, and Louisiana should consider following suit. Finally, lawmakers should be aware of the social messages the law sends and shape laws to reflect an understanding of marriage as a long-term investment and commitment. Louisiana should raise the duty owed by spouses during marriage to be more closely aligned with the duty imposed between divorce and partition, the standards of care expected of business partners and mandataries, and the duty imposed upon spouses in other community property states.

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