Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law

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Despite the many controversies surrounding the “equal management” reform of Louisiana’s matrimonial regimes law in 1978, all must concede that at least Act 627 did not burst forth upon the state like a fiery women’s libber out of control. To the relief of many, equal management emerged from the 1978 legislature more like a debutante entering society under the cautious restraint of her parents. The effective date of Act 627 was postponed until after the 1979 legislative session¹ to allow the legislature another opportunity to make any adjustments deemed necessary once the public had had a look at its progeny. Furthermore, the legislature by concurrent resolution ordained serious chaperonage during the period between the 1978 and 1979 sessions by the Louisiana State Law Institute, the Louisiana State Bar Association, and the Joint Legislative Subcommittee on Matrimonial Regimes and its Advisory Committee.² The primary responsibility for proposing refinements during the interim study period was delegated to the Law Institute. The Institute completely revised and reorganized Act 627, while endeavoring, in accordance with the concurrent resolution,³ to preserve the policy decisions embodied in the Act. The Law Institute revision was contained in five separate bills which were presented to the Joint Legislative Subcommittee for approval in March and April. The five bills, with some alterations approved by the Subcommittee, were

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BE IT FURTHER RESOLVED that the Louisiana Law Institute is authorized and directed to review the provisions of House Bill No. 1569, the statutes and codes of the state of Louisiana and to make such recommendations, proposals, and codifications as it deems necessary to achieve the policy objectives set forth in House Bill No. 1569 by the Legislature and to review proposed legislation which may be prepared pursuant to this resolution for the purpose of assuring that such proposed legislation utilizes the style and semantics appropriate for inclusion in the Civil Code and the statutes.
then introduced at the 1979 legislative session. Ultimately, the legislature enacted three of the original five bills: (1) Act 709, consisting of almost all of the revised articles on matrimonial regimes; (2) Act 710, concerning the marital portion; and (3) Act 711, containing amendments to the Civil Code, Code of Civil Procedure, and Revised Statutes coordinating other related provisions of law with the changes in matrimonial regimes law accomplished in Act 709. Companion bills establishing the procedure for an administration of community property upon termination of the regime and establishing a central registry for matrimonial agreements were not enacted. Thus, on January 1, 1980, when the 1979 acts take effect, equal management, dressed in a new legislative wardrobe, will make its final bid for acceptance.

This article will be devoted to a discussion of the major differences between Act 627 of 1978 and Act 709 of 1979, since the details and effects of the initial equal management reform have already received ample attention in the Louisiana Law Review Symposium on Act 627. Additionally, the authors will comment on problems that remain unresolved by Act 709, despite the opportunity to arrive at solutions during the interim study year. Proper documentation of legislative history is difficult in Louisiana since there are no verbatim records of legislative committee or floor debates. In the case of the 1979 acts, at least four bodies were officially charged with suggesting revisions; thus, accurate documentation is especially difficult. The official comments by the Law Institute that accompany the acts are often helpful in understanding


8. 1979 La. Acts, No. 709, § 5. This repealing section is not effective until January 1, 1980. 1979 La. Acts, No. 709, § 13. However, part of Act 627, permitting spouses to make both matrimonial regime contracts and other contracts during marriage, became effective sixty days after the end of the 1979 legislative session. 1978 La. Acts, No. 627, § 9. Thus, until the repealer takes effect on January 1, 1980, spouses are technically free to contract according to Act 627's terms, which are less restrictive in the area of matrimonial regime contracts than the terms of Act 709 of 1979. See text at notes 126-31, infra. The authors are certain that the failure to repeal a part of Act 627 was inadvertent, and urge caution with respect to reliance on an obvious oversight by the legislature.

the application of the new law and its relation to other parts of the Civil Code. However, the comments, as expressions of legislative intent, should be approached with caution, for all three of the 1979 acts specifically state that the comments are not intended to be considered part of the law nor are they enacted into law. The authors were present at all of the formal meetings of the bodies officially concerned with the revision of Act 627, as well as in attendance at the 1979 legislative committee hearings and floor debates when revision of Act 627 was discussed. Where necessary to clarify the meaning of Act 709, the authors have relied upon their recollections of the discussions and debates, in spite of the impossibility of providing proper documentation. The authors hope that even an undocumented explanation will be more useful to the reader than none.

ORIENTATION OF 1979 ACTS WITHIN CIVIL CODE

Act 709 of 1979 repeals, as did Act 627 of 1978, book three, title six of the Louisiana Civil Code, comprising the articles on marriage contracts, donations made in consideration of marriage, dowry, the marital portion, paraphernal property, the legal regime of community of acquets or gains, and judicial separation of property during marriage. Of the repealed articles, the only ones that neither act attempted to replace were those articles governing dowry and donations made in consideration of marriage. As to the latter, replacement was unnecessary because elsewhere in the Civil Code there are articles on donations to and between persons contemplating marriage which adequately deal with the subject. The

10. 1979 La. Acts, No. 709, § 7; 1979 La. Acts, No. 710, § 5; 1979 La. Acts, No. 711, § 6. Cf. 1978 La. Acts, No. 627, § 10 (comments reflect intent of legislature). There are several instances in which the comments to Act 709 of 1979 go beyond the text of the articles and indicate policy choices that may not in fact have been discussed or made. See note 18, infra. See text at note 376, infra. The Law Institute is currently editing the official comments, as it is authorized by statute to do, for publication by West Publishing Company. Any discrepancy between the comments referred to in this article and those appearing later in West's publication is due to editorial change.


12. LA. CIV. CODE art. 2336 (repealed 1979).
15. LA. CIV. CODE arts. 2382-91 (repealed 1979).
17. LA. CIV. CODE arts. 2425-37 (repealed 1979).
18. LA. CIV. CODE arts. 1734-55. See also LA. CIV. CODE arts. 1535 & 1888, as amended by 1979 La. Acts, No. 711. These articles relax certain general restrictions on donations inter vivos for donations made by "marriage contract." At the time of their
repeal of the dowry articles, though bemoaned by ardent preservationists, will create difficulties only in the extremely unlikely event that there exist today married women with dowries. The dowry has outlived its usefulness as a method for providing benefits to the husband with commensurate protection for the wife. Today a parent or other person seeking to bestow on the spouses the benefits and protections associated with a dowry can do so with greater flexibility through a trust.19

The revised matrimonial regimes law under Act 709 is inserted into the Civil Code; whereas, Act 627 had positioned the matrimonial regimes reform in the Civil Code Ancillaries of the Revised Statutes.20 Under Act 709, the revised articles are located, as were the old Civil Code articles, at the beginning of the obligations provisions pertaining to nominate contracts. The location of the articles on matrimonial regimes, which is the same as that of the French and Quebec Civil Codes,21 emphasizes the ability of the spouses to regulate their marital property according to an express contract. Only in default of such express contracts will the law provide a system for regulating the spouses' ownership and management of property. However, since a majority of couples marry without executing a contract and hence are governed by the legal regime, it might have been more realistic to place the articles on matrimonial regimes among those regulating marriage generally.22 For example, the 1977 Draft Civil Code of Quebec proposes to include the articles on matrimonial regimes in the title on marriage.23 If the articles on matrimonial regimes were included among those governing marriage enactment, these articles contemplated only antenuptial marriage contracts; however, both Act 627 and Act 709 permit marriage contracts (or “matrimonial agreements” as they are called by Act 709) to be made during as well as before marriage. See note 47, infra. Query whether the relaxed donations rules apply to postnuptial marriage contracts. The authors do not recall any debate on this issue. The determination of the extent to which the marital relationship is to be favored by relaxing the regular donations rules for donations to or between the spouses is clearly one of policy and not merely one of drafting. Yet, comment (c) to article 2328 and comment (c) to article 2329 of Act 709 state that articles 1734-55, employing the term “marriage contract,” are applicable to antenuptial agreements only. Likewise, article 1888 was amended without discussion to provide that “a future succession may become the object of an antenuptial matrimonial agreement,” whereas the article previously used the term “marriage contract.” LA. CIV. CODE art. 1888, as amended by 1979 La. Acts, No. 711.

22. LA. CIV. CODE arts. 119-31.
generally, it would be necessary to create a new chapter. The Civil Code articles which appear in chapter five of book one\textsuperscript{24} regulate the personal effects of marriage, which may not be altered by agreement of the parties.\textsuperscript{25} The new chapter which could contain the articles on matrimonial regimes would regulate the \textit{patrimonial} effects of marriage, which may be derogated from by contract of the parties. Either location appears sensible. Apparently, the legislature chose to emphasize the availability of a contractual regime, however infrequently spouses may take advantage of it.

Act 710, providing for the marital portion, formerly a single article in the chapter on dowry,\textsuperscript{26} creates a new chapter four of title six on "matrimonial regimes."\textsuperscript{27} Since the marital portion, unlike the legal regime, cannot be waived or altered by the spouses' agreement,\textsuperscript{28} the articles regulating it properly belong among the articles on marriage, not among the articles governing nominate contracts.\textsuperscript{29} The marital portion articles were added to the title on matrimonial regimes because the jurisprudence has regarded the marital portion as an incident of any matrimonial regime. Analysis of the substance of the marital portion articles is beyond the scope of this article. However, the authors do not recall any meaningful legislative debate on the substance of the revised marital portion articles. They were presented to the legislative committees as embodying present law and jurisprudence, although, as the comments to Act 710 admit, the new articles in one instance overrule jurisprudence\textsuperscript{30} and in two instances supplement prior law.\textsuperscript{31}

The choice of law provisions, formerly appearing in the Civil Code with the articles governing the legal regime,\textsuperscript{32} were inserted into article 10 of the Civil Code, which contains other choice of law rules.\textsuperscript{33} As the comments to Civil Code article 10 in Act 711 of 1979 indicate, the revised rules derogate, as did the choice of law rules in Act 627,\textsuperscript{34} from former article 2400 of the Civil Code. Article 2400, if

\begin{itemize}
  \item[24.] LA. CIV. CODE arts. 119-20.
  \item[25.] See, e.g., Favrot v. Barnes, 332 So. 2d 873 (La. App. 4th Cir. 1976).
  \item[26.] LA. CIV. CODE art. 2382 (repealed 1979).
  \item[27.] 1979 La. Acts, No. 710.
  \item[28.] LA. CIV. CODE art. 2330, added by 1979 La. Acts, No. 709, § 1 (hereinafter cited as LA. CIV. CODE (Supp. 1979)).
  \item[29.] Succession of Lichtentag, 363 So. 2d 706 (La. 1978). See LA. CIV. CODE art. 2433, comment (a) (Supp. 1979).
  \item[30.] See LA. CIV. CODE art. 2434, comment (d), added by 1979 La. Acts, No. 710.
  \item[31.] LA. CIV. CODE art. 2436, comment (a), added by 1979 La. Acts, No. 710 (establishing new three-year prescription); LA. CIV. CODE art. 2435, added by 1979 La. Acts, No. 710 (requiring surviving spouse to deduct from marital portion payments received as a result of death of other spouse).
  \item[32.] LA. CIV. CODE arts. 2400-01 (repealed 1979).
  \item[33.] LA. CIV. CODE art. 10, as amended by 1979 La. Acts, No. 711.
  \item[34.] LA. R.S. 9:2836 (Supp. 1978) (repealed 1979).
\end{itemize}
taken literally, would have applied Louisiana's matrimonial regimes law to movables situated in Louisiana acquired by a non-domiciliary. In contrast, article 10 now provides that only immovables situated in Louisiana and movables owned by Louisiana domiciliaries are subject to Louisiana's matrimonial regimes law.

**MATRIMONIAL AGREEMENTS**

**General Provisions**

The general provisions of both Act 627 of 1978 and Act 709 of 1979 begin by similarly defining “matrimonial regime” as the rules governing the ownership and management of the property of married persons as between themselves and as to third persons. Both acts contain the general rule that matrimonial regimes may be established by contract between the spouses, as well as by operation of law. Act 627 did so by saying that the spouses could adopt a matrimonial regime of their choice by contract. Act 709, however, confusingly states that “a matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating the legal regime.” If the “matrimonial agreement” is simply the contract by which a matrimonial regime is established, the definition is redundant, for once the Act has defined “matrimonial regime,” it is unnecessary to define further the object of the kind of contract. If, on the other hand, a “matrimonial agreement” is intended to be a contract by which only certain

35. LA. CIV. CODE art. 2400 (repealed 1979) provided:

All property acquired in this state by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this state.

36. 1979 La. Acts, No. 711, amending LA. CIV. CODE art. 10. The fourth paragraph states that immovables situated in this state are “subject to the legal regime of acquets and gains . . . .” What was actually meant was that the immovables are subject to all of the laws regulating matrimonial regimes, not just the laws of the legal regime. Thus, if a non-domiciliary spouse has a matrimonial regime contract that is not repugnant to Louisiana’s laws, the matrimonial regime contract, not the legal regime, should govern the ownership of the immovable situated in Louisiana. See LA. CIV. CODE art. 10, comment (b), as amended by 1979 La. Acts, No. 711.


Act 709 defines matrimonial regimes in terms of “property,” whereas Act 627 had used the words “assets and liabilities.” But, since comment (b) to new article 2325 states that the word “property” as used in that article includes “assets and liabilities,” the two definitions are practically identical.


39. LA. R.S. 9:2832 (Supp. 1978) (repealed 1979). The matrimonial regime contract was subject to limitations.

40. LA. CIV. CODE art. 2328 (Supp. 1979).
matrimonial regimes may be established, the definition fails to convey that meaning. By permitting both separation of property and modification of the legal regime of the community of acquets or gains,\(^4\) it seems not to exclude any kind of matrimonial regime from the spouses' choice. The confusion is apparently the result of a House floor amendment\(^4\) that shows insufficient appreciation of the necessity in Civil Code revision for internal consistency of the articles.\(^4\) Since the source provisions for Act 709's definition of "matrimonial agreement" are stated to be four Civil Code articles\(^4\) and Act 627 of 1978,\(^4\) none of which restrict the kind of matrimonial regime that can be adopted by contract, it is most likely that the legislature intended a "matrimonial agreement" to be nothing more than the name given to a contract establishing any matrimonial regime. Hence, anyone seeking limitations on the content or confection of a matrimonial agreement will find no ammunition in the definition provided by act 709.

The awkwardness in the definition of "matrimonial agreement" foreshadows more significant divergences between the two acts concerning the spouses' freedom to make matrimonial agreements. Act 627 permitted spouses to make or modify matrimonial agreements before or during marriage.\(^4\) The freedom to make or modify the agreement during marriage, together with the elimination of the ban against interspousal contracts generally, was one of the most significant alterations of the old law.\(^4\) To those who enacted Act


\(^{43}\) Such lack of appreciation by the legislature of code draftsmanship is particularly regrettable where this Act is concerned, since one of the legislature's stated purposes in authorizing review of Act 627 was to make sure the legislation utilized "the style and semantics appropriate for inclusion in the Civil Code and the statutes." La. H.R. Con. Res. No. 232, 4th Reg. Sess. (1978).


627, the desirability of contractual freedom to make or modify matrimonial agreements during marriage outweighed the danger of one spouse taking advantage of the other. This danger was lessened, since under Act 627, matrimonial agreements could, like any contract, be avoided for a vice of consent and the spouses could not alter the marital portion. Likewise, freedom of contract was thought not to present a real threat to creditors, who were protected by Act 627's requirement of recordation of matrimonial agreements and by actions already given them by the Civil Code to set aside prejudicial contracts of their debtors. Nor were forced heirs threatened, as they retained their right to reduce any excessive donations contained in the matrimonial agreement. The same freedom to make or modify matrimonial regimes before and during marriage appeared in both matrimonial regime bills introduced in the 1977 legislative session, including the Louisiana State Law Institute's "two funds" bill.

In contrast to Act 627, Act 709 places procedural limitations upon the making or the modification of a matrimonial regime contract during marriage and adds limitations on the content of these agreements, whether executed prior to or during marriage. Both the procedural and substantive limitations were the recommendations of the Law Institute. Article 2329 of Act 709 contains the procedural limitation: "Spouses may modify or terminate 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 requirement of court approval did not appear in the Law Institute Council's original revision of the

(as it appeared prior to 1978 La. Acts, No. 627, § 3) (incapacity of husband and wife to contract with each other). Section 9 of Act 627, which amended article 1790, became effective sixty days after final adjournment of the 1979 session. 1978 La. Acts, No. 627, § 9. Act 709's repeal of Act 627, however, does not become effective until January 1, 1980. 1979 La. Acts, No. 709, § 13. Act 627's version of article 1790 has been included in Act 711, whose effective date is also January 1, 1980. 1979 La. Acts, No. 711, §§ 1 & 8. Thus, while Act 627 did in fact amend this article, after January 1, 1980, the amendment is attributable to Act 711, and not Act 627.

48. LA. R.S. 9:2834, comment (b) (Supp. 1978) (repealed 1979) stated: "A matrimonial regime contract is subject to the general rules of conventional obligations except as specifically provided in this Title."


52. LA. R.S. 9:2834, comment (b) (Supp. 1978) (repealed 1979). Act 627 also provided that the spouses could not by their matrimonial regime contract alter the established order of succession. LA. R.S. 9:2833 (Supp. 1978) (repealed 1979).

general provisions of Act 627. The Council was moved, however, to reconsider its original action by the written motion of a member who was concerned that "modification of the legal community by a matrimonial agreement will result in many nonworking spouses having little or no ownership interest in assets or income that would form part of the community under the legal regime. This would lead to substantial weakening of the community concept." The motion made clear that the concern in allowing spouses to enter into matrimonial agreements was solely for the welfare of the spouse whose contributions to the marriage were largely non-economic, and not for the interest of creditors or forced heirs. The solution proposed by the motion was to require that a modification or termination of a matrimonial regime during marriage be in the best interest of the family and have court approval. The result of this motion was the Law Institute's final recommendation to the Joint Subcommittee that the law provide as follows: At any time during marriage, the spouses can subject themselves by matrimonial agreement to the legal regime, but any other voluntary change of a matrimonial regime during marriage can only be made for good cause and with court approval. The recommendation for court approval was rejected by the Joint Subcommittee, which adhered to its previous position, the original position of the Law Institute, that contractual changes in a matrimonial regime during marriage required no special procedural safeguard. Thus, the bill was introduced without any requirement of judicial approval. On the floor of the House, the requirement of court approval was added to the bill by amendment, and after amendments were made by the Senate and concurred in by the House, the enacted version of article 2329, quoted previously, required court approval for contractual changes to a matrimonial regime during marriage. Only the contractual change during marriage from another regime to the legal regime was exempted from this court approval requirement.

Since the requirement of court approval went in and out of the bill as if caught in a revolving door, it is not surprising that the new legislation is inconsistent in its attitude toward spousal overreaching. First, Act 709 exempts prospective spouses altogether from the requirement of court approval as regards their antenuptial...

54. Louisiana State Law Institute, Articles Approved by Law Institute Council, proposed LA. CIV. CODE art. 2331 (December 15-16, 1978).
55. Written Motion to Reconsider Previous Council Action at 2, Submitted by Frank P. Simoneaux; seconded by A.N. Yiannopoulos and Jack Caldwell.
56. Id. at 3-5.
57. RECOMMENDATION, supra note 42, proposed LA. CIV. CODE art. 2329.
matrimonial agreement,\textsuperscript{60} exempts spouses married out of state from the court approval requirement as regards a matrimonial agreement made within a year of moving to Louisiana,\textsuperscript{61} exempts spouses who married and established the legal regime prior to January 1, 1980 from the necessity of court approval for matrimonial agreements made prior to January 1, 1980,\textsuperscript{62} and exempts from the court approval requirement spouses changing to the legal regime by matrimonial agreement.\textsuperscript{63} In the situations encompassed by the exemptions, overreaching by one of the parties is as great a possibility as in those situations not exempted. The less-worldly party is not necessarily any better able to defend himself or herself from a disastrous matrimonial agreement before getting married than after the ceremony, before having lived in Louisiana one year than after this period of residency, or before January 1, 1980 than after that date. Likewise, a change to the legal regime, which does not require court approval, may not always be in the interest of the less-worldly spouse, as when an antenuptial agreement, carefully planned with the aid of the parents to protect the less-worldly spouse, is upset by a change to the legal regime. Furthermore, Act 709 permits matrimonial agreements to be made by an act under private signature duly acknowledged by the spouses, as well as by an authentic act,\textsuperscript{64} whereas Act 627 required the solemn formalities of an authentic act.\textsuperscript{65} An acknowledgment of the execution of a contract, unlike an authentic act, does not entail the customary reading or paraphrasing by the notary of the act's contents to the parties in the presence of the witnesses.\textsuperscript{66} The acknowledgment is thus not as likely as is an authentic act to alert a spouse to the seriousness of what he is doing. It is, therefore, surprising that the lesser formalities are permitted in legislation which, in its other provisions, is concerned with spousal overreaching.\textsuperscript{67} Finally, neither court approval nor any formality whatsoever is necessary for the renunciation by a spouse of the right to concur in transactions for which the legal regime requires concurrence or for the renunciation by a spouse of the right to participate in a community business.\textsuperscript{68} Even

\textsuperscript{60} LA. CIV. CODE art. 2329 (Supp. 1979).

\textsuperscript{61} LA. CIV. CODE art. 2329 (Supp. 1979).


\textsuperscript{63} -LA. CIV. CODE art. 2339 (Supp. 1979).

\textsuperscript{64} LA. CIV. CODE art. 2331 (Supp. 1979).


\textsuperscript{66} Compare M. WOODWARD, WOODWARD'S LOUISIANA NOTARIAL MANUAL § 3.16 (2d ed. 1982) with id. at § 2.09.

\textsuperscript{67} The availability of an acknowledged act for matrimonial agreements also creates a booby-trap where donations are concerned. If any donations are contained in a matrimonial agreement thus executed, they may be null for improper form. See LA. CIV. CODE art. 1536.

\textsuperscript{68} LA. CIV. CODE art. 2348 (Supp. 1979).
though the renunciation can only cover particular property, it may constitute a significant alteration of a spouse's rights. Nonetheless, no court supervision is required in this instance by Act 709. In other areas, the law has steadily become less protective of the less-worldly spouse. For example, the law no longer prevents a wife from obligating herself for her husband's benefit, or a spouse from donating to the other spouse present or future things or, by virtue of other legislation passed in the 1979 session, from contracting with the other spouse generally as to present or future things. With such devices available to the unscrupulous spouse, can the legislature believe that the less-worldly spouse is any safer because a judge must approve a matrimonial agreement made or modified during marriage? A legislature truly concerned with the protection of the less-worldly spouse would be expected to address the subtle means of overreaching as well as such obvious means as matrimonial agreements. Consistent protection against interspousal overreaching whether by subtle or obvious means could have been achieved had the legislature provided that, in contracting with each other, spouses or prospective spouses stand in a confidential or fiduciary relationship. The high standard of disclosure and responsibility that this relationship entails would give a court sufficient authority to invalidate harsh contracts between spouses.

The uncertainty of the fate of the provision requiring judicial approval prior to and during the session resulted in legislative inattention to the mechanics for securing judicial approval of a matrimonial agreement. There is no appropriate venue for the action under the Code of Civil Procedure. The special venue rules for annulment of marriage, separation from bed and board, or divorce do not apply, nor does the general venue article, which contemplates only adversary proceedings, apply

69. LA. CIV. CODE art. 2348, comment (b) (Supp. 1979).
70. Article 2398 of the Civil Code of 1870 had prohibited the wife from binding herself for her husband's debts. This prohibition was explicitly removed by Act 89 of 1974 and had been implicitly removed earlier by passage of the Married Women's Emancipation Acts (now appearing as LA. R.S. 9:1031-05 (1950). See LA. R.S. 9:103 (1950).
71. LA. CIV. CODE arts. 1532 & 1746. Commentators are of the opinion that donations between spouses during marriage may encompass future as well as present property. C. Lazurus, Successions and Donations, Cases and Reading Materials 504 (1975); 3 M. Planiol, Civil Law Treatise pt. 1, no. 3208, at 561 (11th ed. La. L. Inst. trans. 1959).
72. 1979 La. Acts, No. 711, amending LA. CIV. CODE art. 1790. However, contracting for a future succession may only be done by the spouses in an antenuptial agreement. 1979 La. Acts, No. 711, amending LA. CIV. CODE art. 1888.
73. LA. CODE CIV. P. art. 3941.
74. LA. CODE CIV. P. art. 82.
75. LA. CODE CIV. P. art. 42.
to an action upon joint petition.\textsuperscript{6} Since the action is not subject to any mandatory venue requirement,\textsuperscript{7} the spouses may apparently confer venue by consent and shop, if they wish, for a parish where the judges are noted for their willingness to approve matrimonial agreements. Spouses should not assume that a joint petition, stating their intended change, and a judgment approving it contain sufficient formalities for a valid matrimonial agreement. Although Act 627 had explicitly stated that matrimonial agreements made or changed during marriage must conform to the same formalities as those made prior to marriage,\textsuperscript{8} this rule is implicit in article 2331 of Act 709. Thus, judicial proceedings were not intended as alternate formalities for making or changing matrimonial agreements during marriage, but rather as additional formalities with which the spouses must comply. This conclusion is consistent with the legislature’s desire to make it more difficult to change matrimonial regimes during marriage. Consequently, the joint petition should be accompanied by an agreement executed according to the formalities prescribed by article 2331. The judge must somehow identify the agreement as the one that he approved. A procedure might be followed similar to that for probate of testaments, wherein the judge would paraph the agreement \textit{ne varietur} over his signature\textsuperscript{9} and sign a judgment similar to the procès verbal\textsuperscript{10} of the probate of a testament, reciting what was done at the hearing for judicial approval. Both agreement and judgment should then be recorded as required by law.\textsuperscript{11}

Article 2329 makes judicial approval depend upon whether the spouses understand the principles and rules governing the matrimonial regime and whether such a regime serves their best interests. Judges can scarcely ascertain whether the spouses have achieved a meaningful depth of understanding of their regime short of administering an exam to them on the subject. Testimony as to understanding is likely to be produced by means of leading questions or else by prepared paraphrases of the rules and principles of the desired regime. Since the spouses have no adversary, there will be no cross-examination unless the judge becomes an inquisitor, an unfamiliar role for Louisiana judges.\textsuperscript{12} It would seem that the judge

\begin{itemize}
  \item[77.] \textit{La. Code Civ. P.} art. 44.
  \item[79.] \textit{La. Code Civ. P.} art. 2882.
  \item[80.] \textit{La. Code Civ. P.} art. 2890.
  \item[82.] Proponents of judicial approval often cited French \textit{Code civil} article 1397, which requires judicial approval for a contractual change in a matrimonial regime during marriage, as authority for the wisdom of a similar requirement in Louisiana. However, the French legal system may be better suited for this kind of judicial inquiry
\end{itemize}
could more usefully inquire into whether a spouse's consent was both freely given and informed. Although a spouse may not understand all of the ramifications of a change in regime, the spouse may have received advice from independent counsel or trusted family members and on their recommendation may be perfectly willing to make the change. So long as the judge is satisfied that the spouse who lacks thorough understanding of the agreement has not been imposed upon by the other spouse, he should approve the agreement. As extra insurance against imposition, the judge could examine each spouse outside the presence of the other spouse and the lawyers, reminiscent of a procedure followed at one time under the Civil Code when a married woman wished to contract a debt for her separate benefit.\footnote{Between 1855 and 1916, a married woman with her husband's consent and with the approval of a judge could borrow money, or contract debts for her separate benefit, and grant mortgages on her separate property to secure the debts. \textit{La. Civ. Code} arts. 126-28. These articles were explicitly repealed in 1974 by the legislature. \textit{1974 La. Acts}, No. 89, § 2. Nonetheless, they had been implicitly repealed earlier, when the legislature passed the first Married Women's Emancipation Acts. (now appearing as \textit{La. R.S.} 9:101-05 (1950)). The Code had specifically provided that the wife must be examined "separate and apart" from her husband as to whether the debt was solely for her advantage. \textit{La. Civ. Code} art. 127 (repealed 1974).}

The judge must also make a finding that the agreement "serves their [the spouses'] best interests."\footnote{\textit{La. Civ. Code} art. 2329 (Supp. 1979).} Are monetary interests the only interests to be considered or may emotional and psychological interests also be weighed? Whatever may be the nature of the interest involved, must it be shared equally by both spouses, as the word "their" might imply, or may the interest of one spouse predominate? For example, suppose husband and wife were married after January 1, 1980, under the legal regime. Their income has been provided by the husband's separate property and the wife's salary. Under the legal regime, the husband may by unilateral declaration, classify the income from his separate property as separate property.\footnote{\textit{La. Civ. Code} art. 2339 (Supp. 1979).} Then, not only would any accumulation of this income be the husband's separate property, but if this income is spent on the ordinary and customary expenses of the marriage,
there may arise a claim for reimbursement against the wife. The wife wishes to have assurance that the income from the husband's separate property will remain community property not subject to the husband's ability to make the income separate property by unilateral act. He agrees that she should have this assurance because he feels that she, having been a good wife, deserves it. If they seek judicial approval of a contract that permanently classifies the husband's income from separate property as community property, the judge should not deny approval because the resulting regime will not be symmetrical or because the change is not in the monetary interest of the husband. One of the best reasons for changing a matrimonial regime during marriage is to remedy the unfairness to one spouse of the previous regime. Such commendable motives should not be thwarted by interpreting "their best interests" to allow approval of only those contracts that are symmetrical or that redound to the financial advantage of both spouses. Generosity between spouses has always been encouraged by the Code. The Code permitted spouses to donate to each other even when it barred them from otherwise contracting with each other, and some of its restrictive rules of donations inter vivos did not apply to donations between spouses. Consequently, the judge should not reject an agreement solely because it is financially lopsided, if he is otherwise satisfied that the spouse who is making the financial sacrifice or taking the risk is doing so of his own free will in the spirit of helping his spouse.

What if the agreement on its face provides equal opportunity for each spouse to gain or lose, but, because of the actual earning situation of the spouses, the effect of the agreement will be to favor one spouse? Suppose the husband, who has adult children by a previous marriage, marries again under the legal regime. The second wife, wishing to promote harmony with his children, agrees to change to a separate property regime to demonstrate that she has no designs on his fortune. On its face, the separate property regime treats the spouses equally, but as applied to the wife in this example, it may cause her to suffer financially if her earnings and income are not equal to her husband's. If she understands how the regime will work as applied to her, and if her consent was freely given, the judge should permit the wife to be generous, since this agreement, by promoting family harmony, will serve the spouses' best interests.

A second marriage may also present a situation in which the
proposed change is to the financial disadvantage of children of a previous marriage. For example, a husband, having children by a previous marriage, may agree to the conversion of some of his separate property to community or to the disproportionate enlargement of the wife's share of the community. May the judge consider the interest of the children in approving the agreement? In France, the Code civil makes the court's approval of a change dependent on the interest of the family, and courts have struggled to reconcile the interest of a spouse with that of the children. Some decisions have simply placed the interest of a spouse ahead of the interest of a child in the absence of fraud; other decisions have said that assuring a spouse's financial welfare is in the interest of the family as a whole. In contrast to the Code civil, Louisiana's new article 2329 makes court approval dependent on the best interest of the spouses; consequently, the Louisiana judge need not be concerned with the adverse financial effect that the proposed agreement could have on the children of one of the spouses. After all, the children are protected elsewhere in the law. As forced heirs, they will always have a right to reduce excessive donations, even when the donations occur between spouses. Thus, any donations contained in the matrimonial agreement are subject to reduction. Lest there be any doubt that the right to reduce excessive donations reaches benefits conferred by matrimonial agreement, the first paragraph of Louisiana Civil Code article 1754 states that spouses "cannot give to each other, indirectly, beyond what is permitted by the foregoing dispositions." The meaning of "indirect" gifts in the first paragraph of article 1754 is not, however, self-evident. The term does not mean "disguised donations" or donations through an interposed party, since the second paragraph of article 1754 deals with them specifically. Article 1754 is taken verbatim from the Code Napoleon, which also contained some specific rules, not found in the Louisiana Civil Code, on reduction by children of a previous marriage of benefits conferred by matrimonial agreement. It is to

90. C. Civ. art. 1397.
93. The word "their" modifying "best interests" in article 2329 refers to "spouses."
94. LA. CIV. CODE art. 1502.
95. LA. CIV. CODE arts. 1746 & 1752.
96. (Emphasis added.)
97. The second paragraph provides: "All donations disguised, or made to persons interposed, shall be null and void." LA. CIV. CODE art. 1754.
98. Code Napoleon art. 1099 (1804).
these benefits that the "indirect" gifts refer in the Code Napoleon and in Louisiana Civil Code article 1754, thus making the benefits subject to reduction.\footnote{100. The penalty of nullity under the second paragraph of article 1754 does not apply to the indirect gifts mentioned in the first paragraph which, as at French law, are direct gifts, merely reducible. \textit{C. Lazarus, supra note 71, at 505-06.}} This is so despite the argument that they ought not be considered gratuities because the spouses should be deemed to have received value from each other in ways not solely financial.\footnote{101. \textit{M. Planiol, supra note 71, at nos. 1396-415.}} Unfortunately, Louisiana has no rules corresponding to the \textit{Code civil}'s special rules for reduction of indirect gifts to second or subsequent spouses made via matrimonial agreements. When such a situation arises, French law could profitably be consulted to define the scope of reduction for these indirect gifts.\footnote{102. For example, \textit{Code civil} article 1527 states that only benefits resulting from contributions in capital, and not benefits based on income, are subject to reduction. \textit{Id. at nos. 1405-06.}}

Since the judicial inquiry must focus on the best interests of the spouses, they should not have to prove that no harm will accrue to their creditors as a result of the proposed agreement. Creditors, like forced heirs, are protected in other areas of the law. Available to the creditors are the same remedies they have against any contract of the debtor, in particular, the revocatory action,\footnote{103. \textit{La. CIV. Code} arts. 1968-94. \textit{See La. CIV. Code} art. 2376, comment (Supp. 1979).} the action in declaration of simulation,\footnote{104. \textit{La. CIV. Code} art. 2239.} and the oblique action.\footnote{105. \textit{La. CIV. Code} arts. 1989-92.} Thus, for example, if a husband transferred property gratuitously to his wife by means of a matrimonial agreement, and in so doing, rendered himself insolvent or increased his insolvency, a creditor whose debt had accrued prior to the matrimonial agreement could invoke the revocatory action and avoid the transfer upon showing that the transfer was in actual or constructive fraud of his rights.\footnote{106. \textit{See La. CIV. Code} arts. 1968-94. \textit{See generally Note, Dation en Paiement: Problems with the Elusive Concept of Prejudice when Bringing the Revocatory Action, 40 La. L. Rev. ___ (1979).}} Likewise, if the matrimonial regime contract purported to transfer property from the debtor, but the spouses actually intended no transfer, the creditor could set aside the simulated transaction.\footnote{107. \textit{See La. CIV. Code} art. 2239.} In this circumstance, the creditor need not prove that he has been prejudiced or defrauded.\footnote{108. \textit{See Litvinoff, The Action in Declaration of Simulation in Louisiana Law, in Essays on the Civil Law of Obligations} 139 (J. Dainow ed. 1969).} Finally, if, in a matrimonial agreement, the debtor-spouse renounced a right to property or released a debt without payment, a prejudiced creditor could exercise the rights of his deb-
tor as if the debtor had not renounced or released the rights, unless those rights were personal to the debtor. It should be noted, however, that not every act or contract of the debtor which diminishes his estate prejudices the creditor. An unsecured creditor always takes the risk that his debtor will deplete his assets or incur more debts. Since, by not taking security, the unsecured creditor voluntarily settles for uncertainty in the repayment of the debt, he should not be able to upset his debtor's contract with great frequency or ease.

In light of the remedies which the law presently makes available to creditors against the contracts of their debtors, should a creditor also be allowed to intervene in the proceeding in which the spouses seek judicial approval of their matrimonial agreement? French law specifically allows creditors to intervene in the proceeding to approve the matrimonial agreement if there has been a fraud on their rights, but Louisiana's article 2329 is silent on the subject. Under old Civil Code article 2435, creditors were given the right to intervene in a suit between the spouses for separation of property, or even to annul the judgment. A right to intervene or annul the judgment was necessary to protect the creditors in the case of a judicial separation of property, since the new regime would have resulted from a law suit, not a contract, and hence the normal remedies against debtor's contracts would be inapplicable. Act 709 as originally introduced, continued the creditors' right to intervene or annul a judgment in a judicial separation of property, but said nothing with respect to a creditor's right to intervene in a proceeding for judicial approval of a contractual change in regime. This was logical, since creditors already have adequate remedies against their debtor's contracts. Nevertheless, a Senate amendment to article 2376 of Act 709, in which the House concurred, may have made intervention by creditors possible in a proceeding in which judicial approval of a contractual change in regime is sought. Article 2376 is preceded by two articles describing the action of a spouse living under a community regime to force a judicial separation of property. Following these two articles, article 2376 provides: “The creditors of a spouse, by intervention in the proceeding, may object to the separation of property or modification of their matrimonial regime as being in fraud of their rights.” The evidence is clear and convincing that the italicized words, added by

110. C. civ. art. 1397.
113. (Emphasis added.)
the Senate, were injected in haste. Not only is the pronoun “their,” which modifies “matrimonial regime,” and “rights” ambiguous as to whether it refers to creditors or spouses, but also it is unclear whether “the proceeding” for which intervention is authorized refers to the proceeding for judicial separation of property, to which the preceding article is addressed, or the proceeding for judicial approval of a contractual modification of the regime. The added language could certainly be read as authorizing intervention by creditors in both kinds of proceedings. Nothing in the general article on intervention in the Code of Civil Procedure supports a narrower interpretation. It thus appears that the legislature has given the creditors an opportunity to interfere in the spouses’ matrimonial agreement when judicial approval is necessary even though their rights are adequately protected elsewhere in the law. Presumably intervening creditors would have to show the same facts that would entitle the creditors to the normal remedies against contracts before the judge can disapprove the proposed matrimonial agreement.

The effect of judicial approval of a matrimonial agreement under article 2329 of Act 709 is also unclear. Does judicial approval simply remove an incapacity that spouses have during marriage to make this particular kind of contract, leaving other issues affecting validity of the agreement undecided, or does the judge’s approval preclude a spouse from ever disputing the validity of the matrimonial agreement? Resort to traditional issue preclusion analysis has been restricted recently by the Louisiana Supreme Court’s rejection of the common law issue preclusion doctrine of collateral estoppel. The court has held that Louisiana’s only device to prevent relitigation of issues is res judicata, which requires identity of the parties, the cause, and the thing demanded. Under this narrow view of issue preclusion, a spouse would not be precluded from bringing an action to annul the contract for error, duress, or fraud, since the “cause” and the “thing demanded” would differ from that of the action for judicial approval. Even if common law collateral estoppel were available in Louisiana, it is doubtful whether it should apply to a non-adversary proceeding in which no conflicting evidence is produced and which can be viewed as simply adding further solemnity to the occasion. If applicable, common law collateral estoppel would

114. LA. CODE CIV. P. art. 1091.
116. LA. CIV. CODE arts. 1820-46.
117. LA. CIV. CODE arts. 1850-59.
118. LA. CIV. CODE arts. 1847-49. If the contract amounted to a partition, a spouse may also seek to annul the contract for lesion. LA. CIV. CODE art. 1861.
not extend beyond the issue actually decided. Exactly what issue was decided by the judicial approval of the matrimonial agreement is difficult to determine. Arguably, the issue resolved may be any one of the following: the agreement was in the best interest of the spouses and they understood the rules and principles of the regime, or the spouses were not incapacitated from making the agreement, or the spouses' consent as well as their capacity to contract was perfect. Perhaps, in light of the problems of applying common law collateral estoppel to this situation, it is just as well that the supreme court has excluded the application of the doctrine. Of course, even though the judgment has no issue precluding effect in an action to avoid the agreement, any of the testimony in the proceeding for judicial authorization can be used as an evidentiary admission in the later action. Unless an admission is "explained away," it may be in effect as conclusive against a party as collateral estoppel.

Article 2329 creates a Civil Code anomaly; it is the only instance in which persons generally capable of contracting, having consented with respect to a certain object and lawful purpose and complied with prescribed formalities of execution, still would not have made a valid contract. Thus, it is not surprising that the Code provides no analogies for determining the effect of judicial approval of the matrimonial agreement. The nearest analogy to the proceeding for judicial approval is the obsolete procedure under repealed articles 127 and 128, whereby a married woman who obtained the authorization of her husband and a judge could contract debts for her own separate benefit and secure them by a mortgage on her separate property. Under this procedure, she had to satisfy the judge, outside the presence of her husband, that the debt was contracted solely for her advantage and not for the advantage of her husband. Once satisfied as to the personal advantage to the wife, the judge issued a certificate to that effect, which when annexed to an act of mortgage "furnished full proof against her and heirs . . . ." At the time this procedure was in use, a contract with a married woman obligating her separate property was not valid if made for the benefit of her husband. Consequently, the judicial certificate was held to relieve a creditor who sought to enforce a mortgage executed by a married woman of the burden of proving a fundamental element of validity: that the funds were actually used for the wife's separate benefit.

120. Id. at 564 n.3.
The judicial certificate did not prevent the wife from proving fraud or complicity between the creditor and the husband to use the funds for the husband's benefit, but it did preclude the wife from raising against a party in good faith the issue of how the funds were used. By analogy to this procedure, it would seem that a spouse would not be precluded by judicial approval of a matrimonial agreement from showing the bad faith of the other spouse either in inducing a vice of consent or in having knowledge that the facts were other than those established before the judge. The good faith contracting spouse would be protected on the issues that the judge "certifies" (i.e., that the agreement was understood and was in the spouses' best interest). But, since article 128 expressly stated the effect of judicial certification to be full proof against the wife and her heirs, whereas article 2329 says nothing with respect to the effect of judicial approval, reliance on analogies to the jurisprudence that developed under articles 127 and 128 would be somewhat dangerous. And, since no collateral estoppel effect can be given to judicial approval, it would seem that judicial approval amounts to little more than an extra formality, adding solemnity to the making or changing of a matrimonial regime during marriage.

Both Act 627 and Act 709 contain articles forbidding provisions of a matrimonial agreement which stipulate the renunciation or alteration of the marital portion and the alteration of the established order of succession. Nor may spouses derogate by their conventions from laws made for the public order and good morals. Beyond these substantive limitations, Act 627 left the spouses free to devise by matrimonial agreement whatever system of ownership and management of marital property they wished, and once the agreement was properly recorded, the chosen system was effective against third persons. At this point, Act 709 diverges significantly from Act 627 by providing an additional substantive limitation on matrimonial agreements. Article 2330 of Act 709 provides: "Nor may the spouses limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property." This prohibition is applicable only as to third persons; between the spouses,

125. Id.
127. LA. CIV. CODE art. 11. For example, in Holliday v. Holliday, 358 So. 2d 618 (La. 1978), the court invalidated, as against public policy, a provision in an antenuptial agreement waiving alimony pendente lite. See Note, Louisiana's Forbidden Antenuptial Waiver of Alimony Pendente Lite, 39 LA. L. REV. 1161 (1979).
there are no limitations upon the management scheme they may
device. The purpose of the prohibition is to assure a third person
dealing with one spouse alone that that spouse has at least all of the
powers the legal regime gives to a spouse acting alone. Thus,
when a spouse seeks unsecured credit, the creditor can rely on the
power given the spouse under the legal regime by article 2345 to
oblige the community property for debts; the creditor need not
concern himself with whether that spouse is disabled by his
matrimonial agreement from obligating the community property
without the other spouse's consent. Article 2330 does not prohibit
the matrimonial agreement from giving a spouse more power to act
alone than the legal regime would give him. Thus, a matrimonial
agreement may give the husband the sole power to alienate or
encumber community immovable property, even though such action
under the legal regime would have required the wife's consent.
Since this provision would be effective against third parties, as well
as between the spouses, it follows that a third party could not
refuse title from the husband alone.

Article 2330 thus prohibits, insofar as the effect on third parties
is concerned, the spouses from contractually establishing any com-
munity regime that distributes management authority in such a way
as to give one of the spouses less authority to act alone than would
be given by the legal regime. It prohibits total management of the
community by a designated spouse. For example, it precludes con-
tractual adoption of a "head and master" management system, for
the wife cannot, so far as third parties are concerned, be deprived of
her right to obligate the community property. While head and
master is unsatisfactory as a legal regime, there should be no objec-
tion to it as a contractual regime. In fact, management by one
spouse exclusively might be desirable if the other spouse is ill or
mentally unstable. Sole management by one spouse might, in certain
circumstances, obviate the need for interdiction of the other spouse.
Article 2330 also precludes spouses from contractually establish-
ing as to third persons a "two funds" management system whereby each
spouse manages and obligates the community property he would

129. The instances under the legal regime of Act 709 when one spouse may act
alone with respect to community property are: (1) Those for which a spouse has equal
property for debts); La. Civ. Code art. 2346 (Supp. 1979) (general equal management rule
for untitled movables). (2) Those for which a spouse has exclusive management authori-
ty. La. Civ. Code art. 2350 (Supp. 1979) (movable assets of community business manag-
ed solely by one spouse); La. Civ. Code art. 2351 (Supp. 1979) (movables issued or
registered in one spouse's name); La. Civ. Code art. 2352 (Supp. 1979) (partnership in-
terest of partner-spouse).

have owned and managed if single. The two funds system, while unsatisfactory as a legal regime, could prove useful to spouses who each pursue a separate profession and are approximately equal in wealth.

A case might be made for prohibiting such useful contractual management arrangements if the prohibition accomplished its purpose of relieving the third party of the necessity to inquire as to whether a married person has made a matrimonial agreement. But, since article 2330 allows total freedom to arrange the ownership interests in marital property, it would seem that the third party must still inquire as to whether there is a matrimonial agreement in order to determine what the spouse owns. There is little security for a third party in knowing that the spouse with whom he is dealing has the power to obligate the community property, if by matrimonial agreement there is no community. Spouses who are determined that each of them should have sole control over certain property that would under the legal regime be subject to equal management or the power of the other spouse to obligate are driven by article 2330 either to contract for a regime of separation of property, which can be disastrous for the economically inferior spouse, or to contract for a deferred community regime, similar to the legal regime in Quebec and a contractual regime in France, but largely unknown in Louisiana. Thus, the prohibition of article 2330 has little merit; it offers no definitive protection to third parties and prohibits the spouses from usefully tailor-making their management system except indirectly by drastic deviations from the legal regime in the ownership of their marital property.

Like Act 627 and prior law, Act 709 prescribes rules for a separation of property regime. Article 2372 of Act 709 contains a significant departure from Act 627 and prior law. It states: “A spouse is solidarily liable with the other spouse who incurs an obligation for necessaries for himself or the family.” Comment (a) to article 2372 notes that this rule of solidarity for necessaries applies as to third parties; between the spouses, the debt is apportioned according to their contract or in proportion to each spouse’s means.

131. This is similar to the management scheme for the legal regime recommended by the Louisiana State Law Institute in 1977. See La. H.B. No. 783, 3d Reg. Sess. (1977).
133. Code Civ. arts. 1266(c) to 1267(d) (Que.) (société d’acquêts or “partnership of acquêts”).
134. C. Civ. arts. 1569-81 (regimé de participation aux acquêts).
The Louisiana State Law Institute, the originator of the solidarity rule, intended for the rule to be a matter of public order for all separation of property regimes. The reference in the Act to French Code civil article 220 as a source for article 2372 is consistent with this intent, since Code civil article 220 makes solidary liability for necessaries a matter of public order. The purpose of solidary liability is to allow the economically inferior spouse to bargain with third parties for necessaries on the strength of the combined property of the spouses. It is the counterpart of article 2345 of the legal regime whereby each spouse can obligate the community property. However, under the legal regime, a debt made by one spouse does not obligate the other spouse personally without his consent; only the separate property of the debtor spouse and the property classified as community is obligated. By contrast, article 2372 allows a spouse to obligate the other spouse personally for necessaries, thus rendering his entire property—not just the property that would have been classified community under the legal regime—liable for the debt. Article 2372 imposes on the spouses the very thing they may have wished to avoid by adopting a regime of separation of property: the ability of one spouse to obligate the earnings and savings of the other without his consent. Because solidary liability has that effect, the French have carefully circumscribed the spouses’ authority to obligate each other. The French Code civil article 220 expressly does not impose solidary liability for expenses which are manifestly excessive, nor for credit purchases made without the consent of the other spouse. Commentators interpret article 220 as excluding for purposes of solidary liability exceptional expenses, such as the purchase of an automobile or an apartment, and including only such ordinary expenses as those for nourishment, clothing, medicine, education, furniture, and renting of lodging. They even doubt whether a loan to a spouse for ordinary expenses creates solidarity unless the purpose of the loan was known to the lender and he proves that the funds were actually used for that purpose. Louisiana's article 2372 contains no limitations other than

138. RECOMMENDATION, supra note 42, Exposé des Motifs, provides: "[T]he only substantial change in the law governing separation of property relates to the solidarity obligation of the spouses for necessaries. This obligation is a matter of public policy and should be part of all regimes of separation of property."
140. Earnings and the savings therefrom would be classified as community property under the legal regime and would be subject to the power of either spouse to obligate. LA. CIV. CODE arts. 2338 & 2345 (Supp. 1979).
141. C. CIV. art. 220.
142. J. PATARIN ET G. MORIN, supra note 139, at § 23.
143. Id.
those that can be derived from the interpretation of the word "necessaries." The jurisprudence that developed under Louisiana Civil Code articles 120 and 1786, whereby the wife could obligate the husband for necessaries he failed to provide, could be consulted for the term's perimeters.\textsuperscript{144} The new rule of solidarity for necessaries would be applicable not only in cases of contractual separation of property, but also in cases where a separate property regime results from a judgment.\textsuperscript{145} Thus, after a judgment of separation from bed and board terminates the community and creates a separate property regime, attorneys' fees in the subsequent divorce action, if considered necessities, might be the solidary responsibility of both spouses.

The differences between the two acts concerning registry of matrimonial agreements are minor. Article 2332 of Act 709 requires registry in the conveyance records rather than the mortgage records as had section 2834 of Act 627. Both acts require registry in the parish of the situs of immovable property, in order to affect third parties as to the immovable property, and in the parish of the spouses' domicile, in order to affect third parties as to movable property.\textsuperscript{146} Unfortunately, Act 709 left unsolved a problem that had been noticed after passage of Act 627. If a spouse is domiciled in Parish A, but transacts business concerning movables in distant Parish B, a third party in Parish B will be inconvenienced unduly by having to check the conveyance office in Parish A to verify the spouse's latest matrimonial agreement. Act 709 also did not remedy the problem of spouses domiciled out of state who need to establish ownership of movables located in Louisiana under Louisiana's matrimonial regimes law.

To solve both of these problems and for convenience generally, the Louisiana State Law Institute had recommended a system of central registry of matrimonial agreements in the Louisiana Secretary of State's office,\textsuperscript{147} but central registry did not sur-

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144. See, e.g., D.H. Holmes Co. v. Morris, 177 So. 417 (La. 1937) (jewelry not necessary); Watson v. Veuleman, 260 So. 2d 123 (La. App. 3d Cir. 1972) (automobile for son not necessary); Goldring's, Inc. v. Seeling, 139 So. 2d 538 (La. App. 4th Cir. 1962) (duplicate clothing can be necessary according to financial and social condition of spouses).

145. LA. CIV. CODE art. 2370 (Supp. 1979). Although this article refers to a "judgment decreeing separation of property," a separate property regime should also result from a judgment of separation from bed and board that terminates the community regime. LA. CIV. CODE art. 155.


vive review by the House Civil Law and Procedure Committee. That committee apparently thought that checking the central registry would be an unnecessary inconvenience for a third party, particularly a title examiner, whose only dealings are with local people or local property. For him, it is more convenient to check only the local parish records. The Committee overlooked the fact that the central registry scheme did not do away with the requirement of recording a matrimonial agreement in the parish where immovable property is located in order to affect third parties as to that property. Thus, with respect to all local transactions in immovables, a copy of the locally recorded matrimonial agreement would either have been found or else the matrimonial agreement would have been ineffective. Title examinations would not have been made more cumbersome by central registry, which could have solved the problem of the inter-parish transactions in movables and of the spouses not domiciled in Louisiana.

Transitional Provisions

The transitional provisions of Act 709 bear practically no resemblance to those of Act 627 except that both manifest an intent to subject as many people as possible to the new legal regime. Act 627, however, did leave spouses free to reject or modify the new legal regime by matrimonial agreement; thus, they could, if they wished, keep the old legal regime by making it their contractual regime. Article 2330 of Act 709, however, prohibits as to third persons any contractual limitation in community regimes of the right that a spouse has under the legal regime to act alone. Thus, this article prohibits the spouses, insofar as third parties are concerned, from choosing a one-spouse management system. This prohibition would be applicable to couples married after January 1, 1980, the effective date of Act 709, and, if applicable to persons married under the legal regime prior to that date, would preclude their continuing to live by contract under the management rules of the old regime. The Law Institute recommendation contained a provision allowing

spouses married under the old legal regime to elect, by a matrimonial agreement executed prior to January 1, 1980, to continue living under it and to incorporate by reference the entirety of the existing law of the old legal regime. The Joint Subcommittee saw no reason to give a special privilege to those married under the legal regime prior to January 1, 1980 to maintain the old legal regime by contract, since those married after that date could not so elect. The bill, as originally introduced with the Joint Subcommittee's amendment, provided that spouses living under the existing legal community regime could, prior to January 1, 1980, adopt by contract a matrimonial regime of their choice “subject to the provisions of this act.” The words “subject to the provisions of this act” were understood to refer to, among other things, the prohibition of article 2330. The version passed by the House deleted the words “subject to the provisions of this act.” With this deletion, the House went beyond the Law Institute's recommendation, by giving spouses married under the old legal regime not only the contractual ability to keep the old regime, but also the ability to make any other contractual regime that might not conform to the prohibition of article 2330. Under the version passed by the House, spouses married prior to January 1, 1980 could thus contractually enter into a “two funds” system of management, while those married after January 1, 1980, could not. This inequity was remedied by a Senate insertion in the final version of the bill, which provided that spouses living under the existing legal community regime could, prior to January 1, 1980, adopt by contract a matrimonial regime of their choice “in accordance with the provisions of this Act, except that such agreements shall not be subject to the requirement of court approval as provided by Article 2329 of this Act.” Thus, the only privilege given to those married under the legal regime prior to 1980 is relief from the necessity of seeking court approval of matrimonial agreements. Those matrimonial agreements entered into prior to January 1, 1980, as well as any executed after January 1, 1980, are subject to the prohibition of article 2330.

The situation involving spouses presently living under a regime of conventional community established by antenuptial agreement is more complicated. Section 12 of Act 709 states that such spouses “shall be subject to the provisions of this Act governing conventional community property regimes as to matters not provided for in

153. Recommendation, supra note 42, proposed § 11.
154. Id., proposed § 14.
the matrimonial agreement." The "provisions of this Act" referred to must be articles 2325-2333 that deal which matrimonial regime agreements generally. These articles include the rule that all of the provisions of the new legal regime that have not been excluded or modified by the agreement apply,158 as well as the prohibition of article 2330 against limiting a spouse's power to act alone with respect to the community property. Spouses who had made their antenuptial contract against the background of the old legal regime are unlikely to have used terms precisely modifying or excluding the rules of a new legal regime which they did not anticipate. Nor are they likely to have expressly stipulated for parts of the old legal regime that they desired to maintain, since these provisions of the old legal regime would have been applicable, not having been excluded or modified. Will a mere contractual reference to the old legal regime suffice to override the provisions of Act 709 concerning, for example, management? If not, spouses with contractual communities may be surprised to find themselves equal managers. If the spouses' intent was that the husband should be "head and master," it is simply too bad. Act 709 does not allow them to restate their intent contractually prior to January 1, 1980, and after that date any contract they make will be subject to article 2330's prohibition on limiting equal management.

Spouses presently separate in property, whether by contract or by judgment, are subject to the provisions of Act 709 governing separation of property.159 Thus, they are subject to solidary liability to third persons for necessaries, with no exception for spouses who may have made a contract that provided otherwise. These spouses, in addition to the spouses who have a contractual community and who intended, but did not provide, for husband-management, may argue that their contracts are being unconstitutionally impaired by the new law.

The transitional provisions of Act 709, in contrast to those of Act 627,160 make no attempt to specify whether the new law is applicable to particular transactions, assets, or liabilities. When a retroactivity question arises, the court will first have to wrestle with the legislative intent, an unnecessary step under Act 627 where the legislative intent on retroactivity was specified. The authors believe that the omission in Act 709 of these specifications does not represent any change in the legislative intent.

**CLASSIFICATION AS SEPARATE OR COMMUNITY**

In Act 627 of 1978, few substantial changes were made in the

158. LA. CIV. CODE art. 2328 (Supp. 1979).
classification of property under the legal community regime. Property of married persons remained either separate or community. In one case, property previously classified as community was reclassified as separate—the husband's personal injury award or recovery. Under another provision of the 1978 legislation, the privilege the wife enjoyed under former Civil Code article 2386, to maintain the separate character of the fruits of her separate property, was extended to the husband. As to earnings of the spouses while living separate and apart, the legislative decision in 1978 was to classify that income as community.

More subtle refinements of the classification provisions of Act 627 were accomplished by Act 709 of 1979. In two provisions of Act 627, reference was made to the “fruits and revenues” of property. 

162. LA. CIV. CODE art. 2334, as amended by 1977 La. Acts, No. 679, § 1 (repealed 1979), provided in pertinent part: "Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property." Under the omnibus clause of the same article, community property is "that which is acquired . . . in any manner different from that above declared." Thus, all other damages suffered by the husband would be classified as community.

163. LA. R.S. 9:2840 (Supp. 1978) (repealed 1979) provided:
When an offense or quasi offense is committed against the person of a spouse during the existence of the community regime, the recovery or award for the damages sustained is the separate property of the injured spouse; but the portion thereof that is attributable to compensation for the expenses incurred as a result of the injury during the existence of the regime, or in compensation for the loss of community earnings, is community property.

164. LA. CIV. CODE art. 2386 (repealed 1979) provided:
The fruits of the paraphernal property of the wife wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.


166. LA. R.S. 9:2838(1) (Supp. 1978) (repealed 1979) provided: "Each spouse owns a present undivided one-half interest in the community property. The community property comprises: (1) Things acquired during the legal regime through the effort, skill, or industry of either spouse . . . ."

167. LA. R.S. 9:2838 (Supp. 1978) (repealed 1979) provided in pertinent part: "Each spouse owns a present undivided one-half interest in the community property. The community property comprises: . . . (5) Fruits and revenues of community property; (6) Fruits and revenues of separate property except as otherwise provided in R.S. 9:2839 . . . ."
Being a more inclusive term than "fruits," "revenues" included payments resulting from the sale or lease of a mineral interest and other future payments of a similar nature which would not be traditionally defined as "fruits." Obviously, the choice of the word "revenues," which resulted in identical treatment of fruits and those payments, was a policy decision. However, in Act 709, "revenues" was deleted; and "natural and civil fruits ... and bonuses, delay rentals, and shut-in payments arising from mineral leases"168 was substituted. The substitution of language was purposeful; the word "revenues" was considered too inclusive and undefined by the Civil Code. Conspicuously absent from the enumeration found in Act 709 are oil royalties; therefore, the issue is posed whether or not royalties are included in the term "fruits." If not "fruits," oil royalties retain the classification of the property, or mineral interest, from which derived.

Under article 551 of the Civil Code regulating the rights of the usufructuary, "fruits" are defined as "things that are produced by or derived from another thing without diminution of its substance." Civil fruits are further defined as "revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions."169

Applying those definitions to the oil royalty is difficult for oil royalties represent payments for extraction of minerals which does result in a diminution of the substance of the thing. Yet, under past Louisiana jurisprudence, oil royalty payments were considered analogous to "rents," thus civil fruits.170 Comment (c) to article 551 declares that mineral substances and the proceeds of mineral rights are not fruits, because their production results in "depletion of the property." Yet the remainder of the same comment states: "Nevertheless, mineral substances extracted from the ground, the proceeds of mineral rights, and the revenues of regularly exploited mines or quarries may . . . belong to the usufructuary or they may fall into

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A spouse owns his or her separate property to the exclusion of the other.
The separate property of the spouses comprises:

(5) The fruits and revenues of the separate property of a spouse accruing
after an act passed before a notary public and two witnesses reserving them as
the separate property of the spouse has been filed for registry in the mortgage
records of the parish where the spouse is domiciled and, if the fruits and revenues
are derived from immovable property, in the mortgage records of the parish
where the immovable is situated . . . .

169. LA. CIV. CODE art. 551, as amended by 1976 La. Acts, No. 103 (emphasis
added).
170. See McElwee v. McElwee, 255 So. 2d 883 (La. App. 2d Cir. 1971), cert. denied,
260 La. 862, 257 So. 2d 434 (1972).
the community of acquets and gains.” As authority for the foregoing statement in the comment, provisions of the Mineral Code are cited. Article 561 provides that the Mineral Code governs a usufructuary’s rights to minerals. As to mines and quarries already opened, the Mineral Code originally provided that the usufructuary had an imperfect usufruct over minerals produced therefrom. Since he had to account to the naked owner at termination of the usufruct, it was obvious that such minerals and payments derived therefrom were not fruits. However, in 1975 section 194 was amended to eliminate the obligation of the usufructuary to account; thus, by specific legislation minerals subject to a usufruct are to be considered the equivalent of “fruits” under the Mineral Code. Therefore, it is reasonable to conclude, after examining the statutes and comments, that oil royalties, not being “fruits” and specifically excluded from the enumeration of other payments derived from mineral interests, are to retain the classification of the property or interest from which derived. If so, prior Louisiana decisions have been

171. LA. R.S. 31:188-96 (Supp. 1974). LA. CIV. CODE art. 551 comment (h), added by 1976 La. Acts, No. 103, provides: "They may fall into the community of acquets and gains by virtue of directly applicable provisions rather than as the result of their classification as fruits.


174. LA. R.S. 31:194 (Supp. 1974) provides:

A usufructuary of land benefiting under Article 190 or 191 or a usufructuary of a mineral right is obligated to account to the naked owner of the land or of the mineral right for production of the value thereof or any other income to which he is entitled. The accounting for production or the value thereof shall be on the basis of the price received by the usufructuary or, if the production was used or disposed of by the usufructuary other than by sale, on the basis of the value at the time of severance. The usufructuary is also obligated to reserve and give or pay to the naked owner such portion of the production or the value thereof as may be necessary to pay income and severance taxes due.

LA. R.S. 31:194, comment (Supp. 1974) provides:

Article 194 limits the usufructuary of land who has rights in minerals under Articles 190 or 191 and the usufructuary of a mineral right to the benefits of an imperfect usufruct in that they must account to the naked owners on termination of the usufruct. The accounting is to be on the basis of the value received or, if production is disposed of other than by sale, on the basis of value at the time of severance. A consequence of making the usufruct in these cases imperfect is that the income can then be viewed as attributable to the naked owner . . .

175. LA. CIV. CODE art. 550, as amended by 1976 La. Acts, No. 103, provides: "The usufructuary is entitled to the fruits of the thing subject to usufruct according to the following articles.”

175a. LA. R.S. 31:194 (1975) provides: "A usufructuary of land benefiting under Article 190 or 191 or a usufructuary of a mineral right is not obligated to account to the naked owner of the land or of the mineral right for production or the value thereof or any other income to which he is entitled.”

176. See note 170, supra.
legislatively overruled and a significant change in classification from that of Act 627 accomplished.

Related to the legal issue of classification is the presumption under former Civil Code articles 2402 and 2405 that property acquired during the marriage is community. Under Act 627, the presumption was extended to include all property possessed by the spouses during the marriage, but neither spouse was precluded from proving the separate character of property. The latter section of Act 627 overruled the jurisprudence which imposed upon the husband the necessity of including in his acts of acquisition "the double declaration." The presumption that property possessed during the marriage is community and the ability of the spouses to rebut that presumption with evidence to the contrary were unchanged by article 2340 of Act 709.

Although the fact that the community may not be judicially partitioned during its existence was never doubted under Louisiana's community property laws, Act 709 specifically so provides. The community of acquets and gains as a mass of property is dedicated to the purpose of furthering the interests of the family and, therefore, must remain intact to accomplish that purpose. It was unnecessary before 1978 to include such a provision because husband and wife could not sue each other during the existence of the regime except for enumerated causes. However, in 1979, Revised Statute 9:291 was amended to allow husband and wife to sue each other for "causes of action arising out of . . . the provisions of Title VI, Book III of the Civil Code . . . ." Since each owns an undivided one-half interest in community property, arguably either could enforce that ownership interest by seeking a judicial partition. Therefore, it was necessary in Act 709 to specifically prohibit such suits for the

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179. See, e.g., Slaton v. King, 214 La. 89, 36 So. 2d 648 (1948), and cases cited therein; Phillips v. Nereaux, 357 So. 2d 813 (La. App. 1st Cir. 1978).
185. La. Civ. Code art. 1259. Under Revised Statutes 9:291, the specific provision that either spouse can enforce a cause of action arising out of the Civil Code articles governing matrimonial regimes, including new article 2336, necessitated a provision prohibiting partition of the community property during the existence of the regime.
policy reasons previously discussed. In furtherance of the same policy objectives, another provision prohibits a spouse's alienation of his undivided interest in the community or in particular things of the community. If an undivided interest is sold to a third person, it makes the other spouse a co-owner with a stranger and could accomplish indirectly what is prohibited directly—a judicial partition of the community.

Introduced in Act 627 was a provision with no parallel in the Civil Code articles—a "declaration of separateness." The provision was enacted so that a spouse could manage his separate property alone, irrespective of the presumption that all property possessed by the spouses is community. For example, in the case of immovable property, if presumed community, the consent of both spouses was necessary for its alienation or encumbrance. If in the act of acquisition it is declared that the husband is purchasing the property with separate funds, the declaration cannot be set aside by the wife should it be false. Properly interpreted, this provision was an exception to the rule that an unauthorized alienation by one spouse can be avoided by the other. Thus, the wife's sole remedy in the foregoing example was damages on account of the fraudulent management of community property. Under the language of section 2839 in Act 627, it was apparent that if the third person was cognizant of the falsity of the declaration, he was not protected.

After examining the language and purpose of the provision, it is obvious that the enunciated rule of law pertains to management of property because it affects who has the power to alienate property during the existence of the legal regime. The provision does not classify the property as separate or community; it is community as between the spouses if the declaration is false. Instead, it addresses directly the problem of what declarations may be relied upon by a third person. However, in Act 709 "the declaration of separateness"

186. La. Civ. Code art. 2337 (Supp. 1979) provides: "A spouse may not alienate, encumber, or lease to a third person his undivided interest in the community or in particular things of the community prior to the termination of the regime."

187. La. R.S. 9:2839(2) (Supp. 1978) (repealed 1979) provided:

A spouse owns his or her separate property to the exclusion of the other.

The separate property of the spouses comprises:

(2) Things acquired by the spouse with separate assets, including those acquired in exchange for separate assets. The declaration in the act of acquisition that the things are acquired with the separate assets of the acquiring spouse may be controverted by the other spouse or by their creditors, but without prejudice to the rights of third persons . . . .


provision does not appear in the section of the Civil Code governing management, but rather in that regulating classification of property.

The first paragraph of article 2342 is more explicit than its counterpart in Act 627. Consistent with past jurisprudence involving transactions by the wife, the declaration cannot be controverted by a spouse who concurs in the act. However, it may be controverted by the forced heirs and creditors of the spouses even if there is a concurrence. The second paragraph of article 2342 contains the substance of section 2839, but the statutory language is absolute, rather than qualified. In the comments which follow article 2342, an explanation of its application is given:

Thus, a court may determine that the things were actually acquired with community funds and are community property. This determination produces effects between the spouses and toward creditors and forced heirs as long as the thing is owned by the acquiring spouse. But it is without effect as to things that have been transferred by onerous transaction to a third person. That person acquires ownership from the transferor spouse in reliance on the declaration in the act by which the transferor acquired the thing that it is separate property.

There is no indication in the statutory language of article 2342 nor in the comments thereto that if the third person is not in fact acquiring the property in reliance on the declaration and is cognizant of its falsity that the transaction may be annulled by the other spouse. Never was it the intention of the Joint Legislature Subcommittee that this provision could be used by one spouse as an effective means of defrauding the other. The Subcommittee did consider the serious problem of fraud, since it could easily be accomplished by "the declaration" and the absence of a concurrence requirement for the purchase of community immovable property. Presumably,

190. LA. CIV. CODE art. 2342 (Supp. 1979) provides in pertinent part:

A declaration in an act of acquisition that things are acquired with separate funds as separate property of a spouse may be controverted by the other spouse unless he concurs in the act. It may also be controverted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse.


192. Minden Chamber of Commerce v. Goodman, 243 So. 2d 843 (La. App. 2d Cir. 1971); Succession of Winsey, 170 So. 2d 732 (La. App. 1st Cir. 1964), cert. denied, 247 La. 615, 172 So. 2d 701 (1965). LA. CIV. CODE art. 2342 (Supp. 1979) provides in pertinent part: "Nevertheless, when there has been such a declaration, a transfer of the thing by onerous title may not be set aside by a spouse, or by the creditors or forced heirs of the spouses."

193. LA. CIV. CODE art. 2342, comment (a) (Supp. 1979).

194. The Joint Legislative Subcommittee during the first two hearings held pursuant to Senate Concurrent Resolution No. 54 of 1977 rejected a concurrence requirement for the purchase of immovable property. Some of the other six community property states with an "equal management" scheme, such as Washington, do have concur-
the article will be interpreted as originally intended, that is, as a means of protecting innocent third persons who are not active or passive participants in interspousal fraud.

MANAGEMENT OF COMMUNITY PROPERTY

The most controversial issue in the lengthy course of the matrimonial regimes law revision and, indeed, the issue that originally prompted the revision, was that of management of the community property. By enacting Act 627 of 1978, the legislature finally chose equal management of the community property by the spouses as the general rule of management. As part of the new scheme of management, the legislature also required concurrence of the spouses for certain enumerated transactions and gave exclusive management of other transactions to one spouse. Desiring that the version of equal management ultimately to take effect be more refined than that in Act 627, but not wishing to rekindle debate on the new management scheme, the legislature ordained an interim study of Act 627 by the Law Institute, limited to improving the expression and furthering the implementation of the policy already determined and enunciated in the Act. The Law Institute complied by making its revisions to Act 627 consistent with Act 627's equal management scheme, although disclaiming all responsibility for any chaos, corruption, or calamity that equal management might occasion. Consequently, Act 709 contains no major changes in the management scheme of Act 627.

Several variations between the two acts are, however, more than semantical. One such variation occurs in the enumeration of acts requiring concurrence of the spouses. Whereas Act 627 required concurrence for the alienation, encumbrance, or lease of community furniture or furnishings in use in the family home, Act 709...
requires concurrence in these transactions involving "furniture or furnishings while located in the family home." Under Act 627, if the wife removed the family television set from the family home where it was being used and sold it to a good faith purchaser, the sale would have been voidable by the husband. During the debate on Act 627, concern was expressed as to how a prospective purchaser of furniture typically used in a home would know whether the furniture was actually used in the home of the seller-spouse. The legislature decided to place the risk of dealing with one spouse alone, where home furniture is concerned, on the third party, in the interest of insuring the other spouse's participation in the disposal or encumbrance of these essential family assets.

The Law Institute felt that this result was inconsistent with the general rule which the institute intended to recommend to the 1979 legislature for the transfer of ownership of corporeal movables by a possessor. This rule, subsequently enacted, provides: "A transferee in good faith for fair value acquires the ownership of a corporeal movable, if the transferor, though not owner, has possession with the consent of the owner, as pledgee, lessee, depositary or other person of similar standing." The Law Institute apparently thought that in the example of the television set, the new provision on the transfer of ownership would mean that the sale could not be annulled by the husband. It is not clear, because of the difficulty in applying the provision on transfer of ownership to a community movable, whether this result would have followed. Who is "the owner" of a community movable when each spouse owns a present undivided one-half interest in the community property? Is the transferor-spouse by virtue of the legal regime automatically a person of similar standing to a pledgee, lessee, or depositary of the nontransferor-spouse? The applicability of the transfer of ownership provision to community movables should have been discussed rather than assumed; if the provision was inapplicable, then there was no reason to alter the language of Act 627's concurrence requirement for transactions involving furniture and furnishings in use in the family home. Nevertheless, to protect the good faith transferee for value of a corporeal movable, as the provision attempts to do, the Law Institute recommended total deletion of transactions involving family home furniture and furnishings from the list of transactions requiring concurrence of the spouses. The Joint Legislative Subcommittee was unwilling to abandon entirely the concurrence re-

204. 1979 LA. Acts, No. 180, amending LA. CIV. CODE art. 520.
205. See LA. CIV. CODE art. 2336 (Supp. 1979).
206. RECOMMENDATION, supra note 42, proposed LA. CIV. CODE art. 2347.
quirement where family furniture was concerned and reached a compromise in the language ultimately enacted in Act 709. Under Act 709, in the example of the television set, the sale would be voidable by the husband only if the television set was sold in place while located in the family home. Once removed from the family home, furniture is subject to the power of either spouse acting alone to dispose of or encumber it. The compromise concurrence requirement at least prevents one spouse from secretly placing a chattel mortgage on furniture located in the home without the consent of the other spouse, an act which could have been accomplished under the Law Institute recommendation.

Article 2348 of Act 709 restates more clearly than did Act 627 that a spouse whose concurrence would be required for an act may, with respect to particular community property, renounce in advance the right to concur. The new wording, plus the explanatory comment, makes it clear that the renouncing spouse does not, merely by renouncing the right to concur, become a party to the transaction for which concurrence would have been required. The second sentence in article 2348 is new and states that a spouse may also renounce the right to participate in the management of a community enterprise. This relates to the “business exception” to the general rule of equal management whereby “the spouse who is sole manager of a community enterprise has the exclusive right to alienate, encumber, or lease its movables . . . .” The exclusive management for which the business exception provides does not arise when both spouses are participating in the management of the business. In that case each spouse could equally manage the untitled movable assets of the business. Act 627 did not explicitly recognize a spouse’s right to participate in the management of a community business run by the other spouse; however, that right was implicit in the spouses’ relationship as co-owners and equal managers generally of the community property. The business exception was intended to apply only if one spouse voluntarily refrained from participating in the management of the business; it did not mean that a spouse could be involuntarily and completely excluded from such participation. The second sentence of article 2348 of Act 709 indirectly acknowledges

212. If any of the movable assets are titled as required by law, management of those assets would depend on the management rules for titled movables rather than the general equal management rules. La. Civ. Code arts. 2347 & 2360-51 (Supp. 1979).
the right to participate in the management of a community business. A spouse who has not renounced the right to participate cannot be excluded from the business.

When the right to participate has been renounced, the question may arise as to whether the renunciation will be effective against third parties who have no notice of it. There is no requirement in Act 709 for recordation of the renunciation and, since only movables are involved, the general law does not require recordation. The spouse who has renounced, and who thereafter attempts to participate in the business in order to sell a movable asset of the business to a third party, can hardly be expected to produce the renunciation. Therefore, how will the third party know if a spouse has disabled himself by renunciation from acting as an equal manager of the community business? If the renunciation affects third parties, then the result is contrary to the legislative intent of article 2330, which, for the protection of third parties, does not allow a spouse by matrimonial agreement to restrict his powers as an equal manager.214 The second sentence of article 2348 would inconsistently permit a spouse unilaterally to restrict his equal management power with respect to a community business. Thus, in order to avoid violating the objectives of article 2330, the renunciation should not be regarded as affecting third parties.

Another variation between the two acts is the remedy for an unauthorized alienation, encumbrance, or lease of community property. Both acts allow damages for fraud or bad faith management of the community property as a remedy between the spouses,215 but they differ slightly as to the remedy against third parties. Act 627 made any unauthorized act concerning community property avoidable at the instance of the other spouse.216 Article 2353 of Act 709 dictates this result with respect to acts done by a spouse in violation of the concurrence requirement and with respect to the "business exception,"217 but does not dictate relative nullity for an act done in violation of the management rules governing movables registered in one spouse's name218 or partnership interests.219 The

214. See text at notes 128-32, supra.
217. LA. CIV. CODE art. 2353 (Supp. 1979). The "business exception" is the right that a spouse managing a community business without the participation of the other spouse has to be the exclusive manager of the movable assets of the business. See LA. CIV. CODE art. 2350 (Supp. 1979). The voidability of transactions by the non-manager spouse would be an exception to amended article 520, which makes valid the transfer of ownership of a corporeal movable to a good faith purchaser by a person in possession with consent of the owner, even if the article were clearly applicable to community property. For the text of article 520, see text at note 204, supra.
omission does not signify legislative intent to make the management rules governing movables registered in one spouse's name or governing partnership interests effective only between the spouses. Rather, the legislature intended that the general law be consulted to determine if the transaction can be avoided in the unlikely event that a spouse sells or encumbers a movable registered in the name of the other spouse or an interest in a partnership in which the other spouse was a partner. Unfortunately, the general law offers no clear answer because of the ownership and management rules that are peculiar to community property. For example, Civil Code article 2452, declaring that the sale of a thing belonging to another is null, does not precisely fit the situation in which a spouse disposes of a community car registered in the name of the spouse, since the "thing" belongs equally to the seller and his spouse. Likewise, analogy to an agent exceeding his authority is problematic since the spouses are not co-mandataries with respect to community property transactions. Nor can the answer be that the seller-spouse has conveyed his undivided one-half interest in the property, since article 2337 prohibits a spouse from disposing of his undivided interest in a particular community thing prior to termination of the regime.

With respect to registered corporeal movables, new article 520, whereby a person in possession of a corporeal movable can, with consent of the owner, transfer title to a good faith transferee for value, is explicitly made inapplicable. The various registration laws for movables may not offer solutions. In the case of vehicle title registration laws, the jurisprudence has held that the transfer of ownership of a vehicle is governed by the Civil Code despite non-compliance with the Vehicle Certificate of Title Law. Similar jurisprudence can be found under the old Uniform Stock Transfer Act. Title laws for movables are intended to protect the transferee of the person whose name is on the title by declaring the transfer unassailable and by giving the transferee an action for breach of contract if a properly endorsed certificate cannot be delivered.

218. LA. CIV. CODE art. 2351 (Supp. 1979).
220. LA. CIV. CODE art. 2346, comment (b) (Supp. 1979).
221. LA. CIV. CODE art. 2337 (Supp. 1979).
222. 1979 La. Acts, No. 180, amending LA. CIV. CODE art. 525 provides: "The provisions of this chapter do not apply to movables that are required by law to be registered in public records."
These title laws are not addressed to the situation where the transferee, having dealt with the spouse of the person whose name appears on the certificate, wishes to complete the transfer. Common sense and the negative implication of the title laws indicate that any transfer by someone whose name does not appear on the certificate is assailable by the person whose name does appear thereon. But the grounds for the assault and its extent (i.e., whether the transfer is an absolute or relative nullity) must be sought in the general law. For the sake of thoroughness the legislature should amend article 2353 to provide, as did Act 627, that a transaction in violation of any of the management rules, including those involving registered movables and partnership interests, is relatively null.

During the interim study the Advisory Committee had recommended a prescription of three years from the day the transaction is discovered for an action by a spouse to annul an unauthorized transaction by the other spouse. The legislature, however, did not enact a specific prescription for this action, thus necessitating a search of the general law for the appropriate prescription. Article 2221, which provides a ten-year prescription for nullity or rescission of an agreement in cases of certain vices of consent and incapacities, is the provision most clearly applicable to this situation, since it gave as an example of its application an unauthorized act executed by a married woman. The deletion of that example by other legislation in 1979 should not be taken as relevant to the use of article 2221's prescription in the situation described; the deletion was simply part of a comprehensive act removing, among other things, all references in the Civil Code to the incapacities of married women. If article 2221 does not provide the appropriate prescription, then article 3542, providing a five-year prescription for the nullity or rescission of contracts, may arguably be applicable. It is to be hoped that in the next session the legislature will adopt the preferable, shorter three-year prescriptive period. This period is of sufficient length to allow a spouse a fair opportunity to annul an unauthorized transaction, yet its brevity provides security of transactions to third parties.

**TERMINATION**

Of all the provisions in the matrimonial regimes legislation, the section regulating rights upon dissolution has received the least public discussion. Articles 2357 and 2357.1 reflect the underlying

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226. LA. CIV. CODE art. 2221.
230. LA. CIV. CODE art. 2357 (Supp. 1979) provides:

An obligation incurred by a spouse before or during the community property regime, may be satisfied after termination of the regime from the property of the
policies sought to be accomplished in the 1978 legislation. In fact, the statutory language of those two articles is in almost all respects identical to the corresponding provisions of Act 627.232

At termination of the community regime for one of the causes listed in article 2356,233 articles 2357 and 2357.1 regulate the rights of the spouses' creditors for obligations incurred prior to dissolution234 of that regime. A proposal to impose responsibility equally on spouses at dissolution for one-half of the community obligations, regardless of who contracted them, was rejected by the legislature.235 The provisions of the above-cited articles neither govern the rights of post-dissolution creditors, as at least one other author has noted,236 nor do they determine the rights of a co-owner spouse against the other.237 The articles attempt to identify property

former community and from the separate property of the spouse who incurred the obligation.

If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up to the value of that community property. 231. LA. CIV. CODE art. 2357.1 (Supp. 1979) provides: "A spouse may by written act assume responsibility for one-half of each community obligation incurred by the other spouse. In such case, the assuming spouse may dispose of community property without incurring further responsibility for the obligations incurred by the other spouse."

232. LA. R.S. 9:2849 (Supp. 1978) (repealed 1979) provided: "Except as otherwise provided in this Subpart, upon dissolution of the community regime, the claims of creditors may be satisfied from the community property and from the separate property of the spouse who incurred the obligation."

233. LA. R.S. 9:2850 (Supp. 1978) (repealed 1979) provided: "A spouse who accepts the community expressly and unconditionally upon the dissolution thereof is personally obligated for one-half the outstanding obligations incurred by the other spouse for the common interest of the spouses."

234. The language reads as follows: "An obligation incurred by a spouse before or during the community property regime . . . ." LA. CIV. CODE art. 2357 (Supp. 1979) (emphasis added).

No provision regulates the rights of post-dissolution creditors of a spouse. However, the proper theoretical disposition would be to allow those creditors to execute against separate property of the debtor spouse and his one-half interest only in property of the former community. Thus, the pre-dissolution creditors of the debtor spouse are given greater rights than are post-dissolution creditors, which seems to be a reasonable distinction. For an excellent discussion of the problem of post-dissolution creditors, see Bilbe, "Management" of Community Assets Under Act 627, 39 LA. L. REV. 409 (1979).

235. The proposal was made by the Ad Hoc Committee on Matrimonial Regimes of the Louisiana State Law Institute, the composition of which included Professor A.N. Yiannopoulos, reporter, and F.A. Little, Jr., chairman. For a list of the other members of that special committee, see Spaht, supra note 2, at 556. When the proposal was presented to the Council of the Louisiana Law Institute, it was rejected.

236. Bilbe, supra note 234, at 435.

237. See subsection entitled Rights Between Spouses on Dissolution, infra.
available for satisfaction of creditors' pre-dissolution claims at the termination of the community regime.

Causes of Termination

The causes enumerated for termination of the legal matrimonial regime include death, a judgment of separation from bed and board, divorce, or separation of property.\(^\text{238}\) Although not included in the provisions of the article, the comment thereunder reads, "The enumeration of causes of termination of the legal regime is exclusive."\(^\text{239}\) Omitted from the enumeration of the causes for termination of the regime are a judicially approved matrimonial agreement and dissolution of the community under the articles governing absentees and upon declaration of nullity.\(^\text{240}\) Yet in another paragraph of the same legislation,\(^\text{241}\) the Act provides that a judicially approved agreement may terminate the legal regime—for example, a judicially approved separation of property agreement. Although not specifically enumerated in article 2356, such an agreement does require a termination of the legal regime, a separation of property being the antithesis of a community regime.

More difficult to assess at this time is the agreement which merely modifies the legal regime in certain respects—for example, an agreement in which one spouse is given the exclusive power to alienate, encumber, or lease certain community immovable property\(^\text{242}\) or in which one spouse's earnings are designated as separate property. In the former example, the modification does not necessitate termination of the legal regime; the agreement only modifies one aspect of management powers over community property. Whether the latter example terminates the regime is a more troublesome question. In such a situation, there is no specific provision in the contract that the community or legal regime is terminated; certain property is merely reclassified.

Neither the legislation itself nor the comments thereto assist in resolving the problem, unless significance can be attached to the

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\(^{238}\) LA. CIV. CODE art. 2356 (Supp. 1979).

\(^{239}\) LA. CIV. CODE art. 2356, comment (a) (Supp. 1979). 1979 La. Acts, No. 709, § 7, provides: "The article headnotes, the expose des motifs and the comments in this Act are not intended to be considered as part of the law and are not enacted into law by virtue of their inclusion in this Act."


\(^{241}\) LA. CIV. CODE art. 2329 (Supp. 1979).

\(^{242}\) LA. CIV. CODE art. 2347 (Supp. 1979). The described provision is one which may affect third persons under new article 2330.
omission in article 2367 of “contract.” Since the word “contract” had appeared in the corresponding provision of Act 627, it is possible that the drafters of article 2356 were of the opinion that the term was too broad, since not all matrimonial regime contracts terminate the legal regime. A reasonable approach might be to hold the matrimonial agreement to be terminated only when the spouses so stipulate or where the fundamental nature of the community is altered.

**Articles 2357 and 2357.1**

To demonstrate the application of articles 2357 and 2357.1, consider the following hypothetical circumstances:

**HYPO:** H and W are married two years with one child. A judgment of separation from bed and board terminates the community. H owes A $540 for an obligation he incurred before his marriage, and he owes B $940 for a mink stole he purchased for his wife on their first wedding anniversary. W owes C $420 for child care services rendered and D $350; both debts were incurred prior to filing of suit for separation. After a judgment of separation from bed and board is rendered, the spouses voluntarily partition the community property—W is given ownership of the house; H is given ownership of the car and the General Electric stock.

**Article 2357—Assumption of Obligations**

Article 2357 provides:

An obligation incurred by a spouse, before or during the community property regime may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation.

If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up to the value of that community property.

Under the first paragraph of article 2357, the four predissolution creditors in the hypothetical may satisfy their respective obligations from property of the former community and from the separate property of the spouse who incurred the obligation. Thus, by comparing the provisions of articles 2345 and 2357, dissolution

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244. LA. CIV. CODE art. 2345 (Supp. 1979) provides: “A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation.”
of the legal regime affects creditors "only as it results in the reclassification of assets such as subsequent salaries and fruits and revenues of separate property which previously have been community property."Obviously then, the underlying policy of the provision is not to affect adversely creditors of a spouse when there is a termination of the legal regime. The voluntary partition of assets, although enforceable between \( H \) and \( W \), cannot affect the four pre-dissolution creditors.\(^{246}\) Upon default by \( H \), \( A \) and \( B \) can execute against the house as an asset of the former community. Neither, however, could garnish the wages of \( W \). If \( A \) should seize the house, in satisfaction of a prenuptial obligation of \( H \), which is categorized as a separate debt between the spouses, \( W \) would be entitled to recover the entire sum from \( H \) under general legal principles such as breach of warranty, which is implied in a partition,\(^{247}\) dissolution of the contract for failure of cause,\(^{248}\) or as a last resort, a quasi-contractual remedy.\(^{249}\)

At first glance, the scheme of article 2357 appears to have the advantage of simplicity, providing the same rule for satisfaction of obligations after termination of the regime as during its existence. However, upon closer examination, questions arise. Identifying property of the former community may be difficult, especially since the creditor assumes the risk of liability for wrongful seizure should he be mistaken.\(^{250}\) If, as in the hypothetical situation, the spouses have voluntarily partitioned the property of the former community and \( W \) sells the house, is the creditor of \( H \) affected? The second paragraph of article 2357, which did not appear in Act 627, attempts to solve this problem first by tracing values.\(^{251}\) If \( W \) sold the house for \$32,000, she is liable for all obligations incurred by \( H \) up to the value of the property conveyed. Thus, \( W \) is personally liable to \( A \)

\(^{245}\) Bilbe, supra note 234, at 429.

\(^{246}\) Id. at 431. This conclusion is apparent from the statutory language which refers to property of the "former community."

\(^{247}\) LA. CIV. CODE arts. 1384-85, 1387, 1390-91 & 1394. Furthermore, because the partition is designated as a type of exchange, the warranty is the same as that in a sale. Jeannin v. Bouman, 2 Pelt. 64 (Orl. App. 1918).

\(^{248}\) LA. CIV. CODE arts. 1897-98.

\(^{249}\) LA. CIV. CODE arts. 1965 & 2292-300. In this case the articles regulating the quasi-contract resulting from the management of another's affairs may not be applicable because they assume that such quasi-contracts are the result of purely voluntary acts of man. See LA. CIV. CODE art. 2293. However, the remedy of unjust enrichment may be available. LA. CIV. CODE art. 1965.


\(^{251}\) The problem presented by the hypothetical was mentioned in Professor Bilbe's article. See Bilbe, supra note 234, at 431.
for $540, since $32,000 exceeds the amount of the indebtedness. Despite the provisions of the first paragraph of article 2357, her salary may now be garnished in satisfaction of that obligation. Obviously, in the particular hypothetical, tracing of values is not very difficult since the sale of an immovable is normally in writing and recorded. If the transaction involved movables, the problem of tracing values would be more difficult.

Legislatively, the only exception to the imposition of personal liability upon W is the case where she disposed of the house to satisfy other community obligations. Again, there are problems of interpretation. What if W used $320 of the $32,000 in satisfaction of the D bill which was a community obligation? May A seek satisfaction of the entire amount of his obligation by garnishing W's wages since she did not dispose of the entire $32,000 in satisfaction of community obligations? Or, is he precluded from garnishing her wages because she used some portion of the value received for satisfaction of a community obligation? Or instead, is he entitled to partial satisfaction of his obligation, for example, the difference between $540 and $320? In solving the problem, it is necessary to resort to the purpose underlying the second paragraph, which is to maintain for the benefit of unpaid pre-dissolution creditors the property of the former community, or its value, for the satisfaction of their debts. Thus, under the facts proposed, A should be entitled to garnish W's wages for the entire amount due and owing by H.

More difficult to resolve is the issue of disposition of monies received from the transfer of a community asset for a purpose other than the payment of community obligations. For example, there may be a disposition of assets to support the current living expenses of the wife and the child in her care. In fact, it is probably for the payment of such expenses that W is more apt to sell the house. The legislation is specific in its language—"other than the satisfaction of community obligations." It was never intended, however, that expenditure of such funds for current living expenses should impose personal responsibility for obligations of the other spouse. Future amendments to this provision should address and satisfactorily solve the problem.

If A garnishes W's wages, which are now reclassified as separate property, in satisfaction of H's separate obligation, W
should be entitled to indemnification from him. Again, the underlying purpose sought to be accomplished by the legislation is the identification of assets subject to the creditors' claims, not determination of ultimate responsibility as between the spouses. Such a conclusion is reasonable because the responsibility imposed is determined by the value of the property disposed of, not by the amount of the obligation.256 W and H are bound for the same debt to A, one in law257 and one in contract; thus they are liable in solidum to the creditor.258 Since imperfect solidarity exists between H and W, she has a right to recompense from H.259 In this Case W can recover the whole sum, since the affair concerns only one of the co-debtors.260 The result is similar to instances of recovery by a surety from the principal,261 although theoretically responsibility to the creditor is different. The surety is only liable to the creditor if the principal debtor defaults on the obligation.262 Under article 2357 there is no secondary obligation of the wife to pay upon default by the husband; her obligation to the creditor is a principal one which she incurs because of her disposition of community assets.

Mention must be made of comment (b) to article 2357, which provides: "When one remarries under a community property regime, his share of the new community is separate property for the purposes of Article 2357." This comment is misleading and probably unnecessary. If W, after termination and the voluntary partition, remarries under a community property regime, her premarital creditors may seek satisfaction from her separate property and all of the community property of the second marriage.263 Creditors of H, such as A, are limited to seeking satisfaction from identifiable assets of the former community in her possession; thus, considering her share of the second community as her separate property does not benefit A, who does not have access to her separate property anyway. If W disposes of the assets of the first community, she becomes liable to A and incurs a personal responsibility, capable of

256. LA. Civ. Code art. 2357 (Supp. 1979) provides in pertinent part: "If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up to the value of that community property." (Emphasis added.)
261. LA. Civ. Code arts. 3035-63.
262. LA. Civ. Code arts. 3035 & 3045.
satisfaction from her separate property and all of the property of
the second community. Protection of creditors of the first marriage
was unnecessary, and the comment creates confusion as to the pro-
per application of article 2345 when there is a remarriage. Are those
premarital creditors, who are asserting rights by virtue of the provi-
sions of article 2357, restricted to seizing only one-half of the com-

Article 2357.1—Express assumption

Article 2357.1 provides: "A spouse may by written act assume
responsibility for one-half of each community obligation incurred by
the other spouse. In such case, the assuming spouse may dispose of
community property without incurring further responsibility for the
obligation incurred by the other spouse."

Under article 2357 a spouse cannot determine exactly and finally
his ultimate responsibility to creditors of the other spouse even
when there has been a voluntary partition. However, in Article
2357.1, the legislation provides an alternative to this indefinite
liability.

Although poorly phrased, the equivalent of an express assump-
ton of responsibility first appeared in Act 627. After enactment of
the provision in 1978, the Joint Legislative Subcommittee agreed
that the Act be amended to clarify the intended effects of the ex-
press "acceptance." However, it was not until hearings in March of
1979 that the language of article 2357.1 and its interrelationship
with article 2357 were formulated.

264. See Bilbe, supra note 234, at 412.
265. Since husband and wife on termination may be considered liable in solidum,
see text at notes 258-62, supra, a possible method for establishing a definitive par-
tion, as defined by article 1295, would be negotiating either a novation or remission.
See LA. CIV. CODE arts. 2185-98, 2201-03. These articles deal with novation and remis-
sion of the solidarity and the debt, respectively, of co-debtors in solido. For a descrip-
tion of the somewhat analogous situation resulting today when the husband remains
liable for the whole of the community debts because he incurred them even when the
wife accepts the community, see Comment, The Fictitious Community and the Right
266. LA. R.S. 9:2850 (Supp. 1978) (repealed 1979). For the text of this provision, see
note 232, supra.
267. See Spaht, supra note 2, at 555. The recommended change in language was as
follows: "A spouse who accepts the community expressly and unconditionally upon the
dissolution thereof is entitled to one-half of the assets and is personally obligated for
one-half of the outstanding obligations incurred by the other spouse for the common in-
terest of the spouses."
268. These hearings were conducted by the Joint Legislative Subcommittee to
receive recommendations from both the Louisiana State Law Institute and the ad-
visory committee. Id. at 556-57.
As Professor Bilbe succinctly explained: “If an express acceptance permitted the accepting spouse to insulate his or her share of community assets from his or her spouse’s community creditors by paying them one-half of what they are owed, the utility of an express acceptance would be clear.” With this avowed purpose, as well as the desirability of some definitive responsibility, article 2357.1 was drafted.

By written act, as contrasted with tacit acceptance of the community by the wife, a spouse may assume responsibility “for one-half of each community obligation incurred by the other spouse.” Initially, the assuming spouse incurs personal responsibility, which had not previously existed. It is accomplished by unilateral act and need not be concurred in by the other spouse. Upon execution of the act, all of the property of the assuming spouse becomes responsible, including that classified as separate, to community creditors for one-half of the community obligations of the other. A community obligation is defined as one incurred during the existence of a community regime “for the common interest of the spouses or for the interest of the other spouse . . . .” The definition is made more inclusive than that of Act 627 by including an obligation incurred for the interest of the other spouse. Yet, in this context, it is inoffensive; for it is the other spouse, in whose interest the obligation was incurred, who is assuming responsibility for one-half of the amount due.

In contrast to article 2357, after an express assumption, “the assuming spouse may dispose of community property without incurring further responsibility for the obligations incurred by the other spouse.” The purpose sought to be accomplished by this language is a definitive partition and responsibility for obligations of the other. No qualifying language appears in article 2357.1 after "com-

269. Bilbe, supra note 234, at 430.
273. La. R.S. 9:2852(G) (Supp. 1978) (repealed 1979) provided:
   Separate obligations include obligations incurred prior to the establishment of the community regime, obligations resulting from intentional torts, and obligations incurred for the benefit of the separate estate of one spouse to the extent that it does not inure to the benefit of the community or of the family. All other obligations incurred by a spouse during the existence of the community regime are presumed to have been incurred for the common interests of the spouses. Alimentary obligations imposed by law on a spouse shall be deemed to have been incurred during the existence of the community regime for the common interests of the spouses.
munity property," such as "received by the spouse." Yet, a partition of community property, voluntary or judicial, is contemplated.

Another purpose of article 2357.1 is to insulate property of the assuming spouse from seizure by separate creditors of the other. In article 2357 no distinction is drawn between creditors (separate or community) who may seek satisfaction from property of the former community, which is consistent with the rules governing the regime during its existence. However, by an express assumption the following occurs: the assuming spouse (1) limits the responsibility of his share of former community property to one-half of each community obligation of the other; (2) the separate property of the assuming spouse also becomes responsible; and (3) separate creditors of the other spouse may no longer seek satisfaction of their obligations from property of the assuming spouse. Professor Bilbe comments on such a result as follows:

[It] would encourage voluntary partitions and at the same time provide reasonable protection for common interest creditors. It would, however, affect the rights of those creditors whose transactions were not incurred for the common interest. In the case of antenuptial creditors, this treatment is particularly appropriate, and in the case of a separate debt incurred during the marriage, it is justifiable.

In our hypothetical situation, if W after the voluntary partition expresses responsibility for obligations under article 2357.1, she thereby insulates the house from seizure by A, an antenuptial creditor of H. But, she also assumes personal responsibility to B, a community creditor (obligation incurred by H for the interest of the other spouse—"W") for one-half the debt to B. She remains responsible to the persons with whom she contracted prior to the dissolution of the community, i.e., C and D, for the entire amount of their claims. Payment of the one-half of the debt to B would insulate W's property from execution even if H failed to pay the remainder. If H did not assume responsibility under article 2357.1, he would remain liable to A and B for the whole amount and to C and D to the extent of the assets of the former community or their value. If H

276. LA. CIV. CODE art. 1294. See subsection entitled Rights Between Spouses on Dissolution, infra.  
277. LA. CIV. CODE art. 2345 (Supp. 1979) provides: "A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation."  
278. Bilbe, supra note 234, at 431.  
279. A similar situation resulted under the old articles of the Civil Code when the wife accepted the community unconditionally. The husband remained responsible for the whole amount of the community debts and the wife for one-half of the community obligations. Comment, supra note 265, at 610 n.38.  
did assume responsibility under article 2357.1, he would remain liable to A and B for the whole amount and to C and D, each, for one-half of their respective claims.

Despite a proposal requiring recordation of the express assumption, article 2357.1 contains no such provision. Thus, under the legislation, an assumption can be executed unilaterally at any time, and the possibilities of fraud by pre-dating the assumption do exist. Parallel problems involving the wife's acceptance of the community under our former laws governing the community of acquets and gains, do not serve as a model for the express assumption contained in the new legislation. For, upon dissolution of the community, the wife's creditors formerly were given the right to attack a fraudulent renunciation by her, accept a succession of their debtor, or, if the delay for deliberating had passed, creditors of the community could compel her to decide whether she accepted or rejected the community. All of these articles, which deal comprehensively with rights of creditors upon dissolution of the community, have been repealed, with one exception—the oblique action.

By the oblique action, a creditor may exercise a right of his debtor, when the debtor exercises the right to the prejudice of the creditor. Article 1990 refers specifically to acceptance of an inheritance, yet it has a cross-reference to Civil Code article 2421, which allowed a wife's creditors to attack a fraudulent renunciation. Since article 2421 has been repealed, there may be no direct statutory authority for applying the oblique action to the express assumption of responsibility.

If article 1989 is considered as a statement in principle of the right of a creditor to maintain the oblique action, creditors on dissolution of the community may find the action profitable against the spouse whose mate contracted heavy debts. In such a case, it
could be advantageous to a creditor of one spouse to expressly assume responsibility for one-half the community obligations of the other spouse. The advantage to be obtained is reduction of competition over the assets of his debtor. Yet, articles 1991-1992 suggest that there are certain rights of the debtor which are considered too personal to be asserted by the creditors—i.e., separation of property between husband and wife. The enumeration has been held by an appellate court to be illustrative, not exclusive. Furthermore, the creditor would not simply be obtaining property to which the debtor was entitled, the purpose of the oblique action, but would also be assuming on behalf of his debtor a personal liability, which is contrary to general contractual principles. In the comparable situation in which a creditor accepts an inheritance of his debtor, he does so with benefit of inventory, incurring no personal responsibility for the heir. From the foregoing, it seems that a creditor may not by the oblique action assume responsibility on behalf of his debtor under article 2357.1.

Possibly available to a creditor is the revocatory action established in Civil Code articles 1970-1994 which allows him to avoid prejudicial acts of his debtor. To be successful, the creditor must prove that the debtor is insolvent, that he has a judgment against the debtor, and that the assumption of responsibility under article 2357.1 was in fraud of his rights. Although the articles which precede article 1989 are restricted to contracts of a debtor, the article itself refers to the unilateral renunciation of a succession and "any other act of this kind" which would involve the debtor's right to property. But the creditor who will in almost all cases be prejudiced by an assumption is the creditor of the non-assuming spouse. The articles on the revocatory action only contemplated the exercise of the action by a creditor of the debtor. Yet, the drafters

293. La. Civ. Code arts. 1968-94. There are three elements of proof in an action to annul a contract of one's debtor: (1) that the debtor is insolvent; (2) that the creditor has obtained a judgment against his debtor or the action to annul is combined with that for liquidating the debt; and (3) that the contract is in fraud of the creditor's right.
295. La. Civ. Code art. 1969 provides:

From the principle established by the last preceding article, it results that every act done by a debtor with the intent of depriving his creditor of the eventual right he has upon the property of such debtor, is illegal, and ought, as respects such creditor, to be avoided. This can be done in the mode and under the circumstances set forth in the following rules.

(Emphasis added.)
of the Civil Code at the time of its adoption did not contemplate that a spouse by the contract of marriage would be responsible to a creditor of the other spouse out of certain property (assets of the former community), with no personal responsibility. Without the availability of this remedy, neither the separate creditors nor community creditors of the non-assuming spouse can do anything to prevent the express assumption. Perhaps that is as it should be.

If the express assumption is an integral part of the voluntary partition, it would follow that under certain circumstances the contract of partition is subject to the revocatory action. Usually, the express assumption will be combined in a partition, for without a partition there is no share of the community property to insulate. If the express assumption is executed before the partition, the property is that of the former community and subject to satisfaction of the other spouse's obligations, whether community or separate. Even if both expressly assume responsibility under article 2357.1 before a voluntary partition, the same result follows. Thus, the only effect of assumption before partition is the additional liability incurred by the assuming spouse. Therefore, there is nothing to be gained by an express assumption executed before a partition.

Although there is no general recordation requirement for the express assumption, it is arguable that such a written act must be recorded to affect immovable property. As to movables, however, there is no recordation requirement. If after a voluntary partition, for example, movables of the former community are seized by a separate creditor in the possession of the non-debtor spouse, the spouse could produce a written assumption dated one week before seizure. How could the creditor, who by virtue of the assumption has no right to seize the property of the non-debtor spouse, prove it was actually executed after seizure of the property and pre-dated? By remedial legislation in 1980 imposing a recordation requirement, this particular problem could be solved.

Administration of the Community or Special Commissioner

A third alternative upon dissolution was considered by the


297. There is the possibility that under article 2357.1, if a spouse had all of the community property in his possession and executed the express assumption, then he could sell it all without further responsibility to separate creditors of the other spouse. However, the spouse assuming the responsibility would still be liable to the other spouse, as co-owner, for his one-half interest in the community property disposed of. Furthermore, the separate creditors of the other spouse might be able to assert the right accorded to their debtor against his co-owner by the oblique action. See LA. CIV. CODE art. 1989.

298. See LA. CIV. CODE art. 2265.
legislature, enacted in 1978, and repealed in 1979. It was proposed that either spouse could petition for an administration of the community property.\textsuperscript{299} The remedy was even available to a spouse prior to dissolution, if a suit were pending which would result in termination of the community.\textsuperscript{300} As originally contemplated, the administration was a mechanism to be resorted to in instances in which the couple could not agree on the division of the property or when necessary to insure an orderly liquidation of the community. It was hoped that the introduction of a neutral person into the acrimonious dissolution of a community would accomplish a more just result than the potentially destructive injunctive procedure.\textsuperscript{301}

Utilizing the pattern of the administration of a succession, there were specific provisions for the priority of payment of secured creditors;\textsuperscript{302} then, payment of unsecured creditors, whether separate or community;\textsuperscript{303} and finally, appropriate adjustments and reimbursements between the spouses.\textsuperscript{304} Thereafter, the administrator was required to divide the remainder equally between the two spouses.\textsuperscript{305} The administration did not affect personal responsibility of a spouse to a creditor; it only determined how funds were to be applied to obligations.\textsuperscript{306} Secondly, it did not suspend execution by a creditor against separate property of the debtor spouse.\textsuperscript{307}

\begin{itemize}
\item \textsuperscript{299} La. R.S. 9:2851 (Supp. 1978) (repealed 1979).
\item \textsuperscript{300} La. R.S. 9:2851 (Supp. 1978) (repealed 1979) provided:
\begin{quote}
Upon dissolution of the community regime, or pending a suit that may result in its dissolution, either spouse may petition for an administration of the community property in the manner provided in the Louisiana Code of Civil Procedure. After the filing of this petition no execution shall issue against any community property, except for the enforcement of conventional mortgages or pledges.
\end{quote}
\item \textsuperscript{301} La. Civ. Code art. 149, as amended by 1979 La. Acts, No. 711, § 1; La. Code Civ. P. art. 3944. The 1979 amendment to Civil Code article 149 makes it potentially less damaging because the injunction need not restrain the alienation of all community property, but only specific things. 1979 La. Acts, No. 711, § 1.
\item \textsuperscript{302} La. R.S. 9:2852(B) (Supp. 1978) (repealed 1979) provided: “Secured creditors shall be paid with priority from the proceeds of the secured property; any balance due shall be paid to them as unsecured creditors.”
\item \textsuperscript{303} La. R.S. 9:2852(C) (Supp. 1978) (repealed 1979) provided:
\begin{quote}
Each unsecured creditor shall be paid in the proportion that his claim bears to the total obligations of both spouses. Claims of one spouse against the other for reimbursement as hereinafter provided, or for damages for fraud or bad faith in the management of community property, are excluded from the obligations under this Paragraph.
\end{quote}
\item \textsuperscript{304} La. R.S. 9:2852(D) (Supp. 1978) (repealed 1979) provided: “After satisfaction of all obligations, each spouse is entitled to one-half the assets remaining except to the extent that reimbursement and adjustments are due between the spouses.”
\item \textsuperscript{305} La. R.S. 9:2852 (Supp. 1978) (repealed 1979).
\item \textsuperscript{306} Bilbe, supra note 234, at 410.
\item \textsuperscript{307} La. R.S. 9:2851 (Supp. 1978) (repealed 1979). For the text of section 2851, see note 300, supra.
\end{itemize}
fessor Bilbe observed, "Protection of the interest of creditors seems only to require a reasonably expeditious and cost conscious process." Under Act 627, the provision authorizing an administration would not become effective until there were procedural rules enacted to implement it.

In House Concurrent Resolution No. 232, the Louisiana Law Institute was directed to study "the equal management" Act and draft proposals which it deemed necessary to achieve the policy objectives of that legislation. In response to that directive, the Institute proposed at the 1979 legislative session procedural articles implementing the administration of community concept embodied in Act 627. During the initial stages of the legislative process, opposition surfaced to this administration concept. In an effort to avoid jettisoning the entire matrimonial regimes revision, the administrator was abandoned in favor of a special commissioner, whose responsibility would be to assist the court in the partition of community property. By a House floor amendment to House Bill No. 798 and No. 801, the special commissioner was substituted for the administrator.

Under the proposed Code of Civil Procedure articles, after a joint petition was filed requesting the appointment of a special commissioner, the judge was mandated to appoint one. If a petition were filed by only one spouse, after a hearing the judge would appoint a special commissioner if he deemed it necessary to identify the assets and liabilities of the community and divide the community property. Imposed upon the special commissioner was the duty of locating, identifying, listing, and valuing all assets and liabilities of the former community. In the performance of his duties, the commissioner was specifically authorized to use discovery devices.

308. Bilbe, supra note 234, at 432.
310. For the text of Concurrent Resolution No. 232, see note 3, supra.
312. La. H.B. No. 801 (reengrossed version), proposed LA. CODE Civ. P. art. 4751, 5th Reg. Sess. (1979), read as follows: "During the pendency of an action that may result in the termination of the community property regime, either spouse may petition for the appointment of a special commissioner for the purpose of assisting the court in the dissolution and partition of the community."
commissioner was further charged with the responsibility of effecting a division of the community between the spouses by preparing a tableau listing community property and obligations and by proposing a division of community property in kind or by licitation or both.\footnote{317} When the tableau of distribution was homologated, the court would render a judgment recognizing the ownership, rights, interests, and liabilities of each spouse in the community property and sending each spouse into possession of his share.\footnote{318} House Bill No. 801, incorporating the special commissioner concept, was reported unfavorably out of Senate Committee on Judiciary A and failed to gain approval on the Senate floor.

Both the concepts of the administrator and of the special commissioner, when compared to the powers and duties of a notary,\footnote{319} are somewhat radical. The authority and duties of the administrator are in fact far broader than those of the special commissioner. Without any definite proposals to that effect, the concensus of the Advisory Committee which originally conceived the idea of an administrator was that he should have the power to administer the assets.\footnote{320} For example, the administrator could decide if it would be more advantageous for the spouses to liquidate the community by sale if a going concern producing significant income were involved or to permit the managing spouse to continue to operate the business, but be accountable periodically to the administrator. In instances in which an administration of the community property would be necessary, the Advisory Committee believed that the administrator should have flexibility in fashioning remedies appropriate to the circumstances.

The 1979 legislation provides for neither an administrator nor a special commissioner. However, because the Legislative Subcommittee responsible for this legislation repeatedly endorsed the administration of community property, it is reasonable to expect either concept to be resurrected at a future legislative session.

\footnote{317} La. H.B. No. 801 (reengrossed version), proposed La. Code Civ. P. art. 4760, 5th Reg. Sess. (1979), provided: "As soon as possible, the special commissioner shall prepare a tableau listing the community property, the community obligations, and the proposed division of community property either in kind or by licitation or both and debts between the spouses."


\footnote{320} It was the intention of the Joint Legislative Subcommittee and the Advisory Committee that the administrator, as distinguished from the special commissioner and the notary, have the power to actually administer the assets; whereas, the notary and the special commissioner simply assist in identifying, valuing, and dividing the community property.
Rights Between Spouses on Dissolution, Such As Rights To a Partition, Reimbursement, and Accounting

Upon dissolution, subject to the provisions of articles 2357 and 2357.1, the spouses are co-owners of the property of the former community. As a co-owner, a spouse may exercise the right of an owner of property in indivision to seek a partition. Until either a voluntary or judicial partition, all the obligations imposed upon owners in indivision are imposed upon the former spouses.

If the spouses agree to a division of property, they may voluntarily partition it after termination of the regime. The revocatory action is available if the partition is entered into for the purpose of defrauding creditors. Yet, without an express assumption, it is doubtful that a voluntary partition could adversely affect or prejudice creditors. If there were no express assumption of responsibility, creditors of either spouse could ignore the contract of the spouses.

For example, the partition agreement might provide that one spouse was vested with the ownership of all community assets. Under Civil Code article 2357, creditors of the spouse who received nothing in the partition could continue to execute against property of the former community in the possession of the other spouse. If there were a voluntary partition agreement containing an express assumption of responsibility by one spouse in exchange for all of the community assets, the other spouse’s creditors, whether community or separate, could assert the revocatory action. In the latter example, since article 2357 is not applicable to afford protection to the creditors, the revocatory action is their sole remedy.

If, however, the spouses cannot agree as to how the property is to be divided, either may petition for a judicial partition. A simplistic outline of the present procedure for a judicial partition of community property is as follows: (1) taking of an inventory or descriptive list by the notary or notaries, which reflects the active mass; (2) calculating deductions, and (3) an equal division of the remaining assets. As to the division of the community assets, the

321. LA. CIV. CODE art. 2336 (Supp. 1979), and comments thereto.
322. LA. CIV. CODE art. 1289. See also LA. CIV. CODE art. 1308 which provides: “The action of partition will not only lie between co-heirs and co-legatees, but between all persons who hold property in common, from whatever cause they may hold in common.”
323. LA. CIV. CODE art. 1294.
325. LA. CIV. CODE art. 2357 (Supp. 1979).
327. LA. CIV. CODE arts. 1294 & 1307.
328. LA. CIV. CODE arts. 1355-56.
329. LA. CIV. CODE art. 1359.
330. LA. CIV. CODE arts. 1364-67.
judge orders whether the community property is subject to partition in kind\textsuperscript{331} or by licitation;\textsuperscript{332} the judge is to be guided by the statutory directive that partitions in kind are favored.\textsuperscript{333} Under the Civil Code, the judge is accorded discretion in allotting to co-owners their respective shares.\textsuperscript{334}

Comment (a) to article 2336 states that the spouses' co-ownership is subject to the provisions of the Act governing termination of the regime, rather than the general rules of the Civil Code governing judicial partition. Article 2357 is the provision which allows pre-dissolution creditors to satisfy their obligations from property of the former community or separate property of their debtor. Mention is made in the same comment to article 2336 that the spouses may voluntarily partition the community "without prejudice to rights of third persons." Nothing, however, is said concerning the possibility of judicial partition, nor the extent to which the articles on judicial partition should apply. For what reason should the spouses be prevented from seeking a judicial partition of the community property, if they cannot agree? It would be patently unfair to deny judicial partition in an instance where one spouse occupied the home and the other spouse had no remedy other than partition to assert rights to the property.\textsuperscript{335} To deny judicial partition in such circumstances may bestow upon the spouse left in possession a superior bargaining position in the negotiation of a voluntary partition. Judicial partition must remain a remedy available to the spouses upon termination. Under the articles of the Civil Code governing the right to a partition, it is doubtful that the spouse could legally be denied the remedy.\textsuperscript{336} The difficult questions which remain concern the application and the interrelationship of the articles on judicial partition and those on termination under Act 709.

Among the Civil Code articles governing partition, no provision authorizes specifically the payment of unsecured creditors as a part of the proceedings. There is protection afforded for both unsecured\textsuperscript{337} and secured creditors\textsuperscript{338} during the partition pro-

\textsuperscript{331} LA. CIV. CODE arts. 1337 & 1345-56.  
\textsuperscript{332} LA. CIV. CODE arts. 1339-40.  
\textsuperscript{333} LA. CODE CIV. P. art. 4607. See, e.g., Babineaux v. Babineaux, 237 La. 806, 112 So. 2d 620 (1959).  
\textsuperscript{334} LA. CIV. CODE art. 1364-67.  
\textsuperscript{335} See Cooper v. Cooper, 303 So. 2d 319 (La. App. 4th Cir. 1974), and cases cited therein.  
\textsuperscript{336} See LA. CIV. CODE arts. 1289-414.  
\textsuperscript{337} LA. CIV. CODE art. 1337 provides:  
Each of the coheirs may demand in kind his share of the movables and immovables of the succession; but if there are creditors who have made any seizure or opposition, or if a majority of the coheirs are of opinion that the sale is
ceedings. The unsecured creditors who do not make an opposition are protected by a proportionate distribution of the "passive" debts among the heirs. Likewise, at dissolution of the community, the husband and wife, in the partition of the "effects" (assets), were equally liable for their share of the community debts.

Therefore, upon dissolution of the community, whether by death or some other cause, it was unnecessary to provide for the payment of unsecured creditors as part of the partition. Instead, they were protected by division of the debts. Through the jurisprudence, however, the principle was developed that the ownership which vested in the spouses at dissolution of the community was not perfect ownership of an undivided one-half, but vested ownership subject to the payment of the community debts. What vested in the spouses was co-ownership of the residuum after payment of community creditors. Thus, the notary appointed to effect the partition had to ascertain the community debts so as to divide the residuum. By application of this principle, the judiciary preferred the payment of community creditors from community assets over the payment of the spouses' separate creditors.

Under Act 709, each spouse owns a present undivided one-half interest in the community, not in the residuum after payment of community creditors. The principle which evolved jurisprudentially to prefer community creditors over separate creditors at termination has been legislatively repudiated. Further evidence of legislative repudiation appears in the form of article 2357, which fails to distinguish at dissolution, in either the first or second paragraphs, separate creditors from community creditors. Thus, the principle that also served as the theoretical basis for the payment of unsecured community creditors during the partition proceedings has been legislatively overruled.

Unsecured creditors' rights remain the most difficult issue in

necessary in order to satisfy the debts and charges of the succession, the movables shall be sold at public auction, after the usual advertisements.

See Comment, supra note 265.
338. LA. CIV. CODE art. 1338.
339. LA. CIV. CODE art. 1337. Articles 1289-414, governing partition, appear in book three, title one, chapter twelve, entitled "Of the Partition of Successions."
340. LA. CIV. CODE art. 1371.
341. LA. CIV. CODE art. 2409 (repealed 1979).
343. See Newman v. Cooper, 46 La. Ann. 1485, 16 So. 481 (1894); Comment, supra note 265.
344. LA. CIV. CODE art. 2336 (Supp. 1979).
345. For the text of article 2357, see note 230, supra.
the application of the articles on judicial partition to termination of the community regime. Under Civil Code article 2357, unsecured creditors would be protected if the partition is in kind. In such a case, there is no reason why the unsecured creditor should not be permitted to seize property of the former community in satisfaction of his obligation. Thus, the articles governing termination of the regime should apply if the partition is in kind, rather than any contrary provision regulating judicial partition, as comment (a) to article 2336 suggests.

However, if the partition is by licitation, does the first or second paragraph of article 2357 apply? If community property is sold to effect the partition, does that "disposition" impose personal liability on each spouse for obligations incurred by the other to the extent of the value received by each? Personal responsibility is assumed by a spouse when the property of the former community has been disposed of other than for the payment of community obligations. If the judicial sale to effect the partition is not a "disposition," the creditor must trace the funds received and their subsequent disposition. In a partition by licitation, the alternative to applying article 2357 would be to include the payment to unsecured creditors as part of the proceedings. If the community assets are sufficient to satisfy all the creditors of the spouses, payment to the creditors as part of the partition proceedings is preferable. If there are not enough community assets to pay all the creditors of the spouses, are they all, whether separate or community creditors, paid ratably? Ratable distribution of the proceeds from the sale of community assets was the solution of the Subcommittee in the proposed Civil Code articles governing administration of the community property at termination. One of the reasons for not distinguishing community from separate creditors in the administration provisions was that no distinction was made during the legal regime. Therefore, the creditor should not be adversely affected by termination of the regime, a policy reflected in article 2357. In case the community assets are insufficient to satisfy all debts, payment ratably to all the creditors could be ordered. Then, the creditor could proceed against his debtor's separate property for satisfaction of the balance of the indebtedness.

Some other problems exist in adapting the articles on judicial partition to termination of the community—i.e., calculating the ac-

tive mass and the deductions. Article 1359 contemplates an accounting between the "community" and the individual spouses when, for example, separate property has been used to satisfy a community obligation. Under article 2358, the liability for reimbursement is not expressed in terms of a right of one spouse against "the community" and vice versa. The right to reimbursement is against the other spouse. Theoretically, the distinction is consistent with rejection of "the community" as an entity separate from the spouses. Furthermore, many claims for reimbursement between the spouses may accrue after such a partition if there are unpaid creditors.

Obviously, not enough legislative attention was focused upon the interplay of the two articles regulating the rights of creditors at termination and the general provisions on judicial partition. Even more comprehensive study is necessary concerning the interrelationship of articles 2357 and 2357.1 and the articles governing the administration of successions. Although at public hearings the opinion was expressed that the articles on successions would apply if the community is dissolved by death, no scheme is provided delineating the applicability of the various interrelated provisions. Without detailed examination of the pertinent procedural articles on successions, it is apparent that creditors are accorded different rights under the succession articles than those provided by articles 2357 and 2357.1.

Reimbursement

The right of reimbursement upon termination of the community is the major vehicle for adjusting claims between spouses. Although there previously had been only one article in the Civil Code on reimbursement, several appear in Act 709. Basically, the

349. LA. CIV. CODE art. 1356.
350. LA. CIV. CODE art. 1359.
351. LA. CIV. CODE art. 2358 (Supp. 1979) provides: "Upon termination of a community property regime, a spouse may have against the other spouse a claim for reimbursement in accordance with the following provisions."
352. See text at notes 356-68, infra.
354. On numerous occasions during Joint Legislative Subcommittee hearings during 1977-79, members of the Subcommittee and Advisory Committee opined that the administration of succession articles would apply if the community were terminated by death.
355. See LA. CODE CIV. P. arts. 3241-49 & 3301-08. See generally LA. CODE CIV. P. arts. 3081-159.
357. LA. CIV. CODE art. 2408 (repealed 1979).
new articles attempt to legislate the jurisprudential applications of article 2408. However, the new articles do differ from their predecessor in the measure of reimbursement. Previously, under article 2408, reimbursement due a spouse was one-half the enhanced value of separate property improved by common labor or expense. In contrast, under articles 2364-2367, the amount of reimbursement is determined by the amount of property used or its value. The policy reflected in the change in the measure of reimbursement is to treat the advance as an interest-free loan, rather than an investment. The risk of loss is eliminated, but so is the risk of gain. In one instance, however, under the new legislation the investment formula for calculating the amount of reimbursement is retained; if a spouse's separate property increases in value due to the labor of either, the other spouse is entitled to one-half the increase in value.359

Preceding the articles on calculating reimbursement in Act 709 are provisions defining community and separate obligations.360 Under article 2360, as under Act 627 of 1978, the definition of a community obligation includes one incurred during the regime for the common interest of the spouses.361 The definition in Act 709, however, also includes an obligation incurred for the interest of the other spouse. The additional language added in Act 709 significantly expands the category of community obligations. The practical effect of the expansion in definition is to reduce the occasions for reimbursement when community funds are used and to increase them when separate funds are utilized. Under Act 709, as in the 1978 legislation,362 it is possible for an obligation to be in part community and in part separate363—for example, in the case of an obligation incurred by one spouse for the improvement of his separate estate, the fruits of which are community if not reserved as separate. The obligation would be partially separate and partially community, to be determined by the extent to which the community benefited.

If a spouse at termination does not exercise his right to claim reimbursement from the other, his creditors might do so by the obli-

361. LA. Civ. CODE art. 2360 (Supp. 1979) provides: “An obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation.”
363. LA. Civ. CODE art. 2363 (Supp. 1979) provides: “[A]n obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse, is likewise a separate obligation.” See also LA. Civ. CODE art. 2360, comment (c) (Supp. 1979), which reads: “Thus, an obligation may be in part a community obligation and in part a separate obligation of the spouse who incurred it.”
It involves a right of the debtor to reimbursement, which if exercised, would increase his patrimony and thus increase his property subject to seizure in satisfaction of the debt. To be resolved is whether or not the right to reimbursement against a spouse is one that is merely personal to the debtor, and thus not exercisable by his creditors. Although a creditor is forbidden to demand a separation of property between husband and wife, a claim for reimbursement after termination of the community cannot be considered analogous to a suit for separation of property.

Right to Accounting

An additional remedy accorded to spouses on termination by Act 709 is the right to demand an accounting for community property under the control of a spouse at termination. Under article 2369 the obligation to account prescribes three years from the date of termination of the legal regime. There was no parallel provision in Act 627. However, an obligation to account for the administration of community property was imposed upon the husband under prior jurisprudence. To determine the scope of the obligation to account, an examination of the jurisprudence is imperative. Because of his superior position as "head and master" of the community, the court imposed a fiduciary duty on the husband at dissolution of the community regime to disclose to the wife the existence of community assets and their value. But later cases extended this obligation of the husband to account for his administration of community property during the existence of the regime. Even though he was responsible under article 2404 to the wife only if he fraudulently

367. The right to reimbursement under new article 2358 is specifically available only upon termination of the regime. The Joint Legislative Subcommittee rejected the possibility of reimbursement during the existence of the regime.
368. In Cosgrove v. His Creditors, 41 La. Ann. 274, 6 So. 585 (1889), the creditor demanded that the value of certain improvements, placed upon the wife's separate property during the community, and in part with community funds, be placed upon the schedule of the insolvent husband. The court held that this demand was analogous to a suit for separation of property, because the husband could not claim reimbursement until dissolution of the community.
369. LA. CIV. CODE art. 2369 (Supp. 1979) provides: "A spouse owes an accounting to the other spouse for community property under his control at the termination of the community property regime. The obligation to account prescribes in three years from the date of termination of the community property regime."
370. LA. CIV. CODE art. 2404 (repealed 1979).
371. Pitre v. Pitre, 247 La. 594, 172 So. 2d 693 (1965), and fiduciary duty cases cited therein.
disposed of property of the community, later cases imposed a fiduciary duty to account upon the husband because of his extensive managerial powers. Relieved of the burden of proving fraud, the wife had only to prove that the husband fiduciary received the property and "thereafter the burden [was] upon the fiduciary to establish what disposition he had made of the money or property."  

Under article 2354 of Act 709, a spouse, as the husband was under article 2404, is liable to the other for fraud or bad faith in the management of community property. Whether or not this provision eliminates the more onerous obligation to account for the administration of community property during the regime is unclear. Similar language in article 2404 did not, under the jurisprudence, relieve the husband of a fiduciary duty to account for community property under his control during the regime. The official source of article 2354 cited in the legislation is Civil Code article 2404, but no comment accompanies the article. However, in a comment to article 2369, there is an attempt to distinguish the obligation to account during marriage under article 2354 and the obligation to account after termination. Unfortunately, the comments are confusing. The obligation "to account" under the jurisprudence meant simply to account. Under article 2369, comment (c), however, the obligation to account is equated with accountability "for loss or deterioration of the things under his control attributed to his fault . . . ." According to the author of the comment, article 2369 is the reiteration of the rule that governs the relations between co-owners under the general laws of property. Of course, comments are not to be considered part of the law. Therefore, interpretation of the language "to account" in article 2369 should be identical to that of past jurisprudence. If so, a spouse would only have to prove that the other spouse had community property under his control at termination, not that the other spouse was guilty of fault resulting in the loss or deterioration of the property. Obviously, the difference in burdens of proof is significant.

373. LA. CIV. CODE art. 2404 (repealed 1979) provided in pertinent part:

But if it should be proved that the husband has sold the common property or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claims in one-half of the property, on her satisfactorily proving the fraud.


375. LA. CIV. CODE art. 2369, comment (c) (Supp. 1979) provides in pertinent part:

In this revision, either spouse may be required to account for community property under his control during the existence of the community property regime . . . .

In contrast with Article 2354, the obligation for accounting under Article 2369 is not predicated upon a showing of fraud or bad faith in the administration of the community . . . .

376. 1979 La. Acts, No. 709, § 7. For the text of this provision, see note 239, supra.
CONCLUSION

Despite the interim study year for the "equal management" reform of matrimonial regimes, significant unsolved problems remain. No resolution was presented at the 1979 legislative session to continue the study of Act 709 or to monitor its impact after January 1, 1980. Hopefully, those legislators involved with matrimonial regimes reform since 1977, and others who are particularly interested, will continue efforts to further refine the Civil Code articles and provide solutions to presently recognizable problems and those which may develop after actual experience with the legislation.

To the credit of the legislature, the reform of Louisiana's matrimonial regimes laws has received more attention and deliberation than almost any comparable legislation. The process of reformation began in earnest in 1977, culminating in Act 709 effective January 1, 1980. In terms of time and effort, all those persons participating in the two-year project made substantial contributions to the final product. Even recognizing the problems which remain to be solved, the authors believe as does Professor Harry M. Cross, that "the new scheme will work without major difficulties."

377. Cross, supra note 194, at 488.