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PERSONS AND MATRIMONIAL REGIMES

Katherine Shaw Spaht*

Claims for Contributions to Education**

Drafted initially by the Persons Committee of the Louisiana State Law Institute as a part of the complete revision of Book I (Of Persons) of the Louisiana Civil Code, article 161 creates a cause of action for financial contributions made by one spouse to the education, training or increased earning power of the other spouse. The new article appears in Title V, Chapter 5, entitled, “Of the Effects of Separation from Bed and Board and Of Divorce.”

The location and content of article 161 emphasize that the claim for financial contributions is neither a question of community property

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   In a proceeding for a legal separation, declaration of nullity of marriage, or divorce, or in a separate proceeding, the court may allow a party a sum for financial contributions made to the education, training, or increased earning power of the other party to the extent that the contributing party has not previously benefited by such education, training, or increased earning power.
   The sum awarded for such contributions may be in addition to a sum for support and to property received in the partition of the community property.
   See Harmon v. Harmon, 486 So. 2d 277 (La. App. 3d Cir.), cert. denied, 489 So. 2d 916 (La. 1986), where the court interpreted a community property settlement in which the wife conveyed to the husband “[a]ny and all assets ... belonging to partnership” as including fruits of his education, thus denying the wife a judicial partition of the husband’s degree. Of similar import was Clement v. Clement, 487 So. 2d 759 (La. App. 3d Cir.), cert. denied, 489 So. 2d 1274 (La. 1986).

2. La. Civ. Code art. 161 A: “The sum awarded for such contributions may be in addition to a sum for support and to property received in the partition of community property.”
law, nor a mere factor in considering a spouse's request for alimony. The approach taken by some states' statutes and jurisprudence that considers a spouse's education for property division upon divorce was rejected. The reasons for rejection include the conceptual difficulties in recognizing a degree as property, since it cannot be owned or transferred; the insusceptibility of the enhancement in earning capacity offered by the education of being measured with sufficient accuracy to enable the courts to do justice; and most importantly, the inconsistency and injustice which necessarily result from classifying the degree as property. If an education were property, and thus community property to the extent attributable to effort, skill or labor during the community regime, the spouse who either had already received economic benefits or had made no contributions would be entitled to recovery. Considering contributions to a spouse's education as a factor in awarding alimony, as some states do, was also rejected, because fault and present need of the contributing spouse were considered irrelevant to the equities of the claim for contributions.

Under article 161, the award made to a spouse for financial contributions to the education, training or increased earning power of the

3. La. Civ. Code, Book III, Title VI.

Although California does not classify an education as property, a spouse's claim for contributions made to the other spouse's education is a community property reimbursement issue. See Cal. Civ. Code § 4800.3 (West Supp. 1986), discussed in text at infra notes 42-44. In comments critical of the California approach appearing in Rand, Reimbursement of Community Contributions to a Spouse's Education Upon Divorce: California Civil Code Section 4800.3, 12 Pepperdine L. Rev. 1115, 1120-21 (1985), the author observes the following:

The community is clearly an abstract entity. Property acquired during the marriage is certainly community property. However, in the Sullivan type situation, expenditures clearly benefit the non-supporting spouse, whereas the supporting spouse and the community retain little or no assets. It seems more logical to directly reimburse the supporting spouse, rather than the community. Moreover, it is the supporting spouse whose interests the section ostensibly aims to protect. It seems even more illogical for the spouse who has originally been the beneficiary to again indirectly benefit when community property is divided.

6. See, e.g., Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979), rev'd, 648 S.W.2d 847 (Ky. 1982); In re Horstmann, 263 N.W.2d 885 (Iowa 1978).
other spouse is discretionary. It is suggested that the court, in exercising its discretion, consider the following factors: (a) the claimant's expectation of shared benefit when the contributions were made; (b) the degree of detriment suffered by the claimant in making the contributions; and (c) the magnitude of the benefit that the other spouse received.

By preceding "contributions" with the adjective "financial," article 161 assures that the contributions which form the basis of the claim are monetary, either directly or indirectly, and not merely in the form of emotional support or successful entertaining. For example, all of the cases permitting recovery for financial contributions to a spouse's education allow recovery for direct educational expenses, such as tuition, books and fees. In addition, these cases award a sum for actual

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11. In re Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

In Ellesmere v. Ellesmere, 359 N.W.2d 48, 51-52 (Minn. App. 1984), the court stated:

The issue to be decided here is whether there has been a sacrifice and foregoing of the enjoyment of earned income significant enough to fit within the DeLa Rosa principle for allowing recovery. The facts of this case do not present such a sacrificing couple. Both parties testified that they lived extravagantly. Frank earned approximately $52,000 each year during the marriage . . . . Their lifestyle was unaffected by her education . . . .

Unlike the wife in DeLa Rosa, Frank did not make any career or educational sacrifices in support of his wife's education. His position with Control Data required him to move from the United Kingdom to the United States in 1975. Marilyn relocated with him. In 1979 his employer required that he move to Houston, Texas. She again moved with him. He was transferred back to the Twin Cities in 1982. She again followed. None of these moves was made to further her education or career. Rather, she followed him so that he could pursue his career. Incidental thereto is the fact that she was pursuing her education . . . .

Under these facts, equitable restitution would not be appropriate.

contributions to the recipient's support. Some cases permit recovery for such indirect contributions as household expenses over the training period, school travel expenses, medical expenses, clothing expenses, entertainment and leisure expenses, toiletry and personal expenses, the fair market value of homemaking services rendered during the marriage by the claimant, and actual contributions to the support of a child of the marriage. At least two courts recognize that any resulting figure must be adjusted for inflation.

Because of the difficulty in proving with precision the amount of allowable expenditures, the courts in two cases in effect concluded that the total income of the spouses during the educational or training period was the proper measure of expenses for that period. In DeLa Rosa v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984); In re Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

See also Cal. Civ. Code § 4800.3 (West Supp. 1986), Law Revision Commission comment, 1984 Addition: "These expenditures [community contributions] would at least include cost of tuition, fees, books and supplies, and transportation."

14. Id.
16. Id.
18. Id.
19. Id.
20. Id.
In the Haugan case, the court explained:
Furthermore, the trial court should consider adjusting the value of the supporting spouse's contributions by a fair rate of return or for inflation. Such an award is restitutionary in nature; it does not account for a return on the supporting spouse's investment in terms of a share in the future enhanced earnings of the student spouse.

117 Wis. 2d at 211-12, 343 N.W.2d at 802.
24. In Reiss, the court expressed the following opinion:
We appreciate that the technique employed is unusual in that the common method of establishing what should be reimbursed is to ascertain what was actually expended not what was earned. But to apply such a method in a case such as this would be a venture in futility and result in denying a just claim for lack of evidence. Where, as here, records are attenuated or unavailable the technique employed is fair and just.

478 A.2d at 446.
v. DeLa Rosa, the Supreme Court of Minnesota decided that the correct method of calculating the financial contributions made to the education of the other spouse is to compare the amount of each spouse's earnings expended on the other during the training period, excluding the direct educational expenses (all of which are charged to the recipient spouse's income); the difference between the resulting two income figures is the contributing spouse's award. The court's formula for calculating the award, applied to the facts in DeLa Rosa, was $20,500 (one-half of wife's income) minus $9,100 (one-half of husband's income less direct educational expenses [$27,011 - $18,811]) = $11,400 award. Essentially, the same approach was taken in Reiss v. Reiss.

The method of calculating financial contributions to a spouse's education utilized in DeLa Rosa is equitable, because the claim will ordinarily be asserted by the spouse who has been married for only a brief period of time and whose marriage terminated shortly after making

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27. Id. at 759:
   It is this Court's view that the award should have been limited to the monies expended by respondent for petitioner's living expenses and any contributions made toward petitioner's direct educational costs. To achieve this result, we subtract from respondent's earnings her own living expenses. This has the effect of imputing one-half of the living expenses and all the educational expenses to the student spouse. The formula subtracts from respondent's contributions one-half of the couple's living expenses, that amount being the contributions of the two parties which were not used for direct educational costs;
   working spouse's financial contributions to joint living expenses and educational costs of student spouse
   less
   1/2 (working spouse's financial contributions plus student spouse's financial contributions less cost of education)
   equals
   equitable award to working spouse
   Under this formula, respondent is entitled to the sum of $11,400 as opposed to the $29,669 figure awarded by the trial court.
28. 195 N.J. Super. 150, 478 A.2d 441 (N.J. Super. Ct. Ch. Div. 1984), aff'd, 205 N.J. Super. 41, 500 A.2d 24 (N.J. Super. Ct. App. Div. 1985). Just as in DeLa Rosa, the court concluded that the total income of the spouses during the medical school period was the proper measure of the total qualifying expenses. The court then allocated all of the direct school expenses (tuition, books and fees) to the husband, and found that these equaled his total monetary contributions for that period, so that the measure of the other qualifying expenses was the wife's total income of the period, or $80,829. The court divided this figure by two, in recognition of the likelihood that only approximately one-half of the total had been expended on account of the husband. The resulting figure, $40,414.50, was the wife's recovery for the medical school period.

The court then used the same equation to compute the wife's recovery for the husband's low-income period of residency, but there were no specific educational costs to subtract. The resulting figure was $6,292.
the contributions. Under such hypothetical circumstances, records of expenditures during the educational period may be non-existent, and it is reasonable to assume that the totality of the spouses' incomes has been consumed by living and educational expenses. It is for this very reason that equity demands recognition of the claim, because the spouses in all probability will not have accumulated any significant property subject to division at divorce. Furthermore, by assuming that one-half of each spouse's income is expended to support the other spouse, the court assures consideration of the legal obligation of support that each spouse owes to the other and of the fact that during a community regime what each earns is community property. What remains in the DeLa Rosa formula following such an assumption is the deduction of one-half of the earnings of the recipient spouse from one-half of the earnings of the contributing spouse. The resulting figure, however, is only recoverable to the extent that the contributing spouse has not previously benefited. To the extent that the spouse has already benefited by the education or training, the award is subject to reduction.

A persuasive argument may be made that article 161 permits an award in excess of the "financial" contributions of the contributing spouse. Rather than directing the court in its discretion to award the contributing party his financial contributions only, the article permits the court to "allow a party a sum for financial contributions made to

29. This is true because article 161 only permits recovery of a monetary sum for contributions made to the other spouse's education "to the extent that the contributing party has not previously benefited by such education, training, or increased earning power." See discussion in text at infra notes 49-55.

30. The situation was best described in Inman v. Inman, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979), rev'd, 648 S.W.2d 847 (Ky. 1982):

The apparently rather common situation in which one spouse puts the other through graduate or professional school, followed closely by a dissolution upon the completion of the schooling, allows perhaps the clearest exposition of the problems involved. In those instances it is usually the case that little or no marital property has been accumulated. In such instances there is generally no entitlement to maintenance as each spouse is self-supporting. Thus the spouse who has devoted much of the product of several years of labor to an 'investment' in future family prosperity is barred from any return on his or her investment.

The other spouse has received a windfall of contribution to his or her increased earning capacity . . .


33. See discussion in text at infra notes 49-55.


(d) When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the property existing at the time of final separation. However, this award may be made only for the financial contribution of one (1) spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.
the education . . . of the other party." A prerequisite to the claim is a spouse's financial contribution, but the award is a sum that is not expressly limited to the contributions. The quoted language suggests the possibility of prorating the increased earning power of the supported spouse according to the proportion that the financial contributions bear to the total cost of the education. The task of quantification of increased earning power is not easy, but not impossible. Jurisdictions that classify an education as property have the identical problem, since a value must be placed upon the education at dissolution for property division purposes. Awarding a proportionate part of the supported spouse's increased earning power is somewhat analogous to the measure of recovery for a claim of reimbursement where separate property has been enhanced by the uncompensated labor of either spouse. Recovery under such a claim is not limited to one-half the value of the labor. Instead, in this one instance of reimbursement, the law preserves the investment principle by permitting the recovery of one-half of the enhanced value of

35. See, e.g., Haugan v. Haugan, 117 Wis. 2d 200, 213-14, 343 N.W.2d 796, 803 (1984), in which four possible measures of recovery are discussed:

A third approach enables the trial court to consider compensating the supporting spouse according to the present value of the student spouse's enhanced earning capacity. This approach recognizes the spouse's lost expectation of sharing in the enhanced earning capacity; it gives the supporting spouse a return on his or her "investment" in the student spouse measured by the student spouse's enhanced earning capacity. In this case an economist, called as a witness by the wife, estimated the value of the husband's enhanced earning capacity to be $266,000. The economist's figure was the product of multiplying the husband's after-tax annual enhanced earnings of $13,000 (the difference between the husband's annual salary as a physician and the 1979 mean salary for white college-educated males in his age group) by 32.3 (estimated years remaining in the husband's expected working life) discounted to its present value . . . .

Another approach is a variation of the labor theory of value suggested by wife's counsel at oral argument. Under this approach the trial court considers the value of the supporting spouse's contribution to the marriage at one half of the student spouse's enhanced yearly earning power for as many years as the supporting spouse worked to support the student. Under this theory the wife's contribution might be valued at $45,500 (one half of $13,000 x 7), which perhaps should be discounted to present value.


38. Cf. La. Civ. Code arts. 2364 (satisfaction of separate obligation with community property) and 2366 (use of community property to improve or benefit separate property). In both instances the measure of recovery is one half of the amount or value that the community property had at the time it was used.
the separate property. In a sense, a spouse's education may be analogized to separate property; and the financial contributions, to uncompensated labor of the other spouse. Thus, the purpose served by article 2368 of the Civil Code in an analogous situation may be relied upon as supportive of a more liberal award under article 161.

"Education" and "training," as used in article 161, suggest the familiar scenario of medical school and internship/residency. Financial contributions made to the "increased earning power" of the other spouse, to the extent they differ from those made toward education or training, are less familiar. Although the term "increased earning power" appears in the Wisconsin statute, there are no cases interpreting that phrase that do not involve education and training. Financial contributions made to the increased earning power of a spouse might include such indirect contributions as those made by a spouse who is an efficiency expert. For example, suppose the spouse evaluates and recommends changes in the other spouse's business (sole proprietorship) without remuneration, and the recommendations result in increased profits over

40. All of the following cases concern professional education or training: Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984) (medical education); Roberto v. Brown, 107 Wis. 2d 17, 318 N.W.2d 358 (1982) (medical education); In re Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982) (medical education).
41. Because the language of article 161 is "financial contributions made to the ... increased earning power of the other party" (emphasis added), the enterprise arguably must be a business which is not a separate legal entity—i.e., partnership or corporation. See La. Civ. Code art. 2347, comment (b): "This provision applies to a business that is not a legal entity. If the business possesses legal personality, as a corporation or a partnership, its alienation, encumbrance, or lease may be effected by disposition of shares of stock or a partner's interest. See Arts. 2351 and 2352, infra."

Interestingly enough, however, in the two recent cases that have considered the issue of professional good will of a medical corporation, the court emphasized that "medical competence is personal to the physician and cannot be attributed to the corporation." In Depner v. Depner, 478 So. 2d 532, 534 (La. App. 1st Cir. 1985), cert. denied, 480 So. 2d 744 (La. 1986), the court expressed the following opinion:

Professional medical competence is personal to the physician and cannot be attributed to the corporation because it is a personal relationship between physician and patient, not between corporation and patient. Since good will must adhere to some principal property or right it is therefore dependent upon the property or right of either the corporation or the individual or both. In examining the good will in this case we find that it exists independent of the corporation. Absent the corporation it exists, absent the physician it does not exist. Therefore it is not an asset of the corporation. The corporation may profit from this relationship but it cannot share in it. The corporation cannot share in a personal relationship between physician and patient.

See also Pearce v. Pearce, 482 So. 2d 108 (La. App. 4th Cir.), cert. denied, 484 So. 2d 140 (La. 1986), which cites the language of Depner as authority to deny wife's claim that husband's stock in a medical corporation was undervalued because it did not include good
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a sustained period of time. Arguably, the professional services constitute financial contributions which increased the earning power of the other spouse. Article 161 contemplates financial contributions made to the other spouse which enhance his future earning power, whether or not the contributions are to his education or training.

By contrast, no language in article 161 requires that the financial contributions made to a spouse's education or training must substantially enhance the supported spouse's earning capacity. All that the contributing spouse need prove is that financial contributions were made. Under the California statute, reimbursement is due only if community contributions to the education or training of a spouse substantially enhance his earning capacity. Eliminating the "enhancement" element of the claim represents a logical compromise between the necessary elements of the claim and its quantum, particularly if the award is limited to financial contributions. Under article 161, the claimant spouse need not prove as an element of the claim that the education substantially enhanced the other spouse's earning capacity, but absent such proof, the claimant may only be able to recover the amount of the financial contributions. Even under the more liberal interpretation of article 161 permitting an award of the prorated increased earning power of a spouse, the difficulty of proving enhancement would concern the measure of recovery, not an element of the cause of action.

The compromise achieved in article 161 is appealing for three reasons: (1) the potential limitation of recovery to financial contributions is attributable in part to an aversion for speculation as to future earning


If medical competence attaches to the physician, not the corporation, and the other spouse has made direct or indirect financial contributions that have increased the "good will" of the physician-spouse (his earning power), there arguably is a claim under article 161.

42. In the Report of the California Law Revision Commission which accompanied Cal. Civ. Code § 4800.3 (West Supp. 1986), the following observation was made concerning the necessity of proving enhancement to the spouse's earning capacity: "This will ensure fairness in imposing on the student spouse the economic burden of reimbursement and will avoid litigation over small expenditures such as weekend seminars whose impact on the student spouse's earning capacity is speculative or intangible." 17 Cal. L. Rev. Comm'n Reports at 235-236.

43. Cal. Civ. Code § 4800.3(b) (West Supp. 1986): "Subject to the limitations provided in this section, upon dissolution of marriage or legal separation:

"(1) The community shall be reimbursed for community contributions to education or training of a party that substantially enhances [sic] the earning capacity of the party."
capacity of a spouse, which could never be avoided if an element of the cause of action were that the contributions substantially enhanced the other spouse's earning capacity; (2) a claim for financial contributions to a spouse's increased earning power is provided as an alternative to a claim for contributions to the education or training of a spouse (as those terms are interpreted by the jurisprudence); and (3) almost all education or training potentially enhances a spouse's earning capacity, whether or not the enhancement is clearly demonstrable or the spouse actually realizes his potential. Consider, for example, financial contributions that a spouse makes to the other spouse's education and training as a petroleum engineer, not a unique factual pattern in Louisiana. A judge could reasonably conclude at termination of the marriage in the spring of 1986 that the contributions did not substantially enhance the other spouse's earning capacity. Yet, ten years later, in 1996, the potential enhancement represented by the degree in petroleum engineering may be realized. Substantial enhancement of earning capacity as an element of the cause of action is subject to criticism because it initially "entails an evaluation of a future course of action."

44. See text at supra notes 34-38. See also Rand, supra note 5, at 1126: "Substantial enhancement is a much more difficult area because it entails an evaluation of a future course of action." In the article, the author provides a detailed analysis of the California statute and a discussion of the one case construing it.

But consider that any alleged difficulty the court may have in valuing a degree has not prevented it from evaluating potential earning capacity or other contingent expectations in tort or contract actions. Fitzpatrick and Duocette, supra note 35, demonstrate the ability of the court to evaluate the earning capacity conferred by a degree.

45. La. Civ. Code art. 161 A (as added by 1986 La. Acts No. 780, § 1): "[T]he court may allow a party a sum for financial contributions made to the education, training, or increased earning power of the other party . . . ." (emphasis added).

See discussion of the meaning of "increased earning power" in text at supra notes 39-42.

46. In Rand, supra note 5, at 1126 n.56, the author recites:

[The] problems presented by this issue were reviewed by the Law Revision Commission:

". . . But in some cases the education may not enhance the student spouse's earning capacity, or may enhance it only marginally, or may enhance it but the student spouse engages in other work to which the enhancement is irrelevant. In these cases the equities change. If there is no enhancement or only a marginal enhancement of the student spouse's earning capacity, the basis of the reimbursement right — that the community contributed funds for the economic benefit of the student spouse — fails. The reimbursement right should apply only where enhancement of the student spouse's earning capacity is substantial. This will ensure fairness in imposing on the student spouse the economic burden of reimbursement and will avoid litigation over small expenditures such as weekend seminars whose impact on the student spouse's earning capacity is speculative or intangible. Where enhancement of the student spouse's earning capacity is substantial but the student spouse does not take advantage of this,
Implicitly, the contributions must be made during the marriage and prior to a legal separation, divorce or annulment, and the claim may only be asserted after a suit has been filed. The language that limits assertion of the claim to a proceeding for legal separation, divorce, or annulment of marriage suggests that the contributions must precede the described events. Furthermore, it is unlikely that a spouse would make financial contributions to the other spouse after these events occur. The real problem of a lack of specificity arises if financial contributions are made before the marriage.

Another complicating factor is that the prepositional phrase which begins, “in a proceeding,” is followed by an alternative phrase, “or in a separate proceeding.” The intention of the legislature in adding the alternative phrase was to permit a spouse to assert the claim for contributions even after the proceedings for a legal separation, divorce, or annulment of a marriage had terminated. The legislative intention is evidenced by the prescriptive period attached to the claim, which begins to run only from the date of the judgment of divorce or nullity. Yet, literally, the alternative phrase would permit a spouse to assert the claim before any suit for separation, divorce or annulment has been filed. The better view, however, is that the separate proceeding is an action filed after the proceedings referred to in the statute have terminated. Additional arguments supportive of the better view include: the language of the interspousal bar to suit; the article’s location in Chapter 5 entitled, “Of the Effects of Separation from Bed and Board and of Divorce”; and the impossibility of accurately assessing the extent to

reimbursement should nonetheless be required. The higher earning potential is still available to the student spouse, who may take advantage of it in the future. The student spouse should not be able to avoid the reimbursement requirement simply by working at a lower paying job until the marriage is dissolved.”

17 CAL. L. REV. COMM’N REPORTS at 235-36 (emphasis added).


Unless judicially separated, spouses may not sue each other except for causes of action arising out of a contract or the provisions of Title VI, Book III of the Civil Code; restitution of separate property; for divorce, separation from bed and board, and causes of action pertaining to the custody of a child or alimony for his support while the spouses are living separate and apart, although not judicially separated.

48. La. Civ. Code art. 161 B (added by 1986 La. Acts No. 780, § 1): “Any claim for contributions made in accordance with the provisions of Paragraph A of this Article prescribes three years from the date of judgment of declaration of nullity of marriage or judgment of divorce.”

which the contributing spouse has already benefited until termination of the matrimonial regime. To avoid confusion, the article needs clarification of the time period during which financial contributions must be made and of the meaning of the phrase, “in a separate proceeding.”

The figure that represents the financial contributions made to a spouse's education, training or increased earning power is subject to reduction “to the extent that the contributing party has not previously benefited by such education, training, or increased earning power.”

The principle of reduction is very similar to that of the California statute:

“The reimbursement . . . required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust, including . . . (1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party.”

The accompanying Law Revision Commission comment explains:

“For example, if one party receives a medical education, degree, and license at community expense, but the marriage endures for some time with a high standard of living and a substantial accumulation of community assets attributable to the medical training, it might be inappropriate to require reimbursement.”

Another specific instance for reduction under the California statute is where the education or training “substantially reduces” the recipient spouse's need for support from the contributing spouse. Under article 161, which does not condition either the right or the reduction upon the community's respective contributions or benefit, it is possible that the party's benefit previously enjoyed would be a reduction in the obligation of support to

51. Cal. Civ. Code § 4800.3(c) (West Supp. 1986). The statute also provides instances in which the court may reduce or modify a reimbursement award that would be unjust:
   (2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.
   (3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

As in item (2), under Louisiana law, if two claims existed under article 161, judicial compensation would occur (La. Civ. Code art. 1902) to extinguish the two obligations “to the extent of the lesser amount.” La. Civ. Code art. 1893.
53. See text at supra note 51.
the recipient spouse commensurate with his education, training, or increased earning power.\textsuperscript{54}

Unlike the California statute, there is no legislative presumption contained in article 161 that the party has benefited by virtue of the length of time that has elapsed between making the contributions and filing the claim.\textsuperscript{55} Thus, the judge may examine for purposes of reduction whether (1) the spouses enjoyed a higher standard of living, (2) the contributing spouse was relieved of his or her obligation of supporting the recipient spouse, or (3) the spouses accumulated substantial community assets subject to partition. It may be that even in a marriage of long duration, equity demands an award to the contributing spouse, because no net marital assets have been accumulated, and alimony is unavailable.\textsuperscript{56}

The relevancy of the existence and value of community assets to the claim for contributions makes possible the filing of simultaneous suits to recover a sum for contributions and to partition the community before its termination. This possibility raises an issue of jurisdiction in East Baton Rouge Parish. The legislature amended the judicial partition statute\textsuperscript{57} and other related provisions\textsuperscript{58} to authorize the institution of a suit to partition the community property “as an incident of the action

\textsuperscript{54} Furthermore, article 161 applies to spouses if they live under either a community or separation of property regime. Spouses, regardless of their matrimonial regime, are legally obligated to support each other. La. Civ. Code art. 119.

\textsuperscript{55} Cal. Civ. Code § 4800.3(c)(1) (West Supp. 1986):

(1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.

\textsuperscript{56} Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979), rev'd, 648 S.W.2d 847 (Ky. 1982), was such a case. Although the marriage had lasted seventeen years, the couple's "net worth was zero." The court opined:

Thus the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation, should be apportioned to the spouse who provided support when, as in the case of the Inmans', there is little or no marital property acquired through the increased earning capacity provided by the supported spouse's degree or training.

Id. at 269-70.

But see Inman v. Inman, 648 S.W.2d 847 (Ky. 1982).


which would result in a termination of the matrimonial regime." 59 Although the community regime may not terminate until a judgment of separation or divorce is rendered, the action to partition cannot be dismissed as premature. 60 The judgment of partition, however, cannot be rendered "unless rendered in conjunction with, or subsequent to, the judgment which has the effect of terminating the matrimonial regime." 61

That the statute describes such an action to partition community property as an "incident of the action which would result in a termination of the matrimonial regime," i.e., an action for separation from bed and board, 62 arguably means that the family court in East Baton Rouge Parish, rather than the district court, has jurisdiction. Under Louisiana Revised Statutes (La. R.S.) 13:1401, the family court has jurisdiction of "all matters incidental to" divorce, separation from bed and board, and annulment of marriages, but the district court retains jurisdiction of all proceedings "involving liquidation and partition of the community after a judgment of divorce or separation from bed and board." 63 Read literally, the two provisions mean that an action to partition the community before its termination should be instituted in family court; and after a judgment of divorce or separation, in district court. Such a distinction, dependent upon the time the suit is filed, conflicts with the division of jurisdiction generally, as well as its underlying rationale. The

60. La. R.S. 9:2802 (as added by 1986 La. Acts No. 225, § 3):
   An action seeking partition of community property and settlement of claims arising from matrimonial regimes, when asserted as an incident of an action which would result in termination of the matrimonial regime, shall not be deemed premature solely for the reason that the matrimonial regime has not been terminated. No judgment of partition shall be rendered unless rendered in conjunction with, or subsequent to, the judgment which has the effect of terminating the matrimonial regime.
61. Id.
   (7) All actions for divorce, separation from bed and board, annulment of marriages, establishment or disavowal of the paternity of children, alimony and support, custody and visitation of children, as well as all matters incidental to any of the foregoing proceedings, including but not restricted to the issuance of conservatory writs for the protection of community property, the awarding of attorney fees to the wife in judgments of divorce and separation, the cumulation of and rendering executory of alimony, the issuance of writs of fieri facias and garnishment under judgments of the court for alimony and attorney fees, jurisdiction of which was vested in the Nineteenth Judicial District Court for the parish of East Baton Rouge prior to the establishment of the family court for the parish of East Baton Rouge. The Nineteenth Judicial District Court for the parish of East Baton Rouge however, shall retain jurisdiction of all proceedings involving liquidation and partition of the community after a judgment of divorce or separation from bed and board.
family court, for the most part, has jurisdiction over the personal
incidents of the dissolution of the marriage; and the district court, over
community property issues. For that reason, it can be argued persuasively
that because the new legislation prevents rendition of the judgment of
partition until rendition of the judgment that terminates the regime, all
actions to partition community property will result in a partition of
the community only "after a judgment of divorce or separation from
bed and board." Interpreting the two statutes together in light of the
purpose underlying the division of jurisdiction, it is reasonable to con-
clude that the district court in East Baton Rouge Parish will have
jurisdiction in all actions instituted to partition community property.
Obviously as a result of having foreseen the potential conflict, the
legislature in Act 225 added section 5, which reads: "The provisions of
this Act shall not be construed to grant jurisdiction not already granted
to any family court . . . over proceedings involving partition of com-
munity property or over the settlement of claims between spouses arising
from a matrimonial regime." Unfortunately, without consulting the
official act, it is necessary to engage in the previously described reasoning
process to arrive at the legislative solution.

The action for contributions to a spouse’s education, training, or
increased earning power, however, must be instituted in family court if
asserted in a proceeding for legal separation, divorce, or annulment of
a marriage, as the claim is a "matter incidental to" such a proceeding. In
ddition to the language of article 161, its location in the chapter
entitled, "Of the Effects of Separation from Bed and Board and of
Divorce," confirms the conclusion that the action for contributions is
incidental to the action for separation or divorce. Thus, classification
of the spouses’ assets as community or separate property may be litigated
in two different courts for two different purposes: (1) to partition the
community property, and (2) to determine the extent to which the
contributing party has already benefited by financial contributions to
the other spouse’s education, training, or increased earning power. The

64. La. R.S. 9:2802 (as added by 1986 La. Acts No. 225, § 3). See supra note 60.
proceeding for a legal separation, declaration of nullity of marriage, or divorce . . . ."
Arguably, the claim is still an incidental matter for jurisdictional purposes if asserted "in
a separate proceeding." Id. at par. A. See, by analogy, treatment of alimony after divorce
possible application of any issue-preclusion principle\textsuperscript{71} to the dual liti-

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71. The issue preclusion device properly applicable would be estoppel by judgment, which the Louisiana Supreme Court declared in 1978 could no longer be applied:

While this court has on occasion recognized collateral estoppel in our system of law, no clear understanding of the application of that doctrine has been developed in the cases or in legal literature. Therefore, we hold that none of the variations of the common law doctrines of res judicata apply in Louisiana. Welch v. Crown Zellerbach Corp., 359 So. 2d 154, 157 (La. 1978).

Presumably, res judicata remains the only issue preclusion principle applicable in Louisiana. That principle requires that "[t]he thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." La. R.S. 13:4231 (Supp. 1986) (as added by 1984 La. Acts No. 331, § 7). As Justice Dixon observed in Welch, "cause" as used in Louisiana's res judicata legislation is limited and narrow in contrast to "cause of action" at common law, which "encompasses all grounds upon which the claim might have been based." Welch, 359 So. 2d at 157. See also Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976); Sliman v. McBee, 311 So. 2d 248 (La. 1975); and Comment, Preclusion Devices in Louisiana: Collateral Estoppel, 35 La. L. Rev. 158, 164 (1974).

One exception to the rigid application of res judicata under La. R.S. 13:4231 is the partition action. See, e.g., Samuels v. Parsons, 146 La. 262, 83 So. 548 (1919); Wells v. Files, 136 La. 125, 66 So. 749 (1914); Choppin v. Union National Bank, 47 La. Ann. 660, 17 So. 201 (1895). All of these cases are noted in Comment, Res Judicata—"Matters Which Might Have Been Pleadedit, 2 La. L. Rev. 491 (1940). According to the author of the comment: "In three types of cases, however, the judgment is conclusive not only of the matters raised and decided in the suit, but also of all matters which might have been pleaded therein. This is true only when the first suit was a . . . (2) Partition action." Id. at 525. Instituting and trying a suit to partition community property under La. R.S. 9:2801 before the action to recover contributions to a spouse's education raises the issue of whether the claim for contributions might have been made in the partition. The language of La. R.S. 9:2801 is broad enough to include the claim for contributions: "When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising from the matrimonial regime . . . ." La. R.S. 9:2801 (1983) (as amended by 1986 La. Acts No. 225, § 1) (emphasis added). However, article 161 suggests that the claim for contributions need not be combined with any proceeding ("in a separate proceeding"). See discussion in text at supra notes 48-49.

Assuming the action to partition community property and the action to recover a sum for contributions made to the other spouse's education need not be combined, the issue is then whether the classification of assets as community property can be relitigated in the later proceeding. The case of R.G. Claitor's Realty v. Juban, 391 So. 2d 394 (La. 1980) creates some confusion about the relationship of issue preclusion principles to Louisiana res judicata. In an explanation in the Claitor case that is significant in the debate over whether collateral estoppel still survives in Louisiana, the court stated:

While the reference to C. C. art. 2275 is a new argument for the creation of a servitude by an alleged verbal agreement subsequent to the Reciprocal Agreement, the issue of whether that verbal agreement (if proved) created a servitude was fully litigated in the first suit. Any servitude rights arising from the verbal agreement cannot now be relitigated.

391 So. 2d at 403 (emphasis added). In fact, the issue of the verbal agreement may not
Agitation is not unique to the claim for contributions, since presently it may be determined in an alimony proceeding that an asset is community property. No reported appellate court case has directly addressed the issue.

The claim for contributions made to a spouse's education prescribes three years from the date of the judgment of divorce or nullity. If

have been fully litigated:

Claitor's assertion of a servitude created by a verbal agreement was rejected, at least implicitly, by the lower courts in the first suit (although the issue was argued in brief in both courts) . . . .

. . . In the present action the owner ... now argues for the first time that the verbal agreement, confessed by Juban under oath in a deposition, created a servitude under C.C. art. 2275.

Id. at 402-03. Of course, the deposition was not taken until after the suit was filed.

How broadly the Claitor opinion can be construed is a matter of conjecture. For an opinion narrowly construing the Claitor case, see L'Enfant, Developments in the Law, 1980-1981—Louisiana Civil Procedure, 42 La. L. Rev. 676, 691-92 (1982). Assuming that the Claitor case is broadly interpreted as a decision recognizing collateral estoppel in Louisiana, the courts would no doubt restrict its application as common law courts have done. [But see California Co. v. Price, 234 La. 338, 350, 99 So. 2d 743, 747 (1957), decided when Louisiana jurisprudence recognized judicial estoppel. The court stated that judicial estoppel extends to every material fact decided in the course of the controversy.]

An excellent discussion of the history of collateral estoppel and estoppel by judgment in Louisiana and comparisons of common law collateral estoppel to Louisiana res judicata appears in Comment, Preclusion Devices in Louisiana: Collateral Estoppel, 35 La. L. Rev. 158 (1974). The author describes restrictions on principles of preclusion as follows:

The test of Hyman v. Regenstein [258 F.2d 502 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959)] which restricts preclusion to facts necessarily decided in the first case which could be foreseen as important in possible future litigation provides a workable standard that allows flexibility in the application of estoppel.

Id. at 174. Weighing the efficiency of the court system and the consistency of judgments against fairness to the parties and their reasonable expectations, the court may resurrect some principles of collateral estoppel to preclude litigating twice the classification of assets acquired during the existence of a marriage. See also the general discussion of principles of merger or bar and issue preclusion in I Restatement, Second, Judgments §§ 17-29 (1982), particularly, §§ 27-29, which concern issue preclusion and exceptions to the principle.

In another area of family law litigation, the court cleverly relied upon legislative history to preclude relitigation of the issue of fault for permanent alimony after it had been decided in a judgment of separation from bed and board. See Fulmer v. Fulmer, 301 So. 2d 622 (La. 1974), and Spaht, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Persons, 39 La. L. Rev. 659, 663 (1979).


the spouses are judicially separated, the prescriptive period commences only with the judgment of divorce. Pinpointing the date of a judgment of divorce presents difficulties, such as (1) the effect of an appeal on the date of the judgment;14 (2) the effect of delays for appeal on the date of the judgment;7 and (3) the effect of a default judgment that never becomes final because no notice was given.76 In the other important instance where a time period begins to run from the date of the judgment (abatement of judgments), the Civil Code provides that the period com-

   An appeal from a judgment granting or refusing an annulment of marriage, a separation from bed and board, or a divorce can be taken only within thirty days from the applicable date provided in Article 2087 (1)-(3).
   Such an appeal shall suspend the execution of the judgment insofar as the judgment relates to the annulment, separation, divorce, or any partition of community property or settlement of claims arising from the matrimonial regime.

Even though La. Code Civ. P. art. 1842 provides that a final judgment becomes definitive when it has acquired the authority of the thing adjudged, the notion of definitive does not assist in identifying the date of the judgment. There is a suggestion in both the Official Revision Comment and in Judge John T. Hood's article, Hood, Judgments: Book II, Title VI, 35 Tul. L. Rev. 578 (1961), that the definition of a definitive judgment in article 1842 was intended to conform to the definition of "the thing adjudged" in La. Civ. Code art. 3556(31). This concept is applied in McConnell v. Travelers Indemnity Co., 346 F.2d 219, 223 (5th Cir. 1965): "[J]udgments dealing with the merits of a case are final, but become definitive only when the time for appeal has elapsed, or when no appeal may be taken, or when the judgment has been affirmed on appeal and no further appeal may be taken." See Cassidy v. Cassidy, 477 So. 2d 84 (La. 1985), and Andrew v. Andrew, 486 So. 2d 230 (La. App. 3d Cir. 1986) (definitiveness of a divorce judgment).


76. La. Code Civ. P. art. 1913. See also La. Code Civ. P. art. 2087:
   Except as otherwise provided in this Article or by other law, an appeal which does not suspend the effect or the execution of an appealable order or judgment may be taken within sixty days of:
   (1) The expiration of the delay for applying for a new trial, as provided by Article 1974, if no application has been filed timely;
   (2) The court's refusal to grant a timely application for a new trial, if the applicant is not entitled to notice of such refusal under Article 1914; or
   (3) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial, if the applicant is entitled to such notice under Article 1914.

If the notice required by La. Code Civ. P. art. 1913 is not given, the delays for appeal never expire and the judgment will not become definitive. See Williams v. City of Bastrop, 464 So. 2d 1389 (La. App. 2d Cir. 1985); Oceaneering Int'l, Inc. v. Black Towing, Inc., 457 So. 2d 1274 (La. App. 1st Cir. 1984) (dealing with taking a case under advisement; same notice as for default judgments); Ouachita Equip. Rental v. Dyer, 386 So. 2d 193 (La. App. 3d Cir. 1980); Security Ins. Co. v. Holliday, 363 So. 2d 246 (La. App. 4th Cir. 1978), cert. denied, 370 So. 2d 577 (La. 1979).
mences with the signing of the judgment, "if no appeal has been taken, or, if an appeal has been taken . . . from the time the judgment becomes final." The numerous decisions interpreting article 161, prior to the amendment incorporating the quoted language, pre-date the Code of Civil Procedure. Thus, resort to past jurisprudence under analogous statutes provides no resolution to the problem of identifying the date of the judgment from which prescription commences.

Section 2 of Act 780 concerns the prospective application of new article 161. Specifically, the new article "shall have no effect on any action of nullity of marriage, separation, or divorce initiated prior to the effective date of this Act [August 30, 1986], or any action ancillary to such a proceeding." As used in article 161, "no effect on any action" presumably means no application in any such action, because the relationship of the claim for contributions to the actions for separation, divorce or nullity of marriage is simply to determine when the action asserting the claim can be instituted. A claim under article 161 never has an effect on such actions. Section 2 continues by providing that the article has no effect on "any action ancillary to" an action for separation, divorce or nullity. Presumably, "ancillary actions" describes the possibility that the claim for contributions may be initiated in a proceeding separate from the separation or divorce action. "Ancillary" is defined as "[a]iding; attendant upon; describing a proceeding attendant upon or which aids another proceeding considered as principal." More particularly, in Louisiana, the notion of ancillary venue applies where there are "two or more claims arising out of one factual circumstance and . . . the disposition of . . . [one claim] would affect the second

78. See, e.g., Viator v. Heintz, 201 La. 884, 10 So. 2d 690 (1942); Bailey v. Louisiana & N.W.R. Co., 159 La. 576, 105 So. 626 (1925); Scott v. Seelye, 39 La. Ann. 749, 2 So. 309 (1887); Marbury v. Pace, 30 La. Ann. 1330 (1878); Samory v. Montgomery, 27 La. Ann. 50 (1875); Walker v. Succession of Hays, 23 La. Ann. 176 (1871); Carlile v. Huckaby, 154 So. 462 (La. App. 2d Cir. 1934). See Hood, supra note 74, at 581, where the author suggests that the redactors of the Code of Civil Procedure considered the question of when prescription began to run under La. Civ. Code art. 3547, the predecessor to article 3501, as a matter of substance, not procedure. Thus, the author expresses the intention of the redactors of the Code of Civil Procedure that any legislation with prescription running from the date of the judgment should provide its own definition of the date. See also La. Civ. Code art. 3496, which provides the prescriptive period for an action against an attorney for the return of papers. That prescription commences with "the rendition of a final judgment in the law suit or the termination of the attorney-client relationship."

Decisions rendered after the enactment of the Code of Civil Procedure include Master Credit Plan, Inc. v. Angelo, 437 So. 2d 1201 (La. App. 5th Cir. 1983); Consolidation Loans, Inc. v. Guercio, 356 So. 2d 441 (La. App. 1st Cir. 1977).
Arguably, the separation or divorce action and the claim for contributions to a spouse’s education do not always arise out of the same factual circumstance; however, by virtue of the institution of a separation or divorce action, the spouse may assert the cause of action provided in article 161. Undoubtedly, the legislature intended to preclude the assertion of a claim for contributions if a divorce, separation or annulment proceeding was instituted before August 30, 1986.

An action “initiated prior to” August 30, 1986, raises the dilemma of determining the applicable law by the date of filing suit. Consider the possibility of the supported spouse filing of a non-meritorious suit for separation, divorce or annulment for the purpose of depriving the contributing party of a cause of action for contributions. The contributing spouse can move for dismissal of the plaintiff’s action, if at the close of the plaintiff’s evidence it appears that he has no right to relief as a matter of law. In instances where the contributing spouse fails to request a dismissal of the action, he should not be precluded from asserting his claim for contributions if the plaintiff is ultimately denied relief. Despite the failure to include language in article 161 contemplating this possibility, it may be argued that the language, “action . . . initiated,” should be interpreted to mean the action in which the judgment of separation, divorce or annulment was rendered. This qualification protects the contributing spouse from manipulation of the filing date by the supported spouse. Article 155 of the Civil Code reflects the same underlying policy by providing that the community regime is terminated retroactively “to the date on which the original petition was filed in the action in which the judgment is rendered.”

If the contributing party filed suit before August 30, 1986, the right to obtain a dismissal without prejudice depends upon whether the defendant has made a general appearance. If the defendant has not made a general appearance, the plaintiff has a right to the dismissal of his action without prejudice and to file suit again after August 30, 1986. If the defendant has made an appearance, the court may refuse to dismiss plaintiff’s action, except with prejudice. Under the jurisprud-

81. La. Code Civ. P. art. 1672 B.
82. La. Civ. Code art. 155 A: “The judgment of separation from bed and board carries with it the separation of goods and effects and is retroactive to the date on which the original petition was filed in the action in which the judgment is rendered . . . .”
ence, the judge cannot dismiss plaintiff's action without prejudice if substantive rights acquired by the defendant would thereby be lost or if the defendant would be deprived of a just defense. The substantive right acquired by the defendant is arguably the right to be free of a claim by the plaintiff for contributions to the defendant's education or training, a claim plaintiff did not have by virtue of filing suit before August 30, 1986.

Article 161 contains no reference to legal interest on a claim for contributions to a spouse's education. The California statute provides a special rule allowing the contributing spouse to claim interest from the end of the calendar year in which the contribution is made. Article 2000 of the Louisiana Civil Code contains the general rule that "[w]hen the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, . . . in the absence of agreement, at the rate of twelve percent per annum." Under the jurisprudence, an unliquidated debt, such as the claim for contributions to a spouse's education or training, is due from the moment it is ascertainable by judgment. Thus, the claim

86. City Nat'l Bank v. Anlage, 448 So. 2d 199 (La. App. 1st Cir. 1984); Rourke v. Coursey, 338 So. 2d 1197 (La. App. 3d Cir. 1976). But see City Nat'l Bank, 448 So. 2d at 201, where the court expresses the opinion: "We fail to see the necessity of holding Anlage to present evidence of substantive rights and just defenses against CNB when none were raised in his answer." In the answer to a suit for separation or divorce filed prior to August 30, 1986, there will be no reference to the substantive rights of which defendant will be deprived in his answer. The allegations in the defendant's answer will refute allegations of the plaintiff concerning grounds for separation or divorce, and any reference to claims for contributions would be irrelevant and untimely, since the claim can only be asserted in actions initiated after August 30, 1986.


88. Cal. Civ. Code § 4800.3(b)(1) (West Supp. 1986): "The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made."

89. In Sugar Field Oil Co. v. Carter, 214 La. 586, 38 So. 2d 249, 251-52 (1948), involving a quantum meruit claim, the court stated:

In this suit the district judge correctly allowed interest from the date of judgment. On that date the claim had become certain and liquidated by reason of the judgment . . . . It has become the general practice of this Court to permit the allowance of interest from the date of judgment upon the principle that the judgment itself makes the claim a liquidated one.

See also Alexander v. Burroughs Corp., 359 So. 2d 607 (La. 1978); Connette v. Wright, 154 La. 1081, 98 So. 674 (1923); Lone Star Indus. v. American Chem., 461 So. 2d 1063 (La. App. 4th Cir. 1984), aff'd, 480 So. 2d 730 (La. 1986); Roques v. Alfonso, 399 So. 2d 1294 (La. App. 4th Cir. 1981); Consolidated Sewerage Dist. v. Schulin, 387 So. 2d
probably will bear legal interest from the date of the judgment, rather than, as in California, from the end of the calendar year in which the contribution is made. Considering that the calculation of financial contributions (or the sum to be awarded) and reduction for benefits previously received necessarily involve speculation, the rule to be applied under the Louisiana Civil Code seems preferable.

Whether the amount received for financial contributions to the other spouse's education is income to the recipient under the Internal Revenue Code depends upon the position taken by the Internal Revenue Service. Properly speaking, it is neither a payment of support nor property received at divorce by partition of the community. The same dilemma arises in the context of whether the obligation owed by the spouse who was supported is dischargeable in bankruptcy, since it is neither alimony nor a community property claim. At least one appellate court, in New 1369 (La. App. 4th Cir. 1980); Hicks v. Rucker Pharmacal Co., 367 So. 2d 399 (La. App. 2d Cir. 1979), cert. denied, 369 So. 2d 1360 (La. 1979); Brummett v. Hamel's Dairy, 324 So. 2d 502 (La. App. 2d Cir. 1975); North Dev. Co. v. McClure, 276 So. 2d 395 (La. App. 2d Cir. 1973); Johnston v. Empire Gas, 268 So. 2d 333 (La. App. 2d Cir. 1972); Quinn Constr. Co. v. Savoie, 207 So. 2d 229 (La. App. 4th Cir. 1968), cert. denied, 252 La. 117, 209 So. 2d 42 (1968). But see Fouchi v. Fouchi, 487 So. 2d 496 (La. App. 5th Cir. 1986), where the court permitted a former wife to claim interest from her former husband on her share of community property from the date of termination of the community, despite the husband's argument that the principal amount could not be ascertained until the judgment of partition.

90. See discussion in text at supra notes 34-38.

91. 26 U.S.C.A. §§ 71, 215 (West Supp. 1986). To be treated as alimony, the payment must meet the requirements of Section 71: (1) The payment must be in cash; (2) The payment must be received under a divorce or separation instrument, meaning: "(A) a decree of divorce or separate maintenance, or a written instrument incident to such a decree, or (B) a written separation agreement, or (C) a decree requiring a spouse to make payments for the support of the other spouse [other than divorce or separation decree];" (3) the spouses must not be members of the same household (if legally separated or divorced); (4) the instrument must expressly state that the liability for the payments terminates on the death of the payee; (5) and the instrument must not designate the payment as one not to be treated as alimony. (If you so specify in the instrument, Secs. 71 and 215 will not apply. The transaction will be tax-neutral, like a property settlement.)

The payor spouse often wants alimony treatment so that he can deduct the amount of the payments. To get such treatment, however, the payments must not be "front-loaded." Under the provisions of Section 71(f): (1) If the payments exceed $10,000 in one year they must continue for six years or the excess over $10,000 will not get alimony treatment (unless they stop because of death or remarriage); (2) Also, if the payments begin large and then decrease sharply, 71(f)(2) will make the payor recapture his deductions by paying tax now.

92. 26 U.S.C.A. § 1041 (West Supp. 1986). Under Section 1041, there are no tax consequences to transfers of property between former spouses if incident to a divorce.

93. Under 11 U.S.C. § 523(a)(5) (1982), awards for alimony, maintenance, or support payable directly to the spouse are not dischargeable; property settlements or divisions are
Jersey, has recognized the difficulties of classifying the award made to compensate the spouse for contributions to the education of the other spouse.\textsuperscript{94}

Conclusion

Despite the unanswered questions of statutory construction that remain, the enactment of article 161 constitutes legal recognition that a social problem does exist and that it is a problem sufficiently important to require a solution. The legislative debates and balloting reflect the strength of the sentiment that the spouse who makes contributions to the other spouse's education, training or increased earning power deserves compensation, if he does not realize the benefit of such contributions before dissolution of the marriage. The significance of the passage of Act 780 is the legislature's receptiveness to novel solutions for social ills affecting the family. As the revision of Book I—Of Persons proceeds

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\item The award will be dischargeable in bankruptcy unless it is \textit{actually} in the nature of alimony, maintenance, or support. 11 U.S.C. § 523(a)(5)(B) (1982). According to In re Howard, 27 Bankr. 894 (Bankr. W.D. Ky. 1983), a marital debt not in the nature of alimony is dischargeable.

In making the determination of whether the award is support, the courts apply federal law, but can consider state law in deciding whether the award is in the nature of support. Some general factors to be applied in characterizing an award have developed in federal bankruptcy cases, which are enumerated in In re Hall, 40 Bankr. 204 (Bankr. M.D. Fla. 1984): (a) form and circumstances of the award, (b) intent of the parties (if an agreed settlement), and (c) whether at the time there was a need for support (most important). See also In re Wesley, 36 Bankr. 526 (Bankr. S.D. Ohio, 1983); In re Polen, 30 Bankr. 572 (Bankr. D. S.C. 1983); In re Vande Zande, 22 Bankr. 328 (Bankr. W.D. Wis. 1982); In re Taff, 10 Bankr. 101 (Bankr. D. Conn. 1981).

Thus, the court is not bound by the form of the award, and indeed has the duty under the statute to look beyond it to the \textit{intent} of the parties to determine the true nature of the award. Support seems to be the key issue: was the award intended to support the spouse? If not, then it is not alimony and will be dischargeable in bankruptcy. In re Hobbs, 30 Bankr. 586 (Bankr. D. Nev. 1983); In re George, 15 Bankr. 247 (Bankr. N.D. Ohio 1981); and In re Rich, 40 Bankr. 92 (Bankr. D. Mass. 1984).

In a case in which the facts were analogous to a claim for contributions, the wife was awarded payments from her husband in addition to $240 per month alimony. The award was to approximate her share of his pension plan (which would not be available for several years, hence the present payments). She tried to characterize the award as alimony, but the court, examining the factors listed above, found that the award was an equitable allocation of marital assets to compensate her for her contributions to the marriage and in recognition of the fact that her earning capacity was much less than her husband's. The award was not in the nature of support, because the alimony award was sufficient to meet her daily needs. The additional sum was a property settlement, and dischargeable in bankruptcy. See In re Hall, 40 Bankr. 204 (Bankr. M.D. Fla. 1984).

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to its conclusion, the people actively involved in the process can be encouraged by the interest\textsuperscript{95} and progressive attitude of the legislature to family law reform.

\textsuperscript{95} Senate Concurrent Resolution No. 112 (Reg. Sess. 1986):
To create and provide with respect to a joint legislative committee to study and make recommendations with respect to revision of the Louisiana law on divorce and spousal support.

WHEREAS, the Louisiana State Law Institute is finalizing their recommendations for revision to the divorce and spousal support laws; and

WHEREAS, Senate Bill No. 628 and Senate Bill No. 702 have prompted interest and discussion regarding rehabilitative alimony and the concept of fault in the award of permanent alimony and have displayed a need for further study into the problems and necessity for revision in this area; and

WHEREAS, there exists a feeling that the law relative to divorce and spousal support needs revision to specifically include provisions for rehabilitative alimony and for modification of the concept of fault.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana creates a joint legislative committee to study the law relative to divorce and spousal support for the purpose of determining the need for revision of such laws.

BE IT FURTHER RESOLVED that the joint legislative committee created herein shall include the members of the Senate Committee on Judiciary A and the House Committee on Civil Law and Procedure. BE IT FURTHER RESOLVED that the Louisiana State Law Institute is hereby urged and requested to aid and assist the committee in its deliberations and recommendations.

BE IT FURTHER RESOLVED that for purposes of such study the committee created herein shall have all powers otherwise provided by law and by the rules of the respective houses and as well as all powers inherent in legislative committees and that the members thereof shall receive such per diem and mileage as is provided for committees by the rules of the respective houses.

BE IT FURTHER RESOLVED that the committee created herein shall make a written report of its findings to the legislature prior to the 1987 Regular Session, together with any specific proposals for legislation.