Co-Ownership of Former Community Property: A Primer on the New Law

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I. INTRODUCTION

New law governing certain aspects of the co-ownership of former community property takes effect on January 1, 1996.1 The new law is contained in Act 433 which amends one Civil Code article2 and adds seven others3 in Chapter 2 of Title VI, Book III, ultimately effecting a modification of the principles of ordinary co-ownership4 that apply generally to former community property.5 This article first discusses prior law and the scope and temporal effect of the new law and then comments in detail upon each of the eight new Articles.

A. The Old Law—Civil Code Article 2369.1

Until January 1, 1996, when the community property regime terminated, the law of ordinary co-ownership applied "unless there [was] contrary provision of law or juridical act."6 Thus, a community property regime terminated by a divorce judgment7 resulted in the two former spouses occupying the position of ordinary co-owners of former community property. An exception to the application of the law of co-ownership, "contrary provision of law," included rules embodied in other Articles contained in the same Chapter—such as, the
right of a pre-termination creditor of one spouse to satisfy his debt from all former community property not merely the debtor spouse’s one-half interest,8 the personal responsibility to pre-termination creditors incurred by a spouse who disposes of former community property other than for the satisfaction of a community obligation,9 the right to claim reimbursement,10 and the duty to account for former community property under a spouse’s control at termination of the community regime.11 All of these rules supersede the application of the law governing ordinary co-owners, because unlike other co-owners the spouses had a prior property regime that has been described as a “distinct species”12 of co-ownership. The distinct species of co-ownership, the community of acquets and gains, recognizes that by virtue of the intimate relationship of marriage the spouses have a unique partnership that consists of property rights and obligations justifying special rules.13 As a consequence, it is necessary to provide for the appropriate extension of those rules even after termination of the community property regime. In all other respects, the relationship of the spouses14 as to former community property before January 1, 1996, was identical to that of other ordinary co-

   An obligation incurred by a spouse before or during the community property regime may be satisfied after termination of the regime from property of the former community and from the separate property of the spouse who incurred the obligation. The same rule applies to an obligation for attorney’s fees and costs in an action for divorce incurred by a spouse between the date the petition for divorce was filed and the date of the judgment of divorce that terminates the community regime. See generally Katherine S. Spaht & W. Lee Hargrave, 16 Louisiana Civil Law Treatise, Matrimonial Regimes §§ 7.9-7.11 (1989 & Supp. 1995).
9. La. Civ. Code art. 2357 (rev. 1990): “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.” See generally Spaht & Hargrave, supra note 8, §§ 7.9-7.11.
10. See La. Civ. Code arts. 2358-2368 (rev. 1979) which the jurisprudence has extended to the expenditure of former community property or separate property after termination of the community regime. See, e.g., Spaht & Hargrave, supra note 8, § 7.14, at 289-91.
11. La. Civ. Code art. 2369 (1979): “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 prescribed in three years from the date of termination of the community property regime.” See generally Spaht & Hargrave, supra note 8, § 7.19.
14. Under La. Civ. Code art. 2356, the community regime may terminate during the existence of a marriage for the cause of judgment of separation of property (La. Civ. Code art. 2374) or matrimonial agreement (La. Civ. Code art. 2329), and thus the two co-owners are spouses. In fact the new legislation itself uses the term “spouse” to refer to the two co-owners for the sake of simplicity of expression: In fact, co-owners of former community property are sometimes still spouses, for example, when a separation of property is decreed at the request of a spouse under Civil Code Article 2374 (rev. 1979), but are more often former spouses who must hold former
owners with the exception, arguably, of former community property when the community regime terminated by death. As the author has argued before, spouses or former spouses whose community regime has terminated are peculiar co-owners "because they are less likely to remain on friendly terms or to continue to share a common purpose." Particularly in the case of a divorce judgment that terminates the community regime, "the law can no longer assume that management decisions concerning common property will be made weighing the same considerations as during the partnership." Ordinary co-owners usually share a common interest in only one, or no more than a few, assets. As long as they are in agreement, there is little need to regulate the relationship. Thus, the legal rules governing the relationship of co-owners need concern primarily the right to demand a partition and how that partition is to be accomplished. Other rules regulating the relationship address the right to products, use and management of the thing when there is no agreement, the right to make substantial alterations or improvements to the thing, and responsibility for different types of expenses. Application of these rules to community property in co-ownership during the period of months or years that often ensues between the entry of a judgment of divorce and the judicial or extrajudicial partition of that former community property. Whichever is the situation in a given case, these Articles apply to spouse or former spouse co-owners of former community property until that property is partitioned.


18. Id. at 729.
24. For example, substantial alterations or improvements:
When a co-owner makes substantial alterations or substantial improvements consistent with the use of the property, though without the express or implied consent of his co-owners, the rights of the parties shall be determined by Article 496. When a co-owner makes substantial alterations or substantial improvements inconsistent with the use of the property or in spite of the objections of his co-owners, the rights of the parties shall be determined by Article 497.

Consider the difference if the expenses are for maintenance and management:
A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management
former community property are in some cases inappropriate\textsuperscript{25} and in others contradictory to special statutes governing former spouses.\textsuperscript{26} 

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expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.

If the co-owner who incurred the expenses had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of the enjoyment.


Except as otherwise provided in Article 801, a co-owner is entitled to use the thing held in indivision according to its destination, but he cannot prevent another co-owner from making such use of it. As against third persons, a co-owner has the right to use and enjoy the thing as if he were the sole owner.

La. Civ. Code art. 803 (rev. 1990): "When the mode of use and management of the thing held in indivision is not determined by an agreement of all the co-owners and partition is not available, a court, upon petition by a co-owner, may determine the use and management."

Consider also the power of a co-owner to dispose of or to manage his undivided one-half share of former community property, registered movables and a former community enterprise. Under the rules of ordinary co-ownership, a co-owner may "freely lease, alienate, or encumber his share of the thing held in indivision." La. Civ. Code art. 805 (rev. 1990). During the existence of the community regime, neither husband nor wife may dispose of his or her undivided one-half share of community property. La. Civ. Code art. 2337 (rev. 1979). To permit either spouse to alienate his interest after termination of the community regime before a partition would permit either spouse to avoid the provisions of the special statute governing the judicial partition of community property. La. R.S. 9:2801 (1991 & Supp. 1996). During the existence of the community regime, two examples of sole and exclusive management of community property are the alienation of the movables of a community enterprise by the managing spouse (La. Civ. Code art. 2350) and the alienation of registered movables by the spouse in whose name the movable is registered (La. Civ. Code art. 2351). No such parallel explicitly exists under the law of co-ownership.


A spouse who uses and occupies or is awarded by the court the use and occupancy of the family residence pending either the termination of the marriage or the partition of the community property in accordance with the provisions of R.S. 9:374(A) or (B) shall not be liable to the other spouse for rental for the use and occupancy, unless otherwise agreed by the spouses or ordered by the court.


This special statute arguably conflicts with the provisions of La. Civ. Code art. 806 (rev. 1990) if the family residence is co-owned and the use is awarded to one spouse (or one spouse simply uses it) after termination of the community regime. Under La. R.S. 9:374(C) (1991 & Supp. 1996), the spouse who occupies former community property (now co-owned) owes no rent unless agreed to or ordered by the court. However, for ordinary co-owners under La. Civ. Code art. 806 (rev. 1990) the value of enjoyment by a spouse who occupies the family home is to be deducted from what is owed him for necessary expenses. General principles of interpretation render La. R.S. 9:374(C) (1991 & Supp. 1996) applicable since it is the more specific (applying to only one type of co-ownership under certain circumstances).

There is a reference to the predecessor of La. R.S. 9:374 (1991 & Supp. 1996), which was La. R.S. 9:308, in La. Civ. Code art. 802 cmt. b (rev. 1990): "For the use of the family residence and of community movables and immovables after the filing of a petition for separation of [sic] divorce, see R.S. 9:308." This reference recognizes that the special statute is an exception to the content of Article 802.
The inadequacy of the general rules of co-ownership resulted primarily from the omission of affirmative duties to preserve co-owned property or to manage it prudently. For example, an ordinary co-owner is permitted, but not required, to "take necessary steps for the preservation of the thing that is held in indivision." A co-owner is entitled to use the thing absent an agreement, but is liable to his co-owner "for any damage to the thing held in indivision caused by his fault." The comment to the Article imposing liability for damage to the thing creates ambiguity as to the standard of care the co-owner must exercise in using and managing the thing. In the case of divorced spouses, an explicit standard of care for managing former community property and an affirmative duty to preserve property until a partition seemed imperative.

B. The Scope of Act 433 of 1995

The new Act applies to former community property, which is co-extensive at times with patrimony and at times with things that were classified as community property during the regime. Patrimony is the broader and more inclusive term: "the total mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs." Things, by contrast, ordinarily is used to refer to "objects susceptible of appropriation and of pecuniary evaluation." If property in Article 2369.1 means patrimony which includes liabilities, then the former spouses co-own not only things but also obligations. Yet the Civil Code articles governing ordinary co-ownership to which Article 2369.1 refers only govern the co-ownership of things and rights. If a right does not necessarily

27. La. Civ. Code art. 800 (rev. 1990). The comment explains: "This is not unauthorized management of the affairs of another under Civil Code Article 2295 (1870)." For the distinction between conservatory acts, acts of administration, and acts of disposition, see A.N. Yiannopoulos, Personal Servitudes § 37, in 3 Louisiana Civil Law Treatise (2d ed. 1978); Gabriel Baudry-Lacantinerie, Traite Theorique et pratique de droit civil, III Supplement by Bonnecase 630-686 (1926).
31. For somewhat differing views on the interpretation of Article 799, see Symeonides & Martin, supra note 15, at 101-12; and Spaht & Hargrave, supra note 8, § 7.19, at 139-40.
32. Due v. Due, 342 So. 2d 161, 165 (1977) (quoting from A.N. Yiannopoulos, Property § 77, in 2 Louisiana Civil Law Treatise (1976)).
34. La. Civ. Code art. 797 (rev. 1990) (emphasis added): "Ownership of the same thing by two or more persons is ownership in indivision."
35. La. Civ. Code art. 818 (rev. 1990): "The provisions governing co-ownership apply to other rights held in indivision to the extent compatible with the nature of those rights." The examples in the official comment likewise concern the right but not the obligation.
include the correlative obligation, then community obligations incurred by either spouse during the existence of the community regime are not governed by the rules on co-ownership.

Even if obligations are to be included as the correlative of rights, there is no article in the Title on Ownership in Division that governs an obligation incurred by one co-owner before the beginning of the co-ownership relationship. Co-owners of former community property differ from ordinary co-owners in that they share a "community of interest" in some obligations incurred before their co-ownership relationship began. In recognition that co-owners of former community property are different, the court should decide "equitably" according to "justice, reason, and prevailing usages" if the issue concerns satisfaction of a spouse's obligation that was incurred during the existence of the community regime. Initially at least, the court should distinguish between obligations incurred during the existence of the community regime and obligations incurred after termination of the regime. The former arguably are not governed by the new Act or the articles on co-ownership; whereas, the latter are governed by the articles on co-ownership which remain unmodified by the new Act.

For example, an obligation incurred prior to the termination of the community regime may be satisfied from the entire former community property, including the interest of the co-owner spouse who did not incur the obligation. If the obligation is incurred after termination of the community regime, it may be satisfied only from the undivided one-half interest in former community property.

36. For example, see La. Civ. Code art. 1763 (rev. 1984): "A real obligation is a duty correlative and incidental to a real right."
38. One obvious example that La. Civ. Code art. 2369.1 recognizes is the liability of former community property for obligations incurred prior to termination of the regime under La. Civ. Code art. 2357 (rev. 1990). La. Civ. Code art. 2369.1 cmt. c (as added by 1995 La. Acts No. 433, § 1) states: The phrase "unless otherwise provided by law" refers to other provisions of Section 3 of this Chapter of Title VI of Book III of the Civil Code, such as Article 2357 (rev. 1979). These articles depart from the principles governing ordinary co-owners on the basis that the unique and peculiar species of co-ownership, the community of acquets and gains, has previously existed between the spouses. Thus, Article 2357 provides that obligations incurred by a spouse prior to termination of the community regime may be satisfied from the entirety of former community property.
41. La. Civ. Code art. 4: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."
43. See supra note 38. See also La. Civ. Code art. 2369.1 cmt. c (as added by 1995 La. Acts No. 433, § 1).
of the obligor spouse. By virtue of the “unique and peculiar species of co-ownership” that existed previously between the spouses, an obligation incurred before termination of the regime is not subject to the law of co-ownership, at least as to third parties. Arguably, the same treatment exempting pre-termination obligations from co-ownership rules should apply as between the spouses who now find themselves co-owners.

The new Act applies only if the community regime terminates for certain causes: declaration of nullity of the marriage, judgment of divorce, judgment of separation of property, or matrimonial agreement. The new Act does not apply if the cause of termination of the regime is death or judgment of declaration of death. The reason for excluding application of the new article when the community regime terminates by death will be discussed in Part II.

Any claim one former spouse may have against the other, either under the new Act or under the Civil Code articles on co-ownership, may be asserted in the judicial partition. The Legislature amended Louisiana Revised Statutes 9:2801, governing judicial partition of former community property, in the new Act to permit the court to hear and resolve all claims between the former spouses, whether arising from the community regime that previously existed or arising since its termination.

C. Temporal Effect

Section 3 of the new Act deals in detail with the temporal effect of its changes. The general effective date is January 1, 1996; but the new Act is

45. See Spaht & Hargrave, supra note 8, § 7.9, at 256.
47. La. Civ. Code art. 2356 (rev. 1990): “The legal regime of community property is terminated by the death or judgment of declaration of death of a spouse, declaration of the nullity of the marriage, judgment of divorce or separation of property, or matrimonial agreement that terminates the community.”

When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising either from the matrimonial regime, or from the co-ownership of former community property following termination of the matrimonial regime, either spouse, as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter, may institute a proceeding, which shall be conducted in accordance with the following rules. . . .

54. For a comparable provision, see 1978 La. Acts No. 627, § 9:
much more specific about the meaning of the effective date. The property to be
governed by the new Act is "former community property that is co-owned by
spouses or former spouses on or after January 1, 1996, regardless of when the
community regime of the spouses or former spouses terminated." If the
community regime terminated before January 1, 1996, and former community
property remains unpartitioned, the new Act applies but with limitations. No
asset acquired or fruit or product accrued prior to January 1, 1996, would change
characterization under the new Act. This provision was added out of an
abundance of caution even though it is doubtful that a reasonable construction
of the new Act would have resulted in a reclassification of such assets or fruits
or products.

The first of the remaining two provisions of Section 3 protects the validity
of "any act or transaction made prior to January 1, 1996, by a spouse or former
spouse according to the law in force at the time of the act or transaction." This
provision assures that explicit changes in the dispositive power of a co-
owner spouse do not suggest that the spouse did not have such power before
the new Act. For example, general co-ownership law permits either co-owner
to dispose of his undivided share but requires the concurrence of all co-owners
to dispose of the entire co-owned property. Section 3 provides protection for
the former spouse who disposed of his undivided one-half share to a third person
before January 1, 1996, even though under the new Act he cannot. At the same
time, Section 3 recognizes that even though the new Act makes exceptions to the
general law of co-ownership explicit, the same result may have obtained under
the law effective before January 1, 1996. For example, the new Act contains an

Except for R.S. 9:2831 through 2835, Section 1, Section 2, Section 6, Section 7, and
Section 8 of this Act shall take effect on January 1, 1980, and shall be applicable to the
property and obligations of all spouses whether the spouses were married or whether
property was acquired or an obligation was incurred prior to or after January 1, 1980,
unless the spouses have adopted a matrimonial regime by express contract; provided,
that Part II of Chapter 2 of Section 1 of this Act shall not be construed to change the
characterization as community or separate of assets acquired or fruits and revenues
accrued prior to January 1, 1980, nor to invalidate any act or transaction made prior to
January 1, 1980 by a spouse according to the law in force at the time of the act or
transaction.

All other provisions of this Act shall take effect on the sixtieth day after final
adjournment of the 1979 Regular Session and shall be applicable to the property and
obligations of all spouses whether the spouses were married or their property acquired or
obligations incurred prior to or after the effective date of these provisions.

56. 1995 La. Acts No. 433, § 3: "Nothing in this Act shall be construed to change the
characterization of assets acquired or fruits and products accrued prior to January 1, 1996."
57. See infra part II (discussion of La. Civ. Code art. 2369.2 in the Article-by-Article
commentary).
exception to the general principle that both co-owners must consent to the alienation of the co-owned thing: a spouse in whose name a former community movable is registered may alone alienate it. An alienation by the spouse in whose name a former community movable is registered probably was valid before January 1, 1996, through the application of other statutes that supersede principles of co-ownership.

The latter of the remaining provisions of Section 3 addresses the more serious issue, the application of the explicit duty to preserve former community property and to manage it subject to a more stringent standard of care. The last sentence of Section 3 reads: "Nor shall a spouse or former spouse incur an obligation imposed by this Act for any action taken before January 1, 1996, with respect to former community property, unless the spouse or former spouse was obligated according to the law in force at the time the action was taken." Absent that sentence, under the first sentence of Section 3, the new Act would apply to former community property on January 1, 1996. If acts of a spouse performed before January 1, 1996, violated the duty "to preserve and to manage prudently former community property" under a spouse's control "in a manner consistent with the mode of use of that property immediately prior to termination of the community regime," an argument could be made that the spouse is "answerable for any damage caused by his fault, default, or neglect." The comments to Article 2369.3 explain that the Article changes the law. In doing

61. The new Act permits the spouse in whose name a former community movable is registered to alienate it without the other co-owner's consent. La. Civ. Code art. 2369.5 (as added by 1995 La. Acts No. 433, § 1). Even though this is a departure from principles governing ordinary co-owners, statutory schemes governing a particular registered movable, such as a motor vehicle or stock, may well have permitted the same transaction, superseding the application of general co-ownership principles (the more specific prevailing over the more general). See infra text accompanying notes 245-247.

64. "This Act applies to former community property that is co-owned by spouses or former spouses on or after January 1, 1996, regardless of when the community regime of the spouses or former spouses terminated." 1995 La. Acts No. 433, § 3.
66. Id.
This Article changes the law. First it imposes on a spouse who has control of former community property an affirmative duty "to preserve and to manage" such property. In contrast, Civil Code Article 800 (rev. 1990), applicable to ordinary co-owners, provides for a right but not a duty to act for the preservation of the property. Such a duty arises only if the co-owner undertakes to act as a negotiorum gestor or he is appointed as administrator. See Symeonides & Martin, The New Law of Co-ownership: A Kommentar, 68 Tul. L. Rev. 72, 102 (1993). Similarly, the co-ownership articles of the Civil Code do not impose on one co-owner an affirmative duty to manage the co-owned thing unless that owner assumed the qualities of a gestor or was appointed as an administrator. Second, this Article imposes a higher standard of care than that provided by Civil Code Article 799 (rev. 1990) for ordinary co-owners.
so, the redactors did not intend to punish acts of a spouse performed before January 1, 1996, that were not actionable at the time, an intention clearly expressed in the last sentence of Section 3.

II. ARTICLE BY ARTICLE COMMENTARY


After termination of the community property regime, the provisions governing co-ownership apply to former community property, unless otherwise provided by law or by juridical act.

When the community property regime terminates for a cause other than death or judgment of declaration of death of a spouse, the following Articles of this Subsection also apply to former community property until a partition, or the death or judgment of declaration of death of a spouse.

1. First Paragraph Comparison to Predecessor

The first paragraph of this Article is virtually identical to its predecessor. The only language changes consist of adding “to former community property” so that the verb apply has an object and of substituting “otherwise provided by law” for “there is contrary provision of law” after the word unless. Neither of these alterations makes substantive changes in the law. Examples of as “otherwise provided by law” appear in Part I.A. Juridical act has a doctrinal definition: a declaration of will intended to produce legal consequences to which declaration the law attributes those or other legal consequences.

68. A similar issue was considered in the recent case of Succession of Steckler, 665 So. 2d 561 (La. App. 5th Cir. 1995). The defendant, whom plaintiff claimed had been disinherited, argued that the alleged grounds for disinherison (failure to communicate without just cause for two years) had been added to La. Civ. Code art. 1621 in 1985; and consequently, his inaction or other conduct before the effective date of the amendment could not be considered. The court agreed: “It [La. Civ. Code art. 1621 (12)] cannot be applied retroactively to this case because it would effectively divest plaintiff of his right of inheritance to not less than a fixed portion of his parent’s estate based on action, or inaction, by plaintiff that was not prescribed [sic] at the time the acts took place.” 665 So. 2d at 564.

Whether the court was correct in concluding that there would be a retroactive application of Article 1621(12) if it applied to conduct before its effective date, the Legislature intended in Act 433 of 1995 to protect a former spouse who behaved in accordance with law before the effective date of the Act only to discover that after January 1, 1996, such conduct was proscribed.

69. La. Civ. Code art. 2369.1 (added by 1990 La. Acts No. 991, § 1): “After termination of the community property regime, the provisions governing co-ownership apply unless there is contrary provision of law or juridical act.”

2. Cause of Termination

As mentioned in Part I.B., the Civil Code articles of the new Act apply only if the community regime terminates by a judgment of divorce, judgment of separation of property, declaration of nullity of a marriage, or a matrimonial agreement terminating the community regime. The new articles do not apply in two instances: if the community regime terminates by death or declaration of death. The explanation for the omission of termination by death or declaration of death lies in the content of the changes made by the new Act.

The focal point of the changes made by the new Act is the imposition of new affirmative duties. The Articles explicitly impose a duty to preserve former community property under one’s control and to manage such property prudently, as measured against a relatively precise standard. A comment to Article 2369.3 expresses the rationale underlying the change: “... after termination of the community property regime, the law no longer assumes that a spouse who has former community property under his control will act in the best interest of both spouses in managing it.” Clearly, such rationale applies if the community regime terminates during the lifetime of both spouses and under circumstances that suggest the two no longer share a common purpose as to their personal life, and hence as to their property. In fact, the interest of one of these co-owners may be hostile to the interest of the other. If the community regime terminates by reason of death of a spouse or a declaration of death of a spouse after an absence of five years, the survivor will not necessarily be hostile to the interests of the heirs or legatees of the deceased; this is especially true when the survivor is the parent of the deceased’s heirs or legatees. Furthermore, the interrelationship between community property law and successions law, not to mention the law of co-ownership, has never been adequately resolved.

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73. Id. at cmt. a.
74. The author recognizes that recent changes in forced heirship law may well exacerbate squabbles between the surviving spouse and the deceased’s heirs or legatees. At the time the Council of the Louisiana Law Institute was considering the legislation for recommendation to the Legislature, there was no proposed constitutional amendment to eliminate forced heirship for children over the age of 24. See La. Const. art. XII, § 5.
75. See Spaht & Hargrave, supra note 8, § 7.29. See also Karl W. Cavanaugh, Problems in the Law of Successions: Succession Representatives, Surviving Spouses, and Usufructuaries, 47 La. L. Rev. 21 (1986); Succession of Paillet, 602 So. 2d 152 (La. App. 5th Cir. 1992); Gauthier v.
3. **Law Applicable If Termination by Death or Declaration of Death**

For the reasons above mentioned, the Legislature chose to limit the application of the new Act to instances where the community property regime terminates for a cause that may incite hostility between the spouses. The Legislature was unwilling to assume that if the community property regime terminates by death or declaration of death that the same hostility exists between the surviving spouse and the heirs and legatees of the deceased spouse. Therefore, the Legislature chose to exempt former community property owned in indigitation at death or declaration of death from the special rules of the new Act. As a consequence, the law of co-ownership\(^7\) with all its strength and deficiencies will govern the management and disposition of former community property owned in indigination by the surviving spouse and heirs or legatees after the death or declaration of death\(^7\) of a spouse.

The Legislature has always resisted any interference with the procedure for administration of successions.\(^7\) Under the jurisprudence, however, when and if there is an administration of succession property, the succession representative\(^7\) has de jure possession of the entire community property, including the share of the surviving spouse.\(^8\) The surviving spouse and the heirs or legatees do not enjoy equivalent protection from mismanagement or disposition of former community property afforded to a divorced spouse until there is an administration of the succession property.\(^8\) Yet, the administration of succession property deprives the surviving spouse of control over her interest in former community property unless the survivor is the succession representative. The consequence of exempting former community property from the new rules after death may be to encourage further the administration of succession property.

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Gauthier, 502 So. 2d 140 (La. App. 3d Cir. 1987); Succession of Brown, 468 So. 2d 794 (La. App. 1st Cir. 1985); Succession of Dunham, 428 So. 2d 876 (La. App. 1st Cir. 1983).


77. There may be a declaration of death rendered in three instances: (1) when “a person has disappeared under circumstances such that his death seems certain.” (La. Civ. Code art. 30 (rev. 1990)); (2) when a person is missing while on active duty in one of the armed services of the United States and the service accepts the presumption of death (La. R.S. 9:1441-1443 (1991)); and (3) when a person has been an absent person (whose whereabouts are unknown and cannot be ascertained by diligent effort under La. Civ. Code art. 47 (rev. 1990)) for five years (La. Civ. Code art. 54 (rev. 1990)).

78. Katherine Spaht & Cynthia Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 La. L. Rev. 83, 141 (1979): “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.” See also supra note 75.

79. La. Code Civ. P. arts. 3091-3098 (administrator); and 3081-3083 (executor).

80. See supra note 75.


As to former community property subject to the new Act, the new Civil Code articles merely displace some of the rules governing ordinary co-owners. The result is that the law of ordinary co-ownership applies supplemented by some of the unique provisions necessitated by the existence of the spouses' prior community regime and by the special rules of the new Act.

The interrelationship of the co-ownership articles and the articles of the new Act are explored article by article in this Part. Most of the articles on co-ownership are displaced entirely or at least modified by the new articles. One of the articles displaces the law of co-ownership by imposing affirmative duties to preserve and manage prudently former community property. To determine if the new Articles applies requires resolution of the issue of whether former community property is "under a spouse's control." If so, then the new Article applies. If a spouse does not have "control" of former community property, then the law of co-ownership applies, and the spouse does not have the new responsibilities of preservation and particularized prudent management.

Furthermore, a spouse who incurs expenses complying with the new obligation to preserve and to manage prudently former community property under his "control" can more easily recover a proportionate amount from his co-owner.

A reminder, however, about the recovery of expenses under the law of co-ownership: a distinction should be drawn between obligations incurred during the existence of the community regime that continue after termination and are

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85. See discussion infra parts II.C.1. and 2. La. Civ. Code art. 3506(13) defines fault as follows: "There are in law three degrees of faults: the gross, the slight, and the very slight fault."

86. See discussion infra part II.C.7.
satisfied by one spouse and obligations incurred after termination of the community regime while the spouses are co-owners. 87

5. Until Partition, Death, or Declaration of Death

The special rules imposed in the new Act apply in conjunction with the articles on co-ownership until co-ownership ends by partition, 88 or until the death or declaration of death of a spouse. For the same reasons explained in II.A.3., the Legislature concluded that the special rules provided in the new articles should cease to apply when a spouse dies or is declared dead subsequent to termination of the community regime for another cause. The Legislature's decision represents strong resistance to the application of any rules to a spouse or a former spouse other than those of ordinary co-ownership and succession procedure after the death of the other spouse. In particular, there is continuing resistance to any interference in the administration of the estate of a deceased spouse or former spouse by the application of any special rules. 89

6. Meaning of Spouse

The new articles refer to the co-owners of former community property as spouses. Even though a community property regime terminated by divorce or declaration of nullity means that the two co-owners are no longer spouses, the articles use the term for simplicity of expression. 90 If the community property regime terminates because of a judgment of separation of property 91 or a judgment approving a matrimonial agreement terminating the regime, 92 the co-owners of former community property are still spouses. Furthermore, to repeat in each article “former community property” and “former spouse” is cumbersome and seemingly repetitious. Former community property serves as a reminder that the community property regime has terminated.

87. See discussion supra part I.B.

88. La. Civ. Code art. 2369.8 (as added by 1995 La. Acts No. 443, § 1). The second paragraph of Article 2369.8 recognizes the possibility that the spouses may partition former community property extrajudicially under La. Civ. Code art. 809 (rev. 1990) by the language “[i]f the spouses are unable to agree on the partition.” If they are unable to agree on the partition, then “either spouse may demand a judicial partition which shall be conducted in accordance with R.S. 9:2801.” Therefore, even though the other method of partition referred to in La. Civ. Code art. 809 (rev. 1990) is available to the spouses, it is not to be conducted in accordance with the rules providing for judicial partition among ordinary co-owners. See La. Civ. Code arts. 810-813 (rev. 1990). See also La. Civ. Code art. 2369.8 cmt. b (as added by 1995 La. Acts No. 443, § 1).

89. See discussion in Spaht & Hargrave, supra note 8, § 7.29. See also discussion supra part II.A.3.


B. Article 2369.2. Ownership Interest

Each spouse owns an undivided one-half interest in former community property and its fruits and products.

1. Owns an Undivided Interest

Article 797 of the Civil Code declares that "[i]n the absence of other provisions of the law or juridical act, the shares of all co-owners are presumed to be equal." As "other provision of the law," Article 2369.2 modifies this general principle of co-ownership by declaring that each spouse owns an undivided one-half interest in former community property. To emphasize the continuation of ownership of equal shares of community property, Article 2369.2 uses the word "interest" instead of "share." Article 2336, which applies during the existence of the community property regime, states that "[e]ach spouse owns a present undivided one-half interest in the community property." Thus, the new article signals a departure from general principles of co-ownership by its choice of interest not share, a reference to the law of community property rather than purely the law of co-ownership.

In addition, substitution of the concept of ownership for a mere presumption of equal shares signals the departure from the general principles of co-ownership. As a matter of law, rather than by presumption, each spouse owns an undivided one-half interest in former community property. The significance of the departure is that a presumption is rebuttable by evidence that equality of interests was not intended by the spouses or is not fair or equitable under the circumstances. The language of the new article assures that principles such as the equitable distribution of community property are not judicially imported into our law.

Nonetheless, despite the arguably categorical statement of Article 2369.2, the comments mention the possibility that the interests of the spouses may vary if the spouses, rather than the judge, adopted by matrimonial agreement a

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96. See discussion of the presumption as between co-owners and as to third parties in Symeonides & Martin, supra note 15, at 72, 84-91.


conventional community property regime that altered the fractional ownership. This conclusion follows from the obvious intention of the Article that ownership of community property continues in the fractions established during the existence of the regime by law or by matrimonial agreement. Furthermore, the equal fractional ownership of community property is not considered to be a matter of public order and thus may be altered by matrimonial agreement. Article 2369.2 should similarly be interpreted. Article 797 regulating co-ownership provides further support for so concluding since the presumption of equal shares applies “[i]n the absence of... juridical act...,” which surely includes a matrimonial agreement.

2. Fruits and Products

Article 2369.2 also provides for equal ownership of the fruits and products of former community property. The language of this Article is a departure from Article 798. Like ownership of former community property itself, the equality of the respective interests of each spouse in fruits and products is not dependent upon the rebuttable presumption of Article 797.

99. La. Civ. Code art. 2369.2 cmt. b (as added by 1995 La. Acts No. 443, § 1): “If the spouses have adopted a community regime by matrimonial agreement that alters the fractional ownership interests of the spouses in community property, that same interest will be maintained after termination under the authority of Civil Code Articles 797 and 798. See C.C. Art. 2330 (rev. 1979), comment (d).”


101. La. Civ. Code art. 2329 (rev. 1979) permits spouses to enter into a matrimonial agreement as to all matters “not prohibited by public policy.” Despite La. Civ. Code art. 2336 cmt. b (rev. 1982), La. Civ. Code art. 2330 cmt. d (see infra note 102) specifically recognizes a matrimonial agreement that alters the fractional ownership of the spouses. Article 2336 is the article that declares that each spouse owns a present undivided one-half interest in community property, but it also prohibits the judicial partition of community property prior to termination of the regime. Thus, it is logical to conclude when reading La. Civ. Code art. 2336 cmt. b with La. Civ. Code art. 2330 cmt. d in pari materia (even though the comments are not law) that the portion of Article 2336 which is a matter of public order is that sentence that prohibits the judicial partition of community property prior to termination of the regime. The public clearly has an interest in reducing the types of lawsuits between husband and wife and prohibiting the spouses from contracting otherwise. See also La. R.S. 9:291 (1990).


However, this provision does not deprive the spouses of flexibility in determining the ownership and management of their property. For example, the spouses may by matrimonial agreement provide for contribution to the expenses of the marriage, for apportionment of community property according to fixed shares, or for the reservation of fruits as separate property.

103. La. Civ. Code art. 483 (rev. 1979): “In the absence of rights of other persons, the owner of a thing acquires the ownership of its natural and civil fruits.”

La. Civ. Code art. 488 (rev. 1979): “Products derived from a thing as a result of diminution of its substance belong to the owner of that thing.”

104. See supra text accompanying notes 93-102.
A spouse may assert the claim to an equal portion of the fruits and products in the partition action.105

Fruits, the comments explain,106 is a term defined as "things produced by or derived from another thing without diminution of its substance";107 whereas, products are "derived from a thing as a result of diminution of its substance. . . ."108 The two terms have the same meaning in this Article and in Article 798,109 governing an ordinary co-owner's rights to claim fruits and products.

3. Article 798, Second Paragraph Applies

In their article on the new law of co-ownership, Professor Symeonides and Mrs. Martin speculate as to "whether this right [to share in the fruits and products under Article 798] should be classified as a real right to the fruits or products or as a personal right against the other co-owners."110 The authors distinguish between the first paragraph of Article 798 that uses the verb share111 and the second paragraph that uses the verb phrase "are entitled to."112 If the first paragraph applies because the fruits and products are not produced by one co-owner,113 then "each co-owner retains, at all times, a direct
and immediate right in the fruits or products, that is, he has a real right in them.\textsuperscript{114} By contrast, if the second paragraph applies because the fruits and products have been produced by one of the co-owners, "the producing co-owner owns all ‘fruits and products . . . produced by [him]’ while the other co-owners merely have a personal right to claim from him their respective shares."\textsuperscript{115} A real right to or ownership of the fruits and products means that the interest of the co-owner is a part of his patrimony that can be alienated or encumbered by him or can be seized by his creditors.\textsuperscript{116} In commenting upon the result of such a construction, the authors state: "Such a reading of the second paragraph of Article 798, particularly with regard to products, should be avoided, since it would make the other co-owners’ rights dependent on the mercy or the solvency of the producing co-owner. . . . [T]hese modifications [of a co-owner’s ownership] should never reach the point of eviscerating the very core of co-ownership."\textsuperscript{117} The observation is even more compelling in the case of co-ownership of former community property when hostility between former spouses, for example, may encourage irresponsible behavior.

By failing to modify the second paragraph of Article 798\textsuperscript{118} the Legislature has denied to the spouse co-owner who produces the fruits and products the right to recover "reimbursement for the value of his services or labor in producing fruits or products."\textsuperscript{119} What the Legislature grants with one hand, a real right to all the fruits and products produced by the co-owner, it takes away with the other, reimbursement for value of services or labor in producing fruits and products. To illustrate the application of the second paragraph of Article 2369.2, consider \textit{Dugas v. Dugas}.\textsuperscript{120} The wife demanded an "accounting" from the husband for one-half of the net profit from one year’s sugar cane crop. The husband, who had produced the crop, sought to deduct a sum for his time and effort in producing and harvesting the crop in addition to other legitimate farm expenses.\textsuperscript{121} The court awarded the husband $24,000 representing the reasonable compensation for his labor, permitting him to deduct that sum from gross profits as a farm expense. Under this Article and the unmodified second paragraph of Article 798, the salary attributable to the labor of the co-owner/husband could not be deducted as a production expense. He would instead have to urge a quasi-contractual claim for the value of his services either in

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} La. Civ. Code art. 3183 (1870).
  \item \textsuperscript{117} Symeonides & Martin, supra note 15, at 95.
  \item \textsuperscript{118} La. Civ. Code art. 2369.2 cmt. a (as added by 1995 La. Acts No. 443, § 1): "This Article restates in part the rules provided in Civil Code Article 797 (rev. 1990) and the first Paragraph of Civil Code Article 798 (rev. 1990) for ordinary owners."
  \item \textsuperscript{119} La. Civ. Code art. 2369.2 cmt. d (as added by 1995 La. Acts No. 443, § 1).
  \item \textsuperscript{120} 544 So. 2d 111 (La. App. 3d Cir. 1989).
  \item \textsuperscript{121} Such farm expenses might include chemicals, fertilizer, fuel, loans incurred for planting the seed cane, and labor by third parties. 544 So. 2d at 114.
\end{itemize}
unjust enrichment, as the comment to Article 798 suggests, or in negotiorum gestio if both of the remedies are not excluded by the provisions of the article itself. Even if the remedy is not precluded by Article 798, proof of the elements for recovery in quasi-contract are difficult.

C. Article 2369.3. Duty to Preserve; Standard of Care

A spouse has a duty to preserve and to manage prudently former community property under his control, including a former community enterprise, in a manner consistent with the mode of use of that property

123. “A co-owner does not have the right to claim compensation for his own labor or services. Nevertheless, he may be entitled to such compensation under the law of unjust enrichment.” La. Civ. Code art. 798 cmt. c (rev. 1990).
124. La. Civ. Code arts. 2292-2297 (as amended by 1995 La. Acts No. 1041, § 1). “There is a management of affairs when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances.” La. Civ. Code art. 2292; see also La. Civ. Code art. 2292 cmt. a.
125. A convincing argument may be made that the general principles of unjust enrichment or negotiorum gestio do not apply when there is a specific article governing the rights and responsibilities of a co-owner, since the articles on co-ownership are the more specific and thus should prevail over the more general. It is only if there is no specific provision of the co-ownership law governing a situation that the rules of quasi-contract may apply. The comment to La. Civ. Code art. 800 (eff. Jan. 1, 1991) supports this conclusion: “This provision is new. It expresses the principle that necessary steps for the preservation of the thing held in indivision may be taken by any of the co-owners acting alone. This is not unauthorized management of the affairs of another under Civil Code Article 2295 (1870) . . . .” Spahth, Developments 1989-1990, supra note 16, at 329-30 n.60.

But see Symeonides & Martin, supra note 15, at 72, 99:

Because it is contained in the comments rather than in the text of the Article, this statement would be meaningless were the Article to contain any provision to the contrary or any language that could be construed as displacing the residual law of unjust enrichment. Fortunately, Article 798 does not contain any such language. It does not say, for instance, that the producing co-owner is entitled to the costs of production only. Thus, the door remains open for resorting to the residual law of unjust enrichment.

Subsequently, the authors of the Tulane Law Review article do admit that unjust enrichment is a subsidiary cause of action and only if the law provides no other remedy will it be available. Id. at 100-01. Another remedy the law expressly recognizes is negotiorum gestio, and the two actions are distinct. See La. Civ. Code arts. 2292-2297 (as amended by 1995 La. Acts No. 1041, § 1), in particular Article 2292 cmt. e. The gestor is entitled to recover his “necessary and useful expenses.” La. Civ. Code art. 2297 (as amended by 1995 La. Acts No. 1041, § 1). “[T]he next question is whether labor expenses incurred in the production of fruits qualify as ‘useful and necessary expenses’ for which reimbursement is available to gestors under Article 2299 [now Article 2297]. While doctrine and jurisprudence suggest a negative answer, they also permit an affirmative answer in special circumstances.” Symeonides & Martin, supra note 15, at 100-01. See Alain A. Levasseur, Louisiana Law of Unjust Enrichment in Quasi-Contracts 370-427 (1991).
immediately prior to termination of the community regime. He is answerable for any damage caused by his fault, default, or neglect.

A community enterprise is a business that is not a legal entity.

1. Duty to Preserve

This Article imposes an affirmative duty to preserve former community property under a spouse’s control. The duty to preserve of a co-owner/spouse contrasts with the right to preserve of an ordinary co-owner. To the extent that a spouse has former community property under his control, he has a duty to preserve it; and as to other former community property, he has a right to preserve the property. The duty to preserve encompasses preventing destruction, damage or loss of the thing, but not preventing alteration of the thing. The language of this Article supports this conclusion about the scope of the duty to preserve. Under this Article, the duty to preserve is qualified by the phrase, “in a manner consistent with the mode of use of that property immediately prior to termination of the community regime.” Whether a spouse has complied with the duty to preserve former community property should be judged by an objective standard of prudence as modified by this article, just as the duty to manage is judged.

The new legislation, just as the law of co-ownership, recognizes the tripartite distinction between acts of preservation imposed as a duty in this Article and acts of management and disposition. The new legislation does not

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126. La. Civ. Code art. 2369.3 cmt. a (as added by 1995 La. Acts No. 433, § 1): “In contrast, Civil Code Article 800 (rev. 1990), applicable to ordinary co-owners, provides for a right but not a duty to act for the preservation of the property. Such a duty arises only if the co-owner undertakes to act as a negotiorum gestor or he is appointed as administrator. See Symeonides & Martin, The New Law of Co-ownership: A Kommentar, 68 Tul. L. Rev. 701, 746 (1993).”

127. The meaning of this phrase is the same as its meaning in La. Civ. Code art. 2369 (rev. 1979).

128. La. Civ. Code art. 800 (rev. 1979): “A co-owner may without the concurrence of any other co-owner take necessary steps for the preservation of the thing that is held in indivision.”


130. Symeonides & Martin, supra note 15, at 114.

131. See infra text accompanying notes 176-179.

132. Symeonides & Martin, supra note 15, at 114: “The necessity of the measures [for an ordinary co-owner under Article 800], as well as their sufficiency and proportionality, should be judged objectively by the prudent man standard, rather than by the subjective standard of the acting co-owner.”

133. “[I]n a manner consistent with the mode of use of that property immediately prior to termination of the community regime . . . .” La. Civ. Code art. 2369.3 (as added by 1995 La. Acts No. 433, § 1).


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directly address "use" as does the law of co-ownership, so initially an argument can be made that the general law of co-ownership governs "use." Under Article 802 the general rule is that a co-owner has the right to use the thing co-owned according to its destination but may not prevent the other co-owner from making such use of it, unless the use and management is determined by agreement of the co-owners. The comments to Article 802 do, however, recognize that the use of the family residence and community movables and immovables may be the subject of a court order granting to one co-owner/spouse exclusive use even though partition may be available, which is a condition to such a court order for ordinary co-owners.

A strong argument can be made that exclusive use of former community property under a spouse's control, including the right to prevent use by the other co-owner, may be implicitly conferred by the imposition of a duty to preserve (and to manage) such property. Otherwise, a spouse without control of former community property but the right to use the property as an ordinary co-owner could seriously affect the ability of the other spouse to comply with his or her duty to preserve. Of course, if the co-owner/spouse insisted upon exercising his right to use, and use implies some measure of control, then the same co-owner/spouse would himself assume the duty to preserve, in conjunction with or independent of the other spouse. The danger of such an interpretation is that if control does not necessarily follow use then a co-owner/spouse who may enjoy the use but has no control incurs no obligation to preserve the property. Likewise, the co-owner/spouse with control but who either has no use or is required to share the use has the exclusive obligation to preserve the property.

If a co-owner/spouse has control of the property and thus the duty to preserve it, it seems logical to confer upon him exclusive use as a means of permitting him to perform his duty. If a co-owner/spouse chooses to relinquish control over former community property or neither co-owner/spouse has control over such property, the property.

137. La. Civ. Code art. 802 (rev. 1990): "Except as otherwise provided in Article 801 [agreement of the parties], a co-owner is entitled to use the thing held in indivision according to its destination, but he cannot prevent another co-owner from making such use of it."
138. La. Civ. Code art. 801 (rev. 1990): "The use and management of the thing held in indivision is determined by agreement of all the co-owners."
140. La. Civ. Code art. 803 (rev. 1990): "When the mode of use and management of the thing held in indivision is not determined by an agreement of all the co-owners and partition is not available, a court, upon petition by a co-owner, may determine the use and management."

See Symeonides & Martin, supra note 15, at 131-32, for a discussion of the limiting feature of judicial intervention, "partition is not available."
141. If the co-owned thing to be used can be used by both co-owners simultaneously and use implies control, then both would be subject to the duty to preserve.
142. If the co-owned thing can only be used by one co-owner at any given time and use implies control, then the co-owner who has use has the duty to preserve the thing. If the other co-owner first had control and use, the second co-owner who now has control and use is obligated to preserve the property. The obligation of the second co-owner displaces the obligation to preserve former community property imposed upon the first co-owner.
then the general rules of co-ownership apply, and either co-owner/spouse could use the property and act to preserve it.

2. Duty to Manage Prudently

Just as with the duty to preserve, the duty to manage prudently departs from the general principles of co-ownership law by imposing explicitly an affirmative duty to manage prudently, or "duty to act in a prophylactic manner." The co-ownership articles "do not impose on one co-owner an affirmative duty to manage the co-owned thing unless that owner assumed the qualities of a gestor or was appointed as an administrator." The imposition of an affirmative duty to manage prudently under this Article is reinforced by the following sentence: "He is answerable for any damage caused by his fault, default, or neglect." The sentence is virtually identical to Article 576 imposing upon the usufructuary a standard of care that the comment describes as that of a "prudent administrator." Prudently appears already in the first sentence of this Article and combined with the second sentence clearly imposes a standard of care equivalent to that of the "prudent administrator." "Fault, default, or neglect" includes, according to the comment to Article 576, "slight fault," namely, he must exercise the diligence that an attentive and careful man exercises in the management of his own affairs.


See also La. Civ. Code art. 2295 (as amended by 1995 La. Acts No. 1041, § 1): "The manager [negotiorum gestio] must exercise the care of a prudent administrator and is answerable for any loss that results from his failure to do so."
149. La. Civ. Code art. 3506(13): "The slight fault is that want of care which a prudent man usually takes of his business."

But see La. Civ. Code art. 2295 c (imposing the duty of a "prudent administrator" upon the manager of the affairs of another): "The manager may also be liable under the law governing delictual obligations for his fraud, fault, or neglect, but not for slight fault. See C.C. Arts. 2315 and 3506 (13)."
Arguably, the affirmative duty to manage prudently imposes a higher standard of care upon a co-owner/spouse than that imposed upon ordinary co-owners. Because of the failure to impose upon an ordinary co-owner an affirmative duty to preserve or to manage, the lower prudent man standard, rather than the prudent administrator standard, applies to an ordinary co-owner. To be subject to the more rigorous prudent administrator standard, an ordinary co-owner must administer or manage co-owned property that could be damaged by his fault. This Article, by contrast, imposes an affirmative duty to manage and to do so prudently. Furthermore, the prudent management standard under this article is explicitly linked to the mode of use of the property immediately prior to termination of the community regime. The more particularized the standard the easier to measure the actions of the co-owner spouse against that standard to determine whether he was prudent.

Clearly, the obligation of a co-owner/spouse to manage prudently former community property exceeds any obligation imposed upon a spouse during the existence of the community regime. During the regime, the spouse is only liable for "fraud or bad faith" in the management of community property.

The reason for imposing a higher standard of care in managing former community property is that, after termination of the community property regime, the law no longer assumes that a spouse who has former community property under his control will act in the best interest of both spouses in managing it.

Management traditionally includes acts of administration that exceed mere acts to preserve but do not divest the owner of his interest or "deprive him in part or in whole, of a real or personal right." Acts of preservation are not included within the term because the duty to preserve is mentioned specifically with the duty to manage in this Article. Under the traditional tripartite division

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152. For conflicting opinions about the standard of care for ordinary co-owners, see Spaht, Developments 1989-1990, supra note 16; and Symeonides & Martin, supra note 15, at 106-12.

153. "However, when the co-owner is not administering the co-owned property, the prudent man standard that is applicable is lower than the prudent administrator standard in that the latter standard includes affirmative duties and the former does not." Symeonides & Martin, supra note 15, at 112. See also id. at 107-12.


156. Symeonides & Martin, supra note 15, at 113 (quoting from Yiannopoulos, supra note 129, § 87, at 177).

Examples in the footnote in the article by Symeonides & Martin include "sales, exchanges, donations that are transitive of ownership, the burdening of ownership with a real right, and the compromise of a claim." Id. at n.219.
of acts, which is used in allocating powers, management is the residual category. As a general proposition, manage in this Article includes alienate, encumber, or lease to the extent that the articles that follow do not provide specific rules for acts of disposition because the Article is not delineating power but imposing a duty and standard of care. Thus, management under this Article can include alienation, encumbrance or lease in instances where one co-owner/spouse has the authority to act without the concurrence of the other. There are three such instances in the Articles that follow: movables issued or registered in the name of one spouse, movables of a former community enterprise in the regular course of business, and judicial authorization to act alone without the concurrence of the other spouse.

Arguably, there is a distinction in scope of liability between a co-owner/spouse under this Article and a usufructuary under Article 576: the co-owner/spouse is liable for damages and the usufructuary for losses. Damages incorporates two elements of loss—loss sustained and the profit of which the claimant has been deprived. Thus, a failure to prudently manage former community property (i.e. neglect) that results in damage suffered in the nature of a lost profit is actionable.

The extent to which the duty to manage prudently former community property under a spouse’s control affects use is discussed above in II. C. 1.

3. Comparison to Article 2369’s Duty to Account

A spouse’s duty to account for former community property under his control at termination of the regime has always been misunderstood. Obviously, a comparison of the language of Article 2369 and this one indicates some overlap. Article 2369 focuses on a moment in time when a spouse may have control over community property, and that moment is termination of the community property regime. As to that property under a spouse’s control at termination of the community regime, the spouse must “explain what happened to the property that

157. Symeondis & Martin, supra note 15 at 113 (quoting from Yiannopoulous, supra note 129, § 87, at 177).
158. Id.
159. For similar treatment of this issue during the existence of the community property regime, see La. Civ. Code art. 2354 (rev. 1979) (management includes alienation, encumbrance, or lease).
163. Interestingly, the liability of an ordinary co-owner is for damage, not loss, to the thing caused by his fault. La. Civ. Code art. 799 (rev. 1990).
165. See, e.g., Queenan v. Queenan, 492 So. 2d 902 (La. App. 3d Cir.), writ denied, 496 So. 2d 1045 (1986).
was then under his control.”167 “To invoke that duty a spouse need prove only that the other spouse had control of former community property at the moment of termination of the regime,”168 and then the burden shifts to the other spouse to prove what happened to the property. The claim is subject to a short three-year prescriptive period.

“By contrast, the duty to preserve and manage former community property under one spouse’s control imposed by this Article arises at the moment of termination of the community regime and continues until a partition of the former community property occurs.”169 In addition, a claim for breach of the duty requires proof that the spouse “failed to act prudently in a manner consistent with the mode of use of the property immediately prior to termination of the regime, not simply that he had former community property under his control.”170 The claim is subject to a much longer ten-year prescriptive period.171

4. Definition of Community Enterprise

The duty to preserve and to manage prudently extends to a “community enterprise.”172 The Article addresses the community enterprise explicitly to assure retention of the unique character attributed to it under matrimonial regimes law. The community enterprise is a business that is not a legal entity,173 thus neither a corporation nor partnership.174 The business is thus treated as “a collective of things,” as if an entity, for purposes of matrimonial regimes law.

Despite its accepted meaning, this Article defines community enterprise in the second paragraph out of an abundance of caution, rather than simply relying on a comment to Article 2347 containing the same definition.175

This Article maintains the unique treatment of a community enterprise after termination of the community regime so that “the business” collectively is protected by the affirmative duty to preserve and to manage prudently. The community enterprise may well be the most valuable property owned as former community property, and the duties imposed by this Article extend to the business as a whole.

168. Id.
169. Id.
170. Id.
172. La. Civ. Code art. 2369.3 (as added by 1995 La. Acts No. 433, § 1) (emphasis added): “A spouse has a duty to preserve and to manage prudently former community property under his control, including a former community enterprise.”
173. La. Civ. Code art. 24 (rev. 1987): “A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership.”
174. Id.
5. In a Manner Consistent With the Mode of Use

This prepositional phrase was attached to the duty to preserve and to manage prudently in an attempt to particularize the standard of care of a co-owner/spouse. Particularizing the prudent administrator standard is especially important for the duty to manage. A duty to preserve former community property under a spouse's control requires less explanation.

Mode of use appears in Louisiana Civil Code article 803 which concerns the use and management of the co-owned thing in the absence of agreement. The phrase in Article 2369.3 refers to the use of the property immediately prior to termination of the community regime. The obligation to manage prudently former community property under a spouse's control depends upon that use. As a consequence, if former community property under a spouse's control had been unimproved, undeveloped immovable property—for example acreage in the country—the co-owner/spouse would have no obligation to make that property productive by growing crops or by harvesting timber on property that is not timberlands.

6. Immediately Prior to Termination of Community Regime

In an attempt to further particularize the standard of care of a co-owner/spouse and to narrow its scope, this Article focuses on the mode of use of the property immediately prior to termination of the community property regime. The selected time, by contrast to Article 2369, which concerns the duty to account, is not an exact moment nor is it the termination of the regime. Nonetheless, it limits the time period to be considered to one that immediately precedes the event that creates the co-ownership relationship.

Immediately prior to gives the judge some flexibility, but not too much, in imposing a duty under this Article. If the Article had focused on the exact moment of termination of the regime as the duty to account does, a co-owner/spouse could manipulate the use of the property in anticipation of termination of the regime so as to avoid any duty imposed by this Article. On the other hand, it would be unreasonable to require a co-owner/spouse to manage prudently immovable property in a manner consistent with its use a long time

177. La. Civ. Code art. 803 (rev. 1990): "When the mode of use and management of the thing held in indivision is not determined by an agreement of all the co-owners and partition is not available, a court, upon petition by a co-owner, may determine the use and management."
distant from the event that terminates the regime. Consider the case of community immovable property devoted to growing timber twenty years ago during the existence of the community regime. Assume that ten years ago the timber was clear-cut. The co-owner/spouse who controls that immovable property should not be required to plant, grow and harvest timber on the property in an effort to comply with his duty to manage prudently.

7. Expenses Incurred to Comply With Obligation Compared to Those Otherwise Incurred

If a co-owner/spouse is required to expend money to comply with his duty to preserve or to manage prudently, the Articles on ordinary co-ownership should govern his right to recover from the other spouse. If expenditures may be required to preserve former community property or to manage it prudently, the expenditures arguably are necessary. If expenditures are necessary expenses, the co-owner/spouse who made them is entitled to reimbursement of one-half the amount from the other spouse. The comment to this Article is in accord.

The right to reimbursement for expenses should differ, however, if a co-owner/spouse does NOT have control of former community property; the spouse has no duty to preserve or manage prudently. A co-owner/spouse without control of former community is governed by rules of co-ownership under Article 806. He must prove that the expenses are the type for which recovery is granted to an ordinary co-owner: necessary, for ordinary maintenance or repairs, or for necessary management performed by a third person.

If any expenditure is authorized under the provisions of Article 806, the co-owner/spouse’s reimbursement for such expenditure must be reduced “in

180. See McMorris v. McMorris, 654 So. 2d 742, 748 (La. App. 1st Cir. 1995).

[T]he ex-husband may not be entitled to recover from the ex-wife a full-half of the . . . insurance, . . . maintenance costs, and . . . taxes on that home. C.C. Art. 806 gives, to a co-owner who incurs necessary expenses, maintenance and repairs, reimbursement from the other co-owners in proportion to their shares. Art. 806 adds, however, that if the co-owner had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of the enjoyment.

181. La. Civ. Code art. 806 (rev. 1990) (emphasis added): “A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.”

182. Even if the expenditures were not deemed necessary, the co-owner/spouse would be permitted to recover for ordinary maintenance and repairs (duty to preserve) and necessary management expenses paid to a third person, but not other management expenses.

183. “A spouse who incurs expenses in compliance with the obligation imposed by this Article is entitled to reimbursement for one-half the costs in accordance with general principles of the law of co-ownership. C.C. Art. 806 (rev. 1990).” La. Civ. Code art. 2369.3 cmt. f (as added by 1995 La. Acts No. 433, § 1).
proportion to the value of the enjoyment." The reduction of the value of enjoyment has particular implications for spouses who are co-owners of former community property. For example, a co-owner/spouse who makes "necessary" expenditures to comply with his duty to preserve and to manage prudently and claims reimbursement can expect an offsetting claim for rental value from the other co-owner spouse. Such an offsetting claim is typical if the former community property is the family home and has been occupied by the spouse who made the expenditure and is asserting a reimbursement claim.

As acknowledged by a comment to Article 802, which pertains to the right to use a co-owned thing, there may be a court order granting to one co-owner/spouse the exclusive use of the co-owned thing if it is former community property, or, in more limited instances, separate property of the other spouse. The statute that authorizes a court order of exclusive use contains a paragraph that relieves the co-owner spouse who uses or who obtains a court order of exclusive use of the family residence from liability to the other spouse for rental for the use and occupancy, "unless otherwise agreed by the spouses or ordered by the court." This paragraph of the statute has been the subject of numerous decisions interpreting its language, in particular "unless otherwise . . . ordered by the court." Because the statute is so specific and pertains only to former community property not other types of co-owned property, the statute should prevail over the general principle of co-ownership law that permits a reduction for the value of enjoyment in all cases.

Most of the decisions interpreting the statute concern claims for "reimbursement" under matrimonial regimes law for the use of separate property to satisfy a "community" obligation, rather than co-ownership law. The "community" obligation is typically a mortgage indebtedness that has been paid with separate earnings after termination of the community regime. Because the jurisprudence has always treated obligations incurred during the regime but satisfied after its termination as a matter of reimbursement under matrimonial regimes law, it is appropriate to continue to apply those principles to pre-termination obligations. There is no parallel in the law of co-ownership for the right of one co-owner to recover against another for the satisfaction of an obligation incurred before co-ownership began. Expenditures to satisfy pre-termination obligations should be

184. La. Civ. Code art. 806 (rev. 1990): "If the co-owner who incurred the expenses had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of the enjoyment."


187. Id. at (A).

188. Id. at (C).

189. See Spaht & Hargrave, supra note 8, § 7.14, at 289.


subject to provisions different from expenditures to preserve or to manage the 
property after co-ownership begins, and those duties are imposed for the first time. 
When the pre-termination obligation was incurred (during the community regime), 
the law made a different assumption about the nature of the relationship of the two 
spouses. As a consequence, it seems reasonable to subject those expenditures to a 
different set of rules, different from rules for expenditures made between the 
termination of the regime and partition.

To summarize, for an expenditure to satisfy an obligation incurred during the 
existence of the community regime, the rules of reimbursement under Articles 
2358-2368 seem appropriate and just. However, expenditures made for obligations 
incurred after termination of the community regime should be governed by Article 
806. Even though necessary expenses incurred after termination of the regime are 
different from expenditures incurred during the existence of the community 
regime, the more specific statute, Louisiana Revised Statutes 9:374, should 
prevail over the second paragraph of Article 806 which requires reduction of the 
value of enjoyment. Thus, Louisiana Revised Statutes 9:374 arguably applies to 
both types of expenditures when the former community property is the family 
residence.

Consider the application of this Article and Article 806 to the case of Ball v. 
Ball. The husband continued to manage the herd of registered red Braham 
cattle as he saw fit after termination of the community property regime, incurring 
obligations for expenses and disposing of some of the cattle. In addition, he 
claimed the entire losses from the herd on his own individual income tax return and 
thus substantially reduced his own income tax liability. Under this Article the 
first issue is whether the herd of cattle was a community enterprise. The 
description by the trial judge quoted in the court of appeal opinion included such 
phrases as "the cattle operation" and "the cattle business" on the "family farm." Such descriptions suggest a community enterprise, and the husband has a duty to 
preserve the enterprise and to manage it prudently "in a manner consistent with" its 
mode of use "immediately prior to termination of the community regime." He did 
not simply preserve the herd until a partition could be effectuated, instead he 
managed the herd by incurring expenses for them beyond necessities and by selling 
part of the herd. In the language of the court, "[h]e ran the operation as he saw fit! 
He made trips to cattle sales and shows, incurred travel expenses, purchased 
whatever he felt was necessary, and disposed of cattle when he saw fit, again 
without any prior approval or consent of Mrs. Ball."

192. See supra text accompanying notes 190-191.
193. 520 So. 2d 1143 (La. App. 3d Cir. 1987).
194. The court concluded that the husband had breached his "fiduciary duty," wrongly opining 
that the duty is owed by one co-owner to another. Id. at 1144. For a discussion of this judicial 
misconception, see Spaht & Hargrave, supra note 8, § 7.19.
195. 520 So. 2d at 1143.
196. Id. at 1144.
Even if the husband had authority to dispose of individual cattle in the regular course of business, he must "manage" (the residual category that in this case includes alienation) the former community enterprise prudently in a manner consistent with the mode of use immediately prior to termination of the community regime. The court under this Article would have to consider whether under the circumstances he was managing the enterprise prudently when he purchased whatever he felt was necessary and disposed of the cattle when he saw fit. Additional evidence relevant to such an inquiry is the husband's action in claiming the entire losses from the operation of the business on his own individual income tax return. His management practices should be measured against the mode of use of the property (community enterprise) immediately prior to termination of the community regime.

The former husband's ability to recover for the expenses he incurred after termination of the regime would arguably be dependent, under the law of ordinary co-ownership, upon fulfillment of his obligations under this Article. Only if the expenditures of the husband were to preserve the community enterprise and to manage it prudently should the expenses be considered "necessary"; otherwise, the husband must prove that the expenses were for ordinary maintenance of the community enterprise or that they are recoverable under the law of quasi-contract. If the husband could prove any of the foregoing, then he would be entitled to reimbursement for one-half the amount from his former wife. A court order granting him the use of the "community movables" (the community enterprise referred to as "the cattle business") would not protect the husband from the claim for an offsetting reduction based on the value of his enjoyment of the community enterprise, if any, under Article 806. If he failed to prove authorized expenditures under Article 806 or the law of quasi-contract, he could not claim reimbursement. Furthermore, if he failed to comply with his duties under this Article and the wife suffered damage to her one-half interest in the community enterprise due to his fault, default, or neglect, he would owe her a sum to compensate her for such damage.

8. Standard of Care as to Property Not Under Spouse's Control

As mentioned earlier, if former community property is not under a co-owner/spouse's control, the spouse has the obligations of a co-owner. He is permitted, but not required, to preserve the co-owned property and, dependent upon the circumstances, to manage it. He is answerable for damage to the thing caused by his fault. The standard of care ("the prudent man" standard)


is lower than the “prudent administrator” standard similar to the one imposed by this Article, “in that the latter standard [prudent administrator] includes affirmative duties and the former does not.”

Can a co-owner/spouse relinquish control over former community property to avoid the duty to preserve and to manage prudently? The answer depends upon whether relinquishment of control violates the duty of the co-owner/spouse to preserve and to manage prudently former community property. If the relinquishment of control results in a failure to preserve former community property, the spouse would be liable for breach of the obligation to preserve such property. The co-owner/spouse who cannot relinquish control without violating the duties imposed by this Article, but desires relief from these duties, has no option other than to seek a judicial partition. Throughout this new series of Articles, there is always the inherent tension between protection of the interests of each spouse and encouragement to terminate their relationship by partition.

D. Article 2369.4. Alienation, Encumbrance, or Lease Prohibited

A spouse may not alienate, encumber, or lease former community property or his undivided community interest in that property without the concurrence of the other spouse, except as provided in the following Articles. In the absence of such concurrence, the alienation, encumbrance, or lease is a relative nullity.

1. Not Alienate, Encumber or Lease Without Concurrence

This Article is consistent with the general principle affecting all co-owners: no co-owner may alienate, encumber or lease the co-owned thing without consent of the other co-owners. It is also consistent with limitations imposed upon the principle of equal management during the community property regime in the case of transactions of such importance to the well being of the family that consent of both spouses are required. The reason to depart in this Article from the general principle of equal management that permits either spouse to manage or dispose of community property is that “during the existence of the community regime while it may be assumed that a spouse will exercise his management powers in such a way as to promote the mutual purposes of the community regime, no such assumption exists after termination of the community regime.

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201. Symeonides & Martin, supra note 15, at 112.
regime. Therefore, as is the case with ordinary co-owners, this Article assures that a co-owner/spouse's ownership, including the power of disposition generally, "be exercised in a way that takes into account the interests of the other co-owners."

The verbs contained in this Article are terms of art used elsewhere in the matrimonial regimes legislation, as well as in the law of co-ownership. Alienation includes sale, exchange, and other types of disposition. Encumbrance includes mortgage; and according to a comment to Article 2347, all other encumbrances except those imposed by law. Among those encumbrances imposed by law is the "common pledge" of the debtor's property to his unsecured creditors. Therefore, "concurrence of both spouses is not required to subject former community property in its entirety to the satisfaction of obligations incurred by either spouse prior to termination of the community regime. . . ." This conclusion is further supported by the initial reservation made in Article 2369.1 that the new Articles apply "unless otherwise provided by law" and that proviso includes the availability to pre-termination creditors of former community property in its entirety.

**Concurrence** is to "a juridical act" by a co-owner/spouse according to the comment to Article 2347. The term of art appears in Articles 2347 and 2355 which concern the management of community property during the existence of the community property regime. Despite the fact that **consent** is used in Article 805 to express the principle that all co-owners must consent to the disposition of the co-owned thing, no distinction in effect between **concurrence** and **consent** is intended. **Consent** is probably the more precise term. As is explained in Article 1927, consent can be expressed "orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent."

Furthermore, Article 1917 applies the rules of Title IV of Book III,

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206. Symeonides & Martin, supra note 15, at 141.
209. La. Civ. Code art. 2347 cmt. a: "Encumbrances imposed by law are not subject to the requirement of concurrence by the spouses."
212. La. Civ. Code art. 2369.1 (as amended by 1995 La. Acts No. 433, § 1) (emphasis added): "After termination of the community property regime, the provisions governing co-ownership apply to former community property, unless otherwise provided by law."
214. La. Civ. Code art. 2347 cmt. c (rev. 1979): "The concurrence of a spouse is a juridical act. In order to concur, a spouse must have capacity to dispose of his property. If the spouse is incompetent, he is represented by his tutor or curator."
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in which Article 1927 appears, to all obligations regardless of their source.\textsuperscript{216} The use of two different terms to essentially express the same concept can be explained historically: Articles 2347 and 2355 that contain \textit{concurrence} preceded Articles 1927 and 805 that contain \textit{consent} by five and eleven years, respectively. Because \textit{concurrence} is used as a term of art in Title VI on matrimonial regimes, this Article continues the use of the term because it appears in the Articles that more immediately precede the new series.

2. \textit{No Alienation of Undivided Community Interest}

This Article departs from another of the general principles governing all co-owners. A co-owner is permitted to dispose of his interest without the concurrence of the other co-owners.\textsuperscript{217} Under this Article, if the co-ownership is of former community property, one co-owner/spouse may not dispose of his or her undivided interest without the concurrence of the other. This prohibition also applies during the existence of the community regime\textsuperscript{218} with one modification. After the termination of the community property regime, there is "a clear implication that a spouse may concur in an alienation, encumbrance, or lease of the other spouse’s undivided interest in former community property, and thereby render it valid."\textsuperscript{219} During the existence of the community regime, there is no such implication; and the comment to Article 2337\textsuperscript{220} suggests that "even if a spouse consents to the alienation of the other spouse’s one-half interest in community property during the existence of the community, the transaction is an absolute nullity."\textsuperscript{221}

The reason this Article departs from the general rule of co-ownership law that permits a co-owner to dispose of his undivided interest is "the need to prevent a stranger from owning former community property in indivision with a spouse, and to protect the right of the spouses to a partition of former community property under the flexible principles of R.S. 9:2801, rather than the more rigid partition rules governing ordinary co-owners. . . ."\textsuperscript{222} To permit a spouse to dispose of his or her undivided interest to a stranger, for example one of the spouse’s parents, would permit the parent to seek a judicial partition under the Articles governing ordinary co-owners.\textsuperscript{223} Those provisions mandate

\begin{itemize}
  \item \textsuperscript{216} La. Civ. Code art. 1917 (rev. 1984): "The rules of this title are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations."
  \item \textsuperscript{218} La. Civ. Code art. 2337 (rev. 1979).
  \item \textsuperscript{219} La. Civ. Code art. 2369.4 cmt. a (as added by 1995 La. Acts No. 433, § 1).
  \item \textsuperscript{220} La. Civ. Code art. 2337 cmt. b (rev. 1979): "The disposition by a spouse of his undivided interest in the community or in things of the community by \textit{inter vivos} act in favor of a third person is an absolute nullity."
  \item \textsuperscript{221} La. Civ. Code art. 2369.4 cmt. a (as added by 1995 La. Acts No. 433, § 1).
  \item \textsuperscript{222} \textit{id.} cmt. b.
  \item \textsuperscript{223} La. Civ. Code art. 809 (rev. 1990): "The mode of partition may be determined by agreement
partition in kind only when the thing is susceptible of division "into as many lots of nearly equal value as there are shares and the aggregate value of all lots is not significantly lower than the value of the property in the state of indivision." 224 Under the jurisprudence, partition in kind is only available if each item (the thing) is susceptible to division, or what is referred to as the "item" theory of partition. 225 If partition in kind is not available, then the thing must be partitioned by ligation or by private sale. 226 There is no provision for the allocation of liabilities since for ordinary co-owners there will be no "community of debt." Louisiana Revised Statutes 9:2801 was enacted explicitly to adopt an "aggregate" theory of partition to permit flexibility in allocation of assets and to grant authority to allocate liabilities unavailable under ordinary co-ownership law. 227

3. Except as Provided in the Following Articles

The Articles that follow this Article provide three different exceptions to the general principle that concurrence of the co-owner/spouses is required to alienate, encumber, or lease former community property. 228 The three exceptions consist of exclusive authority bestowed upon one of the two co-owner/spouses to dispose of former community property under the following circumstances: (1) when a movable is issued or registered as provided by law in the name of one spouse; 229 (2) when one spouse is the sole manager of a community enterprise; 230 and (3) when one spouse is judicially authorized to act alone. 231 The reasons for each exception are discussed later in this commentary, but each bears a striking resemblance to an instance of exclusive management of community property during the existence of the community regime. 232 As a general comment, the redacters concluded it was desirable to continue two of the instances of exclusive management that exist during the community property regime but with appropriate safeguards—for the sole manager of a community enterprise if the transaction is in the regular course of business 233 and for a spouse the possibility of judicial authorization to act alone if it is necessary and the action is in the best interest of the petitioning spouse and not detrimental to the interest of the other spouse. 234

of all the co-owners. In the absence of such an agreement, a co-owner may demand judicial partition."  
225. See cases cited in Spaht & Hargrave, supra note 8, § 7.25, at 341-42.
It may well have been unnecessary to provide for the remaining instance of exclusive management, movables issued or registered in one spouse's name, since the same result would probably have followed from the application of the specific registration statute.

4. Relative Nullity Without Concurrence

Rather than depend upon the application of general principles of law about the effect of an act by a co-owner/spouse without the concurrence of the other, this Article declares that the act is a relative nullity. It is possible that the same result would have obtained under Article 2031, which classifies a contract as relatively null "when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made." However, the examples of a relatively null contract recited by Article 2031, as well as examples of when prescription commences on the annulment action, suggest that the alienation prohibited by this Article might not be a relatively null contract. Consistent with the decision to permit one co-owner/spouse to consent to the alienation of the other's undivided interest, the redactors concluded that an alienation of the other co-owner's interest in the former community property should only be a relative, not absolute nullity. The same rule exists during the community regime for an alienation, encumbrance, or lease of community property by one spouse without the concurrence of the other spouse when concurrence is required.

The consequences of declaring the transaction a relative nullity include: (1) the potential for the confirmation by the other spouse whose concurrence was not obtained; (2) limiting who may invoke the nullity to the person "for whose interest the ground for nullity was established...", and (3) "curing" the nullity by five years' liberative prescription.

236. Spaht & Hargrave, supra note 8, § 5.8, at 159-60.
238. La. Civ. Code art. 2032 (rev. 1994): "Action of annulment of a relatively null contract must be brought within five years from the time the ground for nullity either ceased, as in the case of incapacity or duress, or was discovered, as in the case of error or fraud."
239. La. Civ. Code art. 2030 (rev. 1994): "A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed."
242. La. Civ. Code art. 2031 (rev. 1994): "A contract that is only relatively null may be confirmed."
244. La. Civ. Code art. 2032 (rev. 1994): "Action of annulment of a relatively null contract must be brought within five years from the time the ground for nullity either ceased, as in the case of incapacity or duress, or was discovered, as in the case of error or fraud."
E. Article 2369.5. Alienation of Registered Movables

A spouse may alienate, encumber, or lease movables issued or registered in his name as provided by law.

1. Movable Issued or Registered in His Name

Movables issued or registered as provided by law include "movables regulated by the Commercial Laws (R.S. 10:8-101 et seq.) and the Vehicle Certificate of Title Law (R.S. 32:701 et seq.) (investment securities)...."245 The comment to Article 2351, which concerns alienation, encumbrance, or lease of movables issued or registered in one spouse's name during the community regime, adds shares of stock.246

2. As Provided by Law

This limiting clause assures that the movables to which the Article applies are only those for which a specific legal registration scheme exists. The same modifying clause appears in Article 2351 which governs the alienation, encumbrance or lease of registered movables during the existence of the community property regime.247 Necessarily excluded are horses, dogs, and the like for which there may be registration but "not as provided by law."

F. Article 2369.6. Alienation, Encumbrance, or Lease of Movable Assets of Former Community Enterprise

The spouse who is the sole manager of a former community enterprise may alienate, encumber, or lease its movables in the regular course of business.

1. Sole Manager of a Former Community Enterprise

The language sole manager must be interpreted consistently with the identical phrase in Article 2350.248 The comment to Article 2350 explains:

248. La. Civ. Code art. 2350 (rev. 1979) (emphasis added): "The spouse who is the sole manager of a community enterprise has the exclusive right to alienate, encumber, or lease its movables unless the movables are issued in the name of the other spouse or the concurrence of the other spouse is required by law."
"A spouse may act alone, that is, to the exclusion of the other spouse, when the other spouse does not participate in the management of a community business." The difficulty of determining whether a spouse participates in the management of a community business has been the subject of scholarly commentary. It should be less difficult to determine if a spouse is participating in the management of a former community enterprise, since the former spouses are unlikely to be jointly participating in the operation and management of the former community enterprise.

This Article represents a departure from the law of co-ownership, similar to the departure from equal management made by Article 2350 during the existence of the community regime. The latter is justified on the basis of facilitating commerce since the power to alienate movables of a community enterprise, for example the inventory of a business, is the essence of the operation of a business. Because concurrence of the spouses in the day-to-day operation of a business is impractical and third parties need the security of reliance on business transactions, the exclusive authority vested in the sole manager is desirable during the existence of the regime. After the termination of the regime the only justification for the exception is to maintain an income source for the former spouses; "it permits the enterprise to continue to operate and produce co-owned income." There is an important limitation, however, contained in this Article that does not appear in Article 2350: the alienation of movables by the sole manager of the community enterprise must be in the regular course of business.

2. In the Regular Course of Business

This prepositional phrase appears in Article 2040, an article that limits the revocatory action to acts of the debtor not in the regular course of business. A similar phrase in the predecessor to Article 2040 has been interpreted by

250. Spaht & Hargrave, supra note 8, § 5.6.
251. La. Civ. Code art. 2369.6 cmt. b (as added by 1995 La. Acts No. 433, § 1): "No such exception is present in the law of simple co-ownership."
252. La. Civ. Code art. 2350 cmt. b (rev. 1979): "This provision establishes an exception to the principle of equal management in the interest of commerce."
255. La. Civ. Code art. 1986 (1870) (revised by 1984 La. Acts No. 331, § 1) (emphasis added): No sale of property, or other contract made in the usual course of the party's business, nor any payment of a just debt in money, shall be set aside under this section, although the debtor were [sic] insolvent to the knowledge of the creditor with whom he contracted, and although the other creditors are injured thereby, if such contract were made more than one year before bringing the suit to avoid it, and if it contain no other cause of nullity than the preference given to one creditor over another.
the jurisprudence to include a transaction by a merchant with another merchant or customer typical of the ordinary operation of his business. A transaction by which the owner of a business sold all of his stock of goods, financed on long-term credit, was not in the "usual course of a party's business." These cases are obviously fact sensitive, requiring an examination of all of the circumstances with a view to discerning the motive of the owner of the business. The motive of the owner of the business in a revocatory action may be to avoid the payment of his debts. The motive of the co-owner/spouse who is the sole manager of a former community enterprise may be to defeat the community property rights of the other spouse. Thus, examining all of the circumstances to discover the motive of the co-owner/spouse under this Article is authorized by the phrase "in the regular course of business."

Adopting the phrase as a limitation upon the exclusive authority of the sole manager to alienate, encumber, or lease the movables of the former community enterprise is a conservative approach. The avowed purpose of the limitation is "to protect the other spouse [non-managing spouse]," yet permit the enterprise to function and produce co-owned income. The compromise achieved by this Article recognizes that the former community enterprise needs the continuity of the exclusive authority of the sole manager; but the non-managing spouse needs some reasonable protection, which is, after all, the purpose of the entire new series of Articles.


256. La. Civ. Code art. 2369.6 cmt. b (as added by 1995 La. Acts No. 433, § 1): "Jurisprudence interpreting the phrase in Article 2040 may be relied upon to determine its meaning in this Article."

257. See Xiques, Syndic v. F. Rivas, 16 La. Ann. 402 (1862) (wholesaler/retailer of cigars pays his bill to another wholesaler [merchant to merchant] by transferring type of cigars desired by transferee for full value in satisfaction of his debt; court held in the "usual course of a party's business"); Thompson v. Gordon, 12 La. 260 (1838).


It was out of the usual course of business, and unlawful, for an insolvent to sell his whole stock of goods on long credits, and without any security from the purchaser . . . . He purchased the stock with no intention of carrying on business as a dry goods merchant, but immediately commenced the sacrifice of the property at such prices for cash, as produced such a rush on the store as compelled him and his clerks, at one time, to barricade the doors.

The whole affair was as unusual, anti-commercial and fraudulent on the part of Brown as of Brady.

There is a paucity of cases on the subject and virtually all were decided before the turn of the century: Xiques, 16 La. Ann. at 402; Beck, 7 La. Ann. at 124; Maurin & Co. v. Rouquer, 19 La. 594 (1841); Dwight v. Bemiss, 16 La. 145 (1840); Thompson v. Gordon, 12 La. 260 (1838); Robbins v. Leverich, 6 La. 340 (1834); Coddington v. Tupper, 4 La. 126 (1832).

259. La. Civ. Code art. 2369.6 cmt. b (as added by 1995 La. Acts No. 433, § 1): "There is an important limitation in this Article upon actions by a spouse who is sole manager of a former community enterprise with regard to its movable assets."

G. Article 2369.7. Court Authorization to Act Alone

A spouse may be authorized by the court in a summary proceeding to act without the concurrence of the other spouse, upon showing all of the following:

(1) The action is necessary.

(2) The action is in the best interest of the petitioning spouse and not detrimental to the interest of the nonconcurring spouse.

(3) The other spouse is an absent person or arbitrarily refuses to concur, or is unable to concur due to physical incapacity, mental incompetence, commitment, imprisonment, or temporary absence.

1. Judicial Authority to Act Alone in a Summary Proceeding

This third and final exception to the general rule that both co-owner/spouses must concur in the alienation or encumbrance of former community property permits "judicial recourse when the spouses cannot agree on management or other decisions affecting former community property..."261 This Article departs from the law of ordinary co-ownership "which allows court intervention only for matters of 'use and management' and only when 'partition is not available.'"262 Obviously, this Article conveys a broader right to judicial intervention than the general law of co-ownership.263 If alienation, encumbrance or lease under Article 2369.4 does not include management and use,264 this Article does not apply. Instead, the general articles on co-ownership have not been displaced and judicial authorization, although more limited, is still available.265 Whether judicial authorization is sought during the existence or after the termination of the community regime, the authorization occurs explicitly in both Articles in "summary proceedings." The rule to show cause, a summary

262. Id. The comment to Article 2369.7 cites La. Civ. Code art. 803 (rev. 1990), which provides as follows: "When the mode of use and management of the thing held in indivision is not determined by agreement of all the co-owners and partition is not available, a court, upon petition by a co-owner, may determine the use and management." See Symeonides & Martin, supra note 15, at 130-33.
264. The argument can be made that the greater power includes the lesser; and if the court can authorize one spouse to act alone to sell former community property without the concurrence of the other spouse (alienation), then such judicial authorization can be obtained to use or manage such property, with one exception. The more specific statutory provision that permits the court to order the use and occupancy of the family residence, etc. (La. R.S. 9:374B) should prevail and require proof of the criteria mentioned in that statute.
proceeding,\textsuperscript{266} serves to expedite what could otherwise be a lengthy, cumbersome process.

Because this Article permits judicial authorization to act alone \textit{when concurrence is required}, there can be no judicial authorization to act where one spouse has exclusive authority to alienate or encumber former community property. For example, the non-managing spouse may not seek authority to act alone to alienate movables of a former community enterprise over the objection of the sole manager spouse.\textsuperscript{267} The same would be true of the spouse who seeks authorization to act alone to alienate former community movables issued or registered in the name of the other spouse alone.\textsuperscript{268} Restricting judicial authorization to act alone to circumstances where concurrence is required contrasts with judicial authorization to act during the community regime when a spouse is an absent person.\textsuperscript{269} If one spouse is an absent person, the other spouse may seek judicial authority to alienate community property subject to the exclusive management of the absent spouse. A situational distinction exists between the spouse who is an absent person and spouses after termination of the community regime. In the case of a spouse who is an absent person, there is no countervailing policy of encouraging partition to promote, only the policy of assuring that the spouse who is not absent can use community property to support himself and the family.

This Article is very similar to Article 2355 which permits a spouse during the existence of the community regime to seek judicial authorization to act alone when concurrence of both spouses is required.\textsuperscript{270} However, there are limitations upon the exercise of judicial authorization in this Article that do not appear in Article 2355.\textsuperscript{271} The limitations in this Article are intended to discourage the former spouses from remaining co-owners and using judicial intervention to manage former community property. If it were possible to avoid a partition and simply depend upon judicial intervention, the spouse with greater economic power and, by virtue of the circumstances, greater control over former

\textsuperscript{266} La. Code Civ. P. arts. 2591, 2595.
\textsuperscript{267} La. Civ. Code art. 2369.6 (as added by 1995 La. Acts No. 433, § 1).
\textsuperscript{270} A spouse, in a summary proceeding, may be authorized by the court to act without the concurrence of the other spouse upon showing that such action is in the best interest of the family and that the other spouse arbitrarily refuses to concur or that concurrence may not be obtained due to the physical incapacity, mental incompetence, commitment, imprisonment, temporary absence of the other spouse, or because the other spouse is an absent person.
\textsuperscript{271} Id. See also La. Civ. Code art. 2369.7 cmt. b (as added by 1995 La. Acts No. 433, § 1): “However, to obtain judicial authorization under this Article requires more stringent proof than that required for obtaining the same authorization during the existence of the community regime. Under this Article a spouse must additionally prove that the action is ‘necessary.’ Compare C.C. Art. 2355 (rev. 1979).”
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community property could manage co-owned former community property indefinitely. This Article seeks to achieve the ideal balance between legal mechanisms that protect each co-owner/spouse but do not discourage partition that ends co-ownership.

2. Action is Necessary

The requirement that the action requested by the spouse be necessary is a limitation that does not appear in Article 2355. The limitation upon court intervention is purposeful. To properly balance the need to protect the co-owner/spouses with the need not to impede partition, this Article requires more proof than for judicial intervention during the existence of the community regime when the spouses are prohibited from seeking a judicial partition. Since judicial intervention that permits one spouse to act alone seriously impinges upon the other spouse’s rights as a co-owner, the term necessary, which has no definition, should be restrictively interpreted. Such a conclusion is supported by the additional limitation contained in this Article: the action is not detrimental to the interest of the nonconcurring spouse.

3. Action is in Best Interest of the Petitioning Spouse and Not Detrimental to the Interest of the Nonconcurring Spouse

The second requirement for judicial intervention is that the action be in the best interest of the “petitioning spouse” and also not detrimental to the nonconcurring spouse. Under Article 2355, the equivalent criteria is that the action be in the best interest of “the family,” a term defined, according to the comment, in its narrowest sense. The substitution of different criteria in this Article recognizes that after termination of the community property regime it is almost impossible to envision action that is in the best interest of the family. The family is no longer intact in many cases, and the appropriate substitute criteria must balance the interest of the spouse who seeks judicial intervention to act alone and the other who is resisting the action proposed. It is not enough, particularly in light of the purpose of this series of Articles, to consider only the

272. La. Civ. Code art. 2369.7 cmt. b (as added by 1995 La. Acts No. 433, §1): “To obtain judicial authorization under this Article requires more stringent proof than that required for obtaining the same authorization during the existence of the community regime.”

273. La. Civ. Code art. 2336 (rev. 1982). But see the narrow exception of La. R.S. 9:2802 (1991) which permits a spouse during the existence of the community regime to file an action to partition community property if it is incidental to another action that will result in a termination of the community property regime.

274. There is no definition of the term “necessary” in the Article or in the article of the Civil Code containing definitions. La. Civ. Code art. 3506.

best interest of the petitioning spouse. The court must also be assured that the action will not prove detrimental to the other spouse who is resisting the action and owns a one-half interest in the property.

The two limitations contained in this Article that do not appear in Article 2355 require more stringent proof than required by that Article to obtain judicial authorization to act alone. By requiring more stringent proof to obtain judicial authority, the former spouse who would benefit by the continuation of the co-ownership relationship with sole management powers conferred by the court is encouraged instead to obtain a judicial partition and terminate the relationship.

4. Absent Person or Arbitrarily Refuses to Concur or is Unable to Concur

Finally, as is the case under Article 2355, to obtain judicial authorization to act alone the petitioning spouse must prove one of three circumstances: (1) the other spouse is an absent person; or (2) the other spouse arbitrarily [without good reason] refuses to concur; or (3) the other spouse is unable to concur “due to physical incapacity, mental incompetence, commitment, imprisonment, or temporary absence.”

H. Article 2369.8. Right to Partition; No Exclusion by Agreement; Judicial Partition

A spouse has the right to demand partition of former community property at any time. A contrary agreement is absolutely null.

If the spouses are unable to agree on the partition, either spouse may demand judicial partition which shall be conducted in accordance with R.S. 9:2801.

I. Right to Demand at Any Time

The right of a co-owner/spouse to demand a partition at any time is a departure from the law governing the spouses during the existence of the

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276. La. Civ. Code art. 2355 (rev. 1990): “A spouse, in a summary proceeding, may be authorized by the court to act without the concurrence of the other spouse upon showing that such action is in the best interest of the family and that the other spouse arbitrarily refuses to concur or that concurrence may not be obtained due to the physical incapacity, mental incompetence, commitment, imprisonment, temporary absence of the other spouse, or because the other spouse is an absent person.” See also Spaht & Hargrave, supra note 8, § 5.9, at 161-63.


community regime. Because the community regime is a "distinct species" of co-ownership, the spouses who each own an undivided one-half interest in community property may nonetheless not demand a judicial partition during the existence of the regime. However, after termination of the "distinct species" of co-ownership, the co-owner/spouses are for most purposes ordinary co-owners with the right to demand a judicial partition of former community property.

The right of an ordinary co-owner to demand a judicial partition is qualified by the following modifications: (1) the co-owners may agree that there will be no partition for "up to fifteen years, or for such other period as provided in R.S. 9:1702 or other specific law," and (2) the co-owners may not partition a co-owned thing if "its use is indispensable for the enjoyment of another thing owned by one or more of the co-owners." Therefore, the first sentence of this Article is an obvious deviation from the modifications that preclude a judicial partition under general co-ownership law. This Article explicitly declares that a judicial partition is available "at any time," and there is no limitation or other modification imposed upon the exercise of that right. The comment to the Article is consistent with such a conclusion.

2. Contrary Agreement is Absolutely Null

In the second sentence of this Article, an agreement between the co-owner/spouses prohibiting a partition is declared absolutely null with all of the resulting consequences. The agreement, which is permissible in part under the general law of co-ownership, cannot be confirmed, and the action

282. La. Civ. Code art. 807 (rev. 1990): "No one may be compelled to hold a thing in indivision with another unless the contrary has been provided by law or juridical act. Any co-owner has a right to demand partition of a thing held in indivision."
283. Persons holding property in common may agree that there shall not be a partition of the property held in common for a specific period of time, not to exceed fifteen years. However, persons holding in common a nuclear electric generating plant or unit, or the site of such plant or unit, located in this state may agree that such plant or unit or site shall not be partitioned for a period of time not to exceed ninety-nine years. Any agreement under the provisions of this Section shall be in writing and shall be valid irrespective of the provisions of Civil Code Article 807.
287. La. Civ. Code art. 2369.8 cmt. a (as added by 1995 La. Acts No. 433, § 1): "This Article provides that a spouse may demand partition of former community property at any time."
288. La. Civ. Code art. 2030 (rev. 1990): "A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed. Absolute nullity may be invoked by any person or may be declared by the court on its own initiative."
to have the agreement recognized as null is imprescriptible. The declaration that the agreement is absolutely null is tantamount to declaring such an agreement against public policy.

The public policy involved is the same one originally expressed in the general law of co-ownership, that is that co-owners are prohibited from agreeing not to partition co-owned property. The reason underlying such historical policy for co-owners was that such an agreement would thereafter preclude any alteration of the relationship and if problems arose between co-owners the property could not be developed because of lack of unanimity. Historically, under general co-ownership law there was no possibility of judicial intervention as a means of remedying a bad co-ownership relationship, only of partition.

To permit such agreements, as the general law of co-ownership now does, could result in subverting the purpose of this new series of Articles. In a weak moment because of the intense personal emotions of divorce, one spouse could prevail upon the other who is more vulnerable to agree to no judicial partition of the former community property for ten years. The ability to use judicial intervention to resolve differences of opinion thereafter would be severely restricted. Furthermore, there would be no judicial intervention available if the former community property were subject to the exclusive management of one of the two former spouses. The former spouse, for example, who is the sole manager of a community enterprise or in whose name the stock is registered could impose upon the other spouse to consent to an agreement not to partition former community property, or just the enterprise or stock, for ten years. The other spouse would have no viable remedy to protect his or her interest other than damages for breach of the obligation to preserve and to

the relative nullity of an obligation.”


292. For a parallel concern, see La. Civ. Code art. 2329 (rev. 1979) that requires judicial approval of a matrimonial agreement executed during the existence of the community regime. Judicial approval requires proof that the agreement serves the spouses’ best interests and that both spouses understand the governing principles and rules of the new regime. The purpose of the requirement is to protect the spouse whose contributions to the marriage are largely non-economic from the imposition of the other spouse.

In part, the need for special protection in this Article as well as Article 2329 is a result of the narrow interpretation of the meaning of duress under La. Civ. Code art. 1959 (rev. 1984). The term has been interpreted to require either violence or threats. Id. at cmt. b. The imposition envisioned by Article 2369.8 (as added by 1995 La. Acts No. 433, § 1), does not reach the level of violence or threats, yet nonetheless may compel a spouse to agree to not partition former community property. The compulsion could result from emotional vulnerability or economic duress, neither of which has historically been considered enough to constitute duress. See Spaht & Hargrave, supra note 8, § 7.23, at 337-39.

293. See supra text accompanying notes 261-279 (discussion of criteria for judicial intervention under La. Civ. Code art. 2369.7 (as added by 1995 La. Acts No. 433, § 1)).
manage prudently. If the agreement were only relatively null, then it could be confirmed expressly by a writing executed immediately thereafter under the same sort of imposition. The confirmation could even be tacit, by certain conduct of the spouse under the same imposition. Thus, two almost simultaneous acts would result in a subversion of the prohibition and its policy.

3. Judicial Partition Under With Louisiana Revised Statutes 9:2801

The co-owner/spouse who seeks a judicial partition must comply with the provisions of Louisiana Revised Statutes 9:2801. Section 2801 contains detailed provisions on the judicial partition of former community property, adopting the concept of the "aggregate theory" of partition. This Article explicitly conforms the law to current practice and the implicit interpretation of the courts that Louisiana Revised Statutes 9:2801, being the more specific statute governing only former community property, prevails over the more general provisions of co-ownership law that apply to all other co-owned property. Derogation from the rules of general co-ownership law on judicial partition is significant. Under general co-ownership law when the co-owned thing is not susceptible to division in kind, "the court shall decree a partition by licitation or by private sale..." To be susceptible to division in kind, the thing held in indivision must be "susceptible to division into as many lots of nearly equal value as there are shares and the aggregate value of all lots is not significantly lower than the value of the property in the state of indivision." The comment to that Article explains that it does not change the law, and under prior law the inequities that existed in the judicial partition of former community property compelled the enactment of Louisiana Revised Statutes 9:2801.

295. "Confirmation is a declaration whereby a person cures the relative nullity of an obligation. An express act of confirmation must contain or identify the substance of the obligation and evidence the intention to cure its relative nullity." La. Civ. Code art. 1842 (rev. 1984).
296. Id. "Tacit confirmation may result from voluntary performance of the obligation."
297. For an analogy, see the refusal to treat a gambling debt as a natural obligation under La. Civ. Code art. 1762 (rev. 1984) because a subsequent promise to pay it would result in an onerous contract. La. Civ. Code art. 1761 (rev. 1984). "[C]ertain obligations that the law renders invalid for reasons of general policy, such as gambling debts and loans bearing usurious interest, should not be recognized as producing the two effects of validity of spontaneous performance and enforceability of a new promise. If a new promise were enforceable in such a situation, the general policy that lies at the foundation of the prohibition would be defeated. For this reason, a new promise is not enforceable under such circumstances." Id. at cmt. d.
298. See Spaht & Hargrave, supra note 8, §§ 7.25-7.28.
302. See Spaht & Hargrave, supra note 8, § 7.25 (discussion of cases).
III. CONCLUSION

After almost ten years of being urged to resolve the problems related to the management of former community property, the Legislature enacted a series of seven new Articles that address the most significant issues. Principal among those issues was the lack of affirmative duties imposed upon the former spouses, as well as a standard of care in managing former community property that was perceived to be entirely too low to protect the other former spouse. By the imposition of affirmative duties and the careful particularization of a higher standard of care, the new Articles resolve the most contentious areas of concern. The balance sought between encouraging partition if the relationship of co-owners sours and protecting each co-owner/spouse before partition, which sometimes involves lengthy preparation, is delicate. The new Articles, hopefully, achieve the appropriate balance between two inherently conflicting policies.

What the Articles clearly do not attempt to solve is the “root” of the problem—marriages that end in divorce. Divorce, the context for raising the issues the new legislation attempts to resolve, creates the unusual level of hostility so unique to these co-owners. Furthermore, the management and stewardship of former community property affects not only the two co-owner/spouses but also the “family,” which must necessarily be of utmost concern to lawmakers. Until the social ill of too many divorces is solved, unforeseen issues not resolved by these new Articles will develop and beg for solutions. At some point, the Legislature may be forced to examine the “root” of the problem and recognize that families cannot grow and flourish if the “root” is not nourished.