Matrimonial Regimes: Recent Developments

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I. MATRIMONIAL AGREEMENTS

The important distinction between a matrimonial agreement and other types of interspousal contracts continues to elude some attorneys and courts.

In Vogt v. Vogt, a former wife filed an action styled "Rule to Show Cause To Enforce Support Provisions of Matrimonial Agreement." The agreement was executed prior to marriage and stated that the parties elected to be governed by Louisiana community property law. It contained provisions stipulating the amount of alimony that the husband would pay to the wife in the event of divorce, provided that she had not committed adultery, as well as the husband's obligation to maintain a life insurance policy in her favor as long as the alimony obligation existed. The former husband contended that the agreement was not a valid matrimonial agreement under Louisiana Civil Code article 2328. The court correctly held that the agreement was an antenuptial contract not contemplated by that article. It also correctly held that, although the document was titled "Matrimonial Agreement," the title affixed to a document does not, of itself, control its character (which, instead, is determined by examining the entire writing). The court

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This article is a sequel to two previous law review articles of the same title. See 60 LA. L. REV. 405 (2000), and 59 LA. L. REV. 465 (1999).

1. 831 So. 2d 428, 429 (La. App. 5th Cir. 2002), writ denied, 836 So. 2d 120 (La. 2003).
2. Id.
3. Id.
4. Id. at 431. LA. CIV. CODE ANN. art. 2328 (2006) (defining matrimonial agreement).
5. Vogt, 831 So. 2d at 432.
6. Id.
then added, "However, it is a matrimonial agreement permitted under Louisiana Civil Code article 2329."

The agreement was not a matrimonial agreement at all. A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating the legal regime. This agreement did none of those things. Alimony is not a rule of any type of matrimonial regime, whether a legal regime, a separation of property regime, a contractual regime, or a regime that is partly legal and partly contractual. The agreement did not change or otherwise affect the legal regime that was to exist between the parties during their marriage. Particularly egregious is the suggestion that there are two types of matrimonial agreements, one permitted by Louisiana Civil Code article 2328 and the other by article 2329. There is only one type of interspousal contract that is classified as a matrimonial agreement, and it is defined in article 2328. Article 2329 does not create a different type of matrimonial agreement. It defines the permitted limits on the objects of a matrimonial agreement and the form requirements for a matrimonial agreement if confected during the marriage of the parties. The matrimonial agreement referred to in article 2329 is the one defined in article 2328.

Two Louisiana Third Circuit Court of Appeal decisions correctly distinguished between a matrimonial agreement and other types of interspousal contracts. In *Pelafigue v. Sudduth*, the court correctly held that an agreement entered into during marriage for the building of a house, which provided for the contributions of money and labor for its construction and its disposition upon divorce of the parties, was not a matrimonial agreement. The contract, although dealing with an asset to be acquired in the future, concerned only the construction of a house, options granted to the parties to purchase the house upon its completion, and its

11. 820 So. 2d at 588.
valuation, and not the classification of that asset.\textsuperscript{12} Thus, it did not modify any of the rules of a legal regime. Hence, the agreement was not a matrimonial agreement requiring dual judicial findings under article 2329 for its validity.\textsuperscript{13}

In \textit{Guidry v. Guidry}, an attorney and his wife entered into a “Shareholders Agreement” and a “Subscription Agreement” with a law firm in which the husband was to become a shareholder.\textsuperscript{14} The agreements fixed the value of the shares of stock to be issued to the husband, in the event of a divorce between the parties, and the wife signed the agreements.\textsuperscript{15} In the subsequent divorce proceedings, the wife contended that these agreements were matrimonial agreements and that they were void for non-compliance with Louisiana Civil Code article 2329, and the trial court held the agreements to be matrimonial agreements subject to the dual judicial findings requirements of that article.\textsuperscript{16} Reversing, the appellate court held that the agreements were not matrimonial agreements because they did not alter the classification of the shares of stock to be acquired by the husband as community property, but simply set forth a procedure to be followed and a method of evaluation of community stock in the event of a divorce.\textsuperscript{17} The analysis and decision are correct.

A previous third circuit case, \textit{Boudreaux v. Boudreaux}, incorrectly held that an agreement between spouses entered into during a pending divorce suit that provided that the wife could live in the family home as long as she remained single and which provided for contingencies of remarriage, etc., was a matrimonial agreement subject to the Louisiana Civil Code article 2329 dual judicial findings requirement.\textsuperscript{18} Neither \textit{Pelafigue} nor \textit{Guidry} mentions \textit{Boudreaux}.

The failure to distinguish between a matrimonial agreement and other types of interspousal agreements probably is the result of

\begin{itemize}
\item[12.] \textit{Id.}
\item[13.] \textit{Id.}
\item[14.] 830 So. 2d at 570–71.
\item[15.] \textit{Id.}
\item[16.] \textit{Id.} at 571.
\item[17.] \textit{Id.} at 572.
\item[18.] See 745 So. 2d 61, 64 (La. App. 3d Cir.), \textit{writ denied}, 748 So. 2d 1165 (La. 1999).
\end{itemize}
not understanding the restrictive nature of a matrimonial agreement. In one of the few commentaries that have defined "matrimonial agreement," Professors Spaht and Hargrave explain: "[A matrimonial agreement] is the kind of agreement that affects the classification and management of future acquisitions that are unique to the matrimonial agreements. Matrimonial agreements ‘contemplate an ongoing regulation of property as it comes into existence.’" 19

Not all agreements between spouses affecting future property are matrimonial agreements, however. As Professors Spaht and Hargrave carefully point out, it is only an agreement which affects "the classification and management of future acquisitions" that is a matrimonial agreement. Although an agreement may have as its object future acquisitions, unless the agreement affects the classification or management of that future property, it is not a matrimonial agreement.

The writer has defined a matrimonial agreement as follows:

All agreements entered into between married persons are not matrimonial agreements. The latter are a particular type of agreement, defined by the subject matter [object] of the agreement.

The basic characteristic that distinguishes a matrimonial agreement from other types of contracts entered into between spouses or between persons contemplating marriage is that a matrimonial agreement contracts with reference to the property regime that exists or will exist between them during the marriage. A property regime is a system of principles and rules that govern the ownership and management of the property of spouses during marriage, both as between themselves and towards third persons.

The object of a matrimonial agreement is these governing principles and rules. If the agreement modifies any of the


20. Spaht & Hargrave, supra note 19, at § 8.6, at 527.
principles or rules of a particular regime, or one system of principles or rules is substituted for another (one regime for another) in whole or in part, the agreement is a matrimonial agreement. Spouses are at liberty, however, to enter into a myriad of other contracts or agreements between themselves before or during marriage which are not matrimonial agreements. For convenience, those agreements between spouses that are not matrimonial agreements have been denominated as "interspousal contracts." These types of contracts between spouses have no special form, court approval, or recordation requirements, as do matrimonial agreements. They are subject only to the general rules governing the proof of obligations and the special rules regulating the proof of some particular types of obligations.\(^2\)

When spouses contract with respect to presently owned community property, they do not modify any of the governing rules and principles of the legal regime classifying property as community or separate.\(^2\)\(^2\) In the legal regime, property is classified as community or separate property (or partially community and partially separate in the case of incorporeal movables) at the moment of acquisition by application of the rules and principles governing the legal regime.\(^2\)\(^3\) Likewise, if the spouses contract with reference to future property in a manner that does not affect any of the classification rules, the management rules, the reimbursement rules, and other rules of their matrimonial regime, that agreement is not a matrimonial agreement.\(^2\)\(^4\)

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24. Although most of the cases raising the issue of whether an interspousal agreement is a matrimonial agreement involve the classification of assets rules, the same analysis applies to an agreement that changes the management rules,
Spouses may agree between themselves on the classification of a particular item of property at the time of its acquisition. The spouses may also change the classification after its acquisition. Neither act is a matrimonial agreement, as neither terminates the legal regime nor modifies any of the rules of their matrimonial regime.

The failure to distinguish between a matrimonial agreement and other types of interspousal contracts can have significant consequences. Matrimonial agreements, whether executed prior to marriage or during marriage, have special requirements not applicable to other types of interspousal contracts, and failure to observe these requirements may result in the matrimonial agreement being a nullity.

Whenever executed, a matrimonial agreement must be by authentic act or by an act under private signature duly acknowledged by both of the spouses; a pre-marital matrimonial agreement under private signature establishing a separation of property regime for the marriage is not valid. In Ritz v. Ritz, the classification of obligations rules, or the reimbursement rules of the legal regime. See generally LA. CIV. CODE ANN. arts. 2335 et seq. (2006).

Similarly, any interspousal contract changing the rules of the separation of property regime or of a contractual regime or a regime that is partly legal and partly contractual is a matrimonial agreement requiring compliance with articles 2329 and 2331. See LA. CIV. CODE ANN. arts. 2326–28, 2370–73 (2006).

25. LA. CIV. CODE ANN. art. 2342 (2006); Bionda v. Bionda, 769 So. 2d 94, 100 (La. App. 1st Cir. 2000); Gautreau v. Gautreau, 697 So. 2d 1339, 1350–51 (La. App. 3d Cir.), writ denied, 703 So. 2d 1272 (La. 1997). Although the result of compliance with article 2342 is generally treated as classifying the property as separate property of the acquiring spouse, the result might be more properly characterized as one of estoppel by deed, one of three types of estoppel recognized by the jurisprudence. Harper v. Leonard, 6 So. 2d 326, 333 (La. 1942). The forced heirs and creditors of the spouses may controvert the declaration of the acquiring spouse, despite the concurrence by the other spouse. LA. CIV. CODE ANN. art. 2342 (2006). Only the concurring spouse is barred from controverting the declaration of the acquiring spouse. Id.

26. Community property may be transformed into separate property by donation, LA. CIV. CODE ANN. art. 2343 (2006), and separate property may be transformed into community property, LA. CIV. CODE ANN. art. 2343.1 (2006).


matrimonial agreement purporting to be in authentic form was signed by one of the witnesses after the marriage ceremony and outside the presence of the parties. The court held that the matrimonial agreement was not an authentic act, nor was it an act under private signature duly acknowledged by the spouses, because neither spouse acknowledged it prior to the marriage ceremony. An attempted acknowledgment by the wife in the partition proceedings after the divorce was not sufficient; all of the requirements for either an authentic act or an act under private signature duly acknowledged by the spouses must be met prior to, or antecedent to, the marriage, absent compliance with the Louisiana Civil Code article 2329 requirements. This article generally requires that in order for the matrimonial agreement executed during marriage to be valid, there must be a joint petition to the court by the parties to the agreement and dual findings by the court: (1) that the matrimonial agreement serves the best interests of the parties, and (2) that they understand the governing rules and principles. This process at times is described as “judicial approval” of the matrimonial agreement. However, the court is not called upon to approve or disapprove of the matrimonial agreement; it must make judicial findings that the agreement is in the best interests of both spouses and that the spouses understand the rules and principles that govern matrimonial regimes. If the spouses understand what the rules would have been in the absence of the matrimonial agreement that changes those rules and what the rules will be as a result of the

29. 666 So. 2d 1181, 1181 (La. App. 5th Cir. 1995), writ denied, 669 So. 2d 395 (La. 1996).
30. Id. at 1184–85.
31. Id. at 1185.
33. See, e.g., Pelafigue v. Sudduth, 820 So. 2d 583, 588 (La. App. 3d Cir. 2002); Biondo v. Biondo, 769 So. 2d 94, 100 (La. App. 1st Cir. 2000); Boyer v. Boyer, 691 So. 2d 1234, 1244 (La. App. 1st Cir.), writ denied, 701 So. 2d 984 (La. 1997); Langley v. Langley, 647 So. 2d 640, 642 (La. App. 3d Cir. 1994). Unfortunately, the words “without court approval” appear twice in article 2329, each time specifying the instances in which article 2329 compliance is not required. See LA. CIV. CODE ANN. art. 2329 (2006).
34. LA. CIV. CODE ANN. art. 2329 (2006).
matrimonial agreement, it is more likely that consent to the changes will be knowingly and intelligently given.

The requirement for a judicial finding that the matrimonial agreement is in the best interests of the spouses presents a closer question. The court, rather than the parties, is called upon to decide what is in the best interests of the contracting spouses. This requirement also presents other problems. The terms and conditions of most matrimonial agreements are designed to be in the economic best interest of one party and against the economic best interest of the other. The most frequent example is a matrimonial agreement terminating the legal regime and establishing a separation of property regime during marriage when only one spouse is a substantial income earner or has substantial separate property generating income that may not be classified as civil fruits of that separate property. However, the article requires that the court make a judicial finding that the matrimonial agreement serves the best interests of both spouses. Prior to the judicial findings required by the article, typically no evidence is adduced as to the relative financial situations of the spouses or the economic effect on the spouses of the agreement.

The purpose of these article 2329 requirements is to prevent imposition upon one spouse by the other spouse. Without a meaningful judicial inquiry into the terms of the matrimonial agreement and their effect on the spouses, this purpose is not achieved. A more realistic requirement would be that there be judicial findings: (1) that both parties understand the governing rules and principles and the changes in those rules and principles effected by the matrimonial agreement, and (2) that they have knowingly agreed or consented to these changes. Whether agreeing to these changes is in the best interest of a particular spouse or the best interests of both spouses should be left up to them to decide, not the court.

This proposal would place upon the court the responsibility or duty to ascertain that the parties truly understand the consequences of what they are doing and that they have both knowingly and freely consented to it, rather than requiring the court to determine if the agreement serves their mutual best interests. If judicial supervision or oversight for the renunciation or modification of marital property rights during marriage is to be required, it is
important that the court prevent imposition on a spouse by the other spouse by ascertaining and making a judicial finding as to these matters. A function of the court should be to assure that the spouses clearly understand the economic consequences of their agreement. Each spouse should decide whether these economic consequences are in his and her best interest. Also, the court should determine whether consent to the agreement has been knowingly and freely given.

Some have contended that this judicial supervision is not needed to prevent imposition on a spouse by the other spouse during marriage. Indeed, such imposition is already possible: a spouse during marriage may waive final spousal support without judicial supervision, and this waiver may have as much of a devastating economic impact on a spouse as a waiver of the legal regime. Arguably, the legislature should give more protection to spouses with reference to property and support rights that accrue during marriage than those that might arise after the termination of the marriage. If so, the protection afforded during the marriage should be meaningful.

There are exceptions to these requirements. Spouses may subject themselves to the legal regime by a matrimonial agreement at any time “without court approval.” Also, during the first year after moving into and acquiring a domicile in this state, spouses

35. See Spaht & Hargrave, supra note 19, at § 8.6, at 523–28.

36. See McAlpine v. McAlpine, 679 So. 2d 85, 91 (La. 1996), which conversely opines that a waiver of the legal regime by a spouse potentially involves greater consequences on the part of the non-earning spouse than would a waiver of permanent alimony.

37. This view is reflected in the jurisprudential prohibition of the waiver of the statutorily imposed duty of the spouses to support each other during marriage, Holliday v. Holliday, 358 So. 2d 618 (La. 1978), but permitting the waiver of post-divorce spousal support, McAlpine, 679 So. 2d 85. One court has held that the purpose of the judicial supervision required by article 2329 is to protect spouses who possess inferior bargaining positions. Poirier v. Poirier, 626 So. 2d 868, 870 (La. App. 3d Cir. 1993), writ denied, 634 So. 2d 389 (La. 1994). This policy is reflected, in part, in the provisions of Louisiana Civil Code article 116, permitting the modification, waiver, or extinguishment of the obligation of final spousal support, but not of an interim allowance. LA. CIV. CODE ANN. art. 116 (2006).

38. LA. CIV. CODE ANN. art. 2329 (2006). The use of the term “without court approval” twice in this Civil Code article is unfortunate, as the court neither approves nor disapproves of the agreement of the spouses. See id.
may enter into a matrimonial agreement "without court approval." If a judgment of separation of property is rendered for one of the stipulated causes, a reconciliation of the parties reestablishes the legal regime, unless prior to the reconciliation, the spouses execute a matrimonial agreement to the contrary, which "need not be approved by the court."

In Poirier v. Poirier, while married, the Poiriers signed a document entitled "Community Property Partition." It purported to partition community property, but the document contained the following provisions:

[T]hey [Poiriers] desire to settle and liquidate the community property which formerly existed between them. . . . [S]he [Lynette] agrees to accept her interest in the community property described herein to avoid any further litigation between all parties; . . . and . . . the parties hereto discharge each other from any further accounting of the community property which formerly existed between them.

The court concluded that by referring to community property in the past tense the parties intended to terminate the legal regime, not just to partition community property of an existing legal regime. The court found that there were no dual judicial findings made pursuant to article 2329; the recitation in the judgment of divorce that the partition "be confirmed and made final" was not a compliance with the article 2329 requirements; accordingly, the court affirmed the trial court's annulling of the agreement.

39. Id.
41. 626 So. 2d 868, 868–69 (La. App. 3d Cir. 1993), writ denied, 634 So. 2d 389 (La. 1994).
42. Id. at 869–70.
43. Id. at 870.
44. Id. In interpreting the requirements of article 2329 to be stricti juris, the court found the purpose of the article to be the protection of spouses with inferior bargaining positions: "Obviously, the Legislature found many spouses possessed such inferior bargaining positions, that the law could not allow them to give up their community rights without judicial supervision. Id. In face of this strong legislative policy, we find the formalities of Article 2329 to be stricti juris." Id.
The agreement was, in part, a matrimonial agreement because it purported, according to the court, to terminate the legal regime. A partition of community property is not a matrimonial agreement because it does not modify or terminate a matrimonial regime nor modify any of its rules. Hence, dual judicial findings pursuant to Louisiana Civil Code article 2329 are not required if the parties are married at the time of the confection of the interspousal contract to partition community property. The parties may voluntarily partition the community property in whole or in part without complying with the requirements of article 2329. If, however, the agreement also reflects an intention to terminate the matrimonial regime existing between the parties, as found by the court in Poirier, then the dual judicial findings requirement of Louisiana Civil Code article 2329 applies to that portion of the agreement. Thus, if the dual judicial findings are not made, that portion of the agreement attempting to terminate the regime is null. If this portion of the agreement is severable, the portion of the agreement partitioning the community property is valid. However, the court did not address the severability issue in Poirier.

Johnson v. Johnson erroneously held "that a Marriage Contract drawn up by the plaintiff before the marriage" that established "a separate property agreement in lieu of a community property regime," and which the court of appeal decided was "at the very least . . . executed by an act under private signature" was "valid as to form." Although wrong in its conclusion, the opinion correctly quotes article 2331, which requires that a matrimonial agreement be by authentic act or by act under private signature duly acknowledged by the spouses.

In Holland v. Holland, the husband contended that he and his wife had an (apparently verbal) agreement "during their marriage whereby he would support her while she was in medical school and then she would support plaintiff while he pursued his

45. However, neither the community nor things of the community may be judicially partitioned prior to the termination of the legal regime. LA. CIV. CODE ANN. art. 2336 (2006).
47. 614 So. 2d 884, 885 (La. App. 3d Cir. 1993).
In a classic goose/gander twist, the wife left the husband shortly before her graduation from medical school. He sought "reimbursement" both under then Louisiana Civil Code article 161 (now article 121) and under the "contract." The court correctly found article 161 inapplicable because the petition for a separation from bed and board was filed prior to the effective date of this article. The court also found "that the plaintiff has no cause of action for reimbursement in contract." It correctly held that article 2330, which prohibits certain types of contracts between spouses because of a strong public policy against these types of contracts between spouses, was inapplicable in this case. Then, it correctly cited the form requirements of article 2331 for matrimonial agreements (i.e., an authentic act or act under private signature duly acknowledged by the spouses), but held that "[t]he plaintiff has failed to indicate the existence of such a formalized agreement, which would give rise to a valid cause of action," finally affirming the trial court's decision to sustain an exception of no cause of action. This, of course, is wrong. The claimed agreement was not a matrimonial agreement: it did not affect any rule or principle of the property regime of the parties, and the form requirements of article 2331 were not applicable to the contract. If they had been, the agreement also would have required compliance with the judicial findings requirement of article 2329 because it was entered into during the marriage. Nor was the object of the agreement any property of the parties, either separate or community. The claim for financial contributions made during the marriage to the education or training of a spouse under Louisiana Civil Code articles 121 through 124 is not a reimbursement claim, a property claim, or a spousal support claim. Comment (f) to article 121 states, "The second paragraph of this Article is intended to make clear that the contemplated award is not spousal support or a

49. 539 So. 2d 1011, 1012 (La. App. 4th Cir. 1989).
50. Id.
51. Id.
52. Id.
53. Id.
54. Id. at 1012–13.
55. Id. at 1013.
disposition of community property.” The basic error of the court was in apparently assuming that any agreement between married persons is a matrimonial agreement, which, unfortunately, is an often repeated mistake.

In *Washington v. Washington*, a husband and wife entered into a written contract (an act under private signature) for the avowed purpose of settling “their respective property rights and to agree on support provisions for the Wife and Children,” including a specific provision for support of the wife’s two children, who were not the husband’s children. The contract provided that the agreement “may be offered in evidence” and, “if acceptable to the court, shall be incorporated by reference in any judgment that may be rendered.” When, in a divorce proceeding, the wife sought to enforce the portion of the agreement concerning the support of her children, the court wrongly held the agreement to be a matrimonial agreement. It referred to Louisiana Civil Code article 2328, which defines a matrimonial agreement as “a contract establishing a regime of separation of property or modifying or terminating a legal regime”; article 2329, containing the dual judicial findings requirements for matrimonial agreements entered into during marriage; and article 2331, containing the form requirements for matrimonial agreements. It then concluded:

The contract in question was neither by authentic act nor was it an act under private signature duly acknowledged by the parties. Therefore, pretermittting the question of validity of the husband’s agreement to support children of whom he is not the legal or natural father, we find the marital contract void for failure of the parties to comply with the form requirements of Article 2331. Therefore, the trial court correctly rejected the wife’s reconvensional demands.

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57. 471 So. 2d 925, 925–26 (La. App. 2d Cir. 1985).
58. *Id.* at 926.
59. *Id.* at 926–27.
60. *Id.*
61. *Id.* at 927.
The agreement was not a matrimonial agreement. The referenced articles 2328, 2329, and 2331 are not applicable to the agreement. It was an interspousal contract, which has neither a judicial findings requirement nor any form requirement not applicable to contracts in general. Once again, the error seems to be the assumption that all agreements between spouses are matrimonial agreements.

The dual judicial findings requirement of a matrimonial agreement (if executed during the marriage) and the form requirements (whenever executed) are essential to the validity of that type of interspousal contract. Under article 2332, lack of proper registry of the matrimonial agreement does not invalidate the matrimonial agreement as between the parties; however, lack of registry may render the agreement ineffective as to third persons:

A matrimonial agreement . . . is effective toward third persons as to immovable property when it is filed for registry in the conveyance records of the parish in which the immovable property is situated, and as to movables when filed for registry in the parish or parishes in which the spouses are domiciled.62

These registry requirements regulate only the effect of the matrimonial agreement as to third persons; although unrecorded, if the form and other requirements are met, the matrimonial agreement is valid as between the parties.

In contrast to a matrimonial agreement, other interspousal contracts do not have any special form requirements or other requirements because the parties are married to each other at the time of the agreement. They are subject only to the general rules governing the proof of obligations and the special rules governing the proof of some particular types of obligations.63 The latter include the form requirements for an inter vivos trust;64 for a sale of immovable property;65 for a conventional mortgage;66 for a

contract of mandate,\(^67\) for donations inter vivos of immovables and corporeal and incorporeal movables (which itself involves varying form requirements);\(^68\) and for other types of juridical acts. All of these types of transactions (and others, including inter vivos donations of life insurance)\(^69\) may be the object of interspousal contracts.\(^70\)

There are no special registry requirements for interspousal contracts that are not matrimonial agreements. Depending upon the nature of the interspousal contract and its subject matter (object), there may be registry requirements in order for the interspousal contract to be effective as to third persons. These include the filing for registry requirements for the alienation\(^71\) and encumbrance\(^72\) of immovables, donations of immovables,\(^73\) and contracts of partnership.\(^74\)

Under prior law, spouses were prohibited from entering into contracts with each other except in certain limited situations.\(^75\) The present matrimonial regimes law reverses this rule, providing that spouses can contract with each other to the same extent as persons who are not married to each other, except in certain limited situations.\(^76\) This freedom of interspousal contracting includes

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\(^{67}\) L.A. CIV. CODE ANN. art. 2993 (2006).


\(^{75}\) See L.A. CIV. CODE ANN. art. 2446 (1870), repealed by 1979 La. Acts No. 709, § 2; L.A. CIV. CODE ANN. art. 1790 (1870), amended by 1979 La. Acts No. 711, § 1, repealed by 1984 La. Acts No. 331, § 1. See also Miller v. Miller, 102 So. 2d 52, 56–57 (La. 1957) (holding article 1790 prohibited a husband and wife from contracting with each other, except in limited circumstances).


It should be noted that, unlike article 2329, article 2330 is not limited to matrimonial agreements. L.A. CIV. CODE ANN. art. 2330 (2006). Its public policy proscriptions apply to any “agreement” of the spouses. \textit{Id}. The first type of agreement, one to alter the marital portion, is a matrimonial agreement, as the marital portion is an incident of any matrimonial regime. L.A. CIV. CODE ANN.
sales, donations, voluntary partitions of any or all of the community or co-owned separate assets, compromises of disputes, employment contracts in which one spouse is employer and the other employee, partnership agreements, the formation of corporations and other legal entities or juridical persons, and any other type of contract into which any other two consenting adults having contractual capacity are permitted to enter, subject to general public policy limitations and with the exception of certain specified types of agreements between spouses that are prohibited for public policy reasons.\textsuperscript{77}

Louisiana Civil Code article 2330 limits the contractual freedom of the spouses as to certain specified matters of public order or public policy.\textsuperscript{78} Spouses may not, either before or during marriage, renounce or alter the marital portion or the established order of succession, nor may they limit with respect to third persons the right that one spouse alone has under the legal regime

\begin{footnotesize}
\begin{enumerate}
\item[77] LA. CIV. CODE ANN. arts. 2329-30 (2006).
\item[78] LA. CIV. CODE ANN. art. 2330 (2006).
\end{enumerate}
\end{footnotesize}
to obligate the community or to alienate, encumber, or lease community property.\textsuperscript{79} These specific public policy restrictions apply both to matrimonial agreements and other interspousal contracts.\textsuperscript{80} Additionally, any rule of public order or public policy applies to both types of contracts.\textsuperscript{81} Any act in derogation of laws enacted for the protection of the public interest is an absolute nullity, whether it is a matrimonial agreement or another type of interspousal contract.\textsuperscript{82}

II. RETIREMENT BENEFITS

Not surprisingly, several cases deal with retirement benefit issues. In two cases, the participant spouse claimed a \textit{Hare v. Hodgins} modification to the \textit{Sims} formula in the allocation of the retirement benefits.\textsuperscript{83} In \textit{Donaldson v. Donaldson}, the husband

\begin{itemize}
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{See} sources cited \textit{supra} note 76 and accompanying text.
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{LA. CIV. CODE ANN.} art. 7 (2006).
\item \textsuperscript{83} \textit{Hare v. Hodgins}, 586 So. 2d 118, 128 (La. 1991), held that if an increase in pension benefits is due to personal effort or achievement after the termination of the community that has little or no relationship with the prior community, the community should not be given credit for it in the apportionment of the pension benefits. Such increase in benefits might occur where the employee spouse attains a significantly higher-paying position while remaining within the coverage of the same pension plan, either through earning a post-community degree, or transfer within the company to an unrelated area of service. \textit{Id.} On the other hand, when such an increase results from nonpersonal elements such as longevity raises, cost-of-living raises, forfeitures by terminated employees, and investment returns, the community should participate in that gain. \textit{Id.} The employee spouse claiming an adjustment has the burden of proof. \textit{Id.}

\textit{Sims v. Sims}, 358 So. 2d 919, 923 (La. 1978), held that to the extent that an employee’s contractual pension right derives from the spouse’s employment during the existence of the community, it is a community asset subject to division upon dissolution of the community. The employee’s spouse is entitled to be recognized as the owner of one-half of the value attributable to the pension or deferred compensation right earned during the existence of the community. \textit{Id.} When the fixed percentage method is used to calculate the non-employee spouse’s portion of the pension benefits in a defined benefits plan, the community portion of the pension right is deemed to be the same fraction that results when the length of the employee spouse’s creditable employment during
was a bus driver-motorman employed by the New Orleans Public Service Authority, and after the divorce, he was promoted to dispatcher, with a slight increase in pay. The court held this increase did not justify a *Hare v. Hodgins* adjustment in the allocation of the benefits payable by his defined benefits pension plan. Additionally, seventeen years after his divorce, as a result of collective bargaining negotiations, a “Thirty-and-Out” program was instituted, in which all employees were allowed to retire after thirty years’ credit in the retirement plan, regardless of age; further, all employees were required to make contributions to fund the program. Donaldson made the contributions out of his current earnings for two years prior to his retirement, and, in return, he received full retirement benefits upon his retirement at age sixty-two, instead of early retirement benefits, for an effective increase of nine percent.

The court of appeal, relying, in part, on *Hare v. Hodgins*, held that Donaldson’s gross retirement benefit should be reduced by nine percent before calculating his wife’s community interest in the benefit. Although the facts do not fit within the *Hare*’s requirement that the increase in the pension benefits be “due purely to his personal effort and skill and unrelated to his prior community earnings,” the result in *Donaldson* seems fair and consistent with matrimonial regimes principles. The increase in retirement benefits resulting from the post-termination “Thirty-and-Out” program did not result from a foundation provided by prior community earnings, as in *Hare*. However, in *Hare*, the supreme court did not indicate that post-termination individual effort was the only reason to modify the *Sims* straight-line apportionment, noting that the emerging jurisprudential concepts

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the community is divided by the length of his total creditable service, which is a straight-line apportionment of benefits. *Id.* at 924.

84. 831 So. 2d 416, 418 (La. App. 5th Cir. 2002).
85. *Id.* at 420–21.
86. *Id.* at 418–19.
87. *Id.*
88. *Id.* at 420–21.
90. *Id.*
were not yet well defined. Other post-termination significant events unassociated with employment during the legal regime that result in a substantial increase in retirement benefits and which are not fairly ascribable to employment during the community should be considered by the courts in determining an equitable apportionment of the retirement benefits.

The former husband unsuccessfully sought a Hare adjustment in *Goetzman v. Goetzman* based upon the fact that his labor union, which controls and operates his pension plan, increased through collective bargaining its members' retirement benefits three times between the termination of the community and the trial of the partition action. However, the evidence showed that this was a continuation of the pattern that existed during the legal regime, that the increases in benefits were not unusual or extraordinary, but rather were regular and expected. The benefits were increased once a year, if actuarially reasonable, and had been increased at least nine times during the legal regime of the parties. The Hare adjustment was properly denied.

*Smith v. Smith* involved a dispute between the first and second wives of a deceased Bossier City fireman (who was employed during both marriages) over the survivor benefits paid to the second wife, the designated beneficiary, as a result of his death. The court held that the first wife was entitled to her Sims portion of the survivor benefits under *Johnson v. Wetherspoon*. The Bossier Firemen’s Pension and Relief Fund is a non-qualified plan not subject to the federal Employee Retirement Income Act of 1974 ("ERISA") because the Bossier City plan is a governmental plan, and governmental plans are not subject to ERISA. However, if the survivor benefits had been a part of a private

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91. *Id.* at 128.
92. 835 So. 2d 731, 733–34 (La. App. 1st Cir. 2002).
93. *Id.* at 735.
94. *Id.*
95. *Id.*
96. 839 So. 2d 1255, 1256–57 (La. App. 2d Cir. 2003).
97. *Id.* at 1257 (citing *Johnson v. Wetherspoon*, 694 So. 2d 203, 206–07 (La. 1997)). *See also* *Vicknair v. Firefighters' Pension & Relief Fund of New Orleans*, 907 So. 2d 787, 789–90 (La. App. 4th Cir. 2005).
pension plan subject to ERISA (a "qualified plan"), the result would have been different. The United States Supreme Court in Boggs v. Boggs held that ERISA preempted Louisiana law insofar as it applied to the qualified joint and survivor annuity mandated by ERISA, reasoning that Congress intended that the named beneficiary receive the survivor annuity, and to the extent that state law recognized any other claims to it, state law must yield to federal law under principles of preemption.99

Louisiana Revised Statutes Section 9:2801(A)(4)(a) provides that, in a community property partition action, the court shall value the assets as of the time of trial on the merits of the partition action.100 At issue in Sparcella v. Hero was the correct basis for the valuation of the accumulated sick leave of the husband.101 A community property partition agreement provided that the wife was entitled to one-half of the accumulated and unused sick leave of the husband during the existence of the community, payable upon his retirement or end of employment with the City of New Orleans Fire Department.102 The value of his sick leave was based upon his daily rate of pay; at the termination of the community, his daily rate of pay was $118.57, and at retirement it was $154.28.103 The wife contended that the community interest in the sick leave should be calculated based upon his daily rate of pay at retirement, when the sick leave was payable.104 Rejecting this contention and using the daily rate of pay at the termination of the community to calculate the community interest in the value of the accumulated sick leave, the court relied primarily on the intent of the parties as reflected in the partition agreement.105 The court held that since the parties had partitioned this asset in that agreement, the wife was not entitled to participate in any increase in value of the asset between the termination of the community and retirement of the husband, when the asset was distributed.106

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101. 848 So. 2d 610, 611–12 (La. App. 5th Cir. 2003).
102. Id.
103. Id. at 612.
104. Id. at 612–13.
105. Id. at 613.
106. Id.
agreement, it is not so clear that the sick leave benefits should be valued as of the date of the termination of the community in view of the supreme court’s insistence that the non-participant spouse is entitled to participate in the continued appreciation in value of the community assets after the termination of the community until their partition.\textsuperscript{107} The procedural requirement that the assets be valued as of the time of trial on the merits of the partition action reflects this view.\textsuperscript{108}

Another issue involving the timing of the valuation was presented in \textit{Rivera-Santos v. Rivera-Santos}.\textsuperscript{109} At the time of his divorce, the husband was a Staff Sergeant, E-6, in the United States Army; thereafter, he applied for Warrant Officer school, was accepted, attended that and other special training schools, and was eventually appointed a Warrant Officer, W-2.\textsuperscript{110} The evidence reflected that the move from a Noncommissioned Officer ("NCO") to a Warrant Officer is not a normal progression of benefits or promotions; indeed, it was described by a military expert witness "as an extraordinary move."\textsuperscript{111} The court applied the \textit{Hare}
modification of the *Sims* formula and calculated the wife’s interest in his military retired pay based upon his rank and pay at the time of the divorce as opposed to his rank and pay at the time of his retirement.\(^\text{112}\)

Whether or not a spouse has waived an interest in the other spouse’s retirement benefits in a community partition agreement continues to be an issue. After canvassing the intermediate appellate court decisions, the supreme court in *Robinson v. Robinson* announced the rule to be: “When the agreement does not expressly address the employee spouse’s pension, the issue of whether the agreement divests the non-employee spouse of any community property rights in the pension depends upon the intent of the parties.”\(^\text{113}\)

The pertinent inquiries are: (1) whether the pension plan is listed in the agreement, and, if not, (2) whether it was discussed by the parties as a part of the settlement.\(^\text{114}\) If the answer to both of these inquiries is in the negative, the pension plan was not partitioned in the agreement.\(^\text{115}\) The issue of whether a pension was considered in property settlement discussions is a question of fact.\(^\text{116}\) The customary “boiler-plate” language in the agreement does not necessarily divest the non-employee spouse of his or her right in the employee spouse’s pension.\(^\text{117}\)

Although *Robinson* and the supreme court’s subsequent opinion in *Jennings v. Turner* did much to clarify the effect of clauses in a community property settlement agreement, which are variously referred to as omnibus clauses, general divestiture clauses, and boiler-plate clauses, the opinions did not conclude that all such clauses fail to transfer one spouse’s interest in a pension plan to the other spouse.\(^\text{118}\) Both opinions state that such divestiture language does not “necessarily” have this effect,\(^\text{119}\)

\(^{112}\) Id. at 483–84.

\(^{113}\) 778 So. 2d 1105, 1121 (La. 2001).

\(^{114}\) Id. at 1120–21.

\(^{115}\) Id. at 1121.

\(^{116}\) Id. at 1119.

\(^{117}\) Id. at 1121.

\(^{118}\) See *Jennings v. Turner*, 803 So. 2d 963 (La. 2001); *Robinson*, 778 So. 2d 1105.

\(^{119}\) *Jennings*, 803 So. 2d at 965; *Robinson*, 778 So. 2d at 1121.
leaving open the possibility that such a clause in a particular case
might be specific enough to have this legal effect. Although one
may expect divergent results in the retrospective search for the
intent of the parties in a transaction, the application of these rules
should produce more consistent results than those reflected in the
previous appellate court decisions.

Presumably, these rules also apply to other objects of a
community property partition agreement, including other assets,
obligations, and reimbursement claims. The cases should be a
reminder to the practitioner not to rely on general divestiture
clauses, but to take care that all these matters are expressly
provided for in the agreement and also to take care to document,
where appropriate, any discussions between the parties and their
attorneys concerning any matter which is not subsequently
expressly incorporated into the agreement.

III. DEFERRED RETIREMENT OPTION PLAN ("DROP")

In Smith v. Smith,120 a case involving a Deferred Retirement
Option Plan ("DROP") in a public retirement plan, the Louisiana
Second Circuit Court of Appeal reaffirmed its rejection of the
reasoning of the fifth circuit in Schlosser v. Behan,121 joining the
first, third, and fourth circuits in their refusal to follow
Schlosser.122 The manner in which DROP operates in a public
retirement plan was explained by the writer in previous articles:

[A] member who is eligible for regular retirement may
make a one time election to participate in the Deferred
Retirement Option Plan (DROP) for a specified period not
exceeding three years. If the member does so, the member

120. 839 So. 2d 1255, 1258 (La. App. 2d Cir. 2003).
121. 722 So. 2d 1129 (La. App. 5th Cir. 1998), writ denied, 739 So. 2d 791
(La. 1999).
122. See Sullivan v. Sullivan, 892 So. 2d 134 (La. App. 3d Cir. 2004), writ
denied, 901 So. 2d 1104 (La. 2005); Knighten v. Knighten, 809 So. 2d 324,
333–34 (La. App. 1st Cir. 2001), writ denied, 805 So. 2d 207 (La. 2002),
vacated on other grounds, Talbot v. Talbot, 864 So. 2d 590 (La. 2003); Sullivan
v. Sullivan, 801 So. 2d 1093 (La. App. 3d Cir.), writ denied, 800 So. 2d 876 (La.
2001); Zalfen v. Albright, 791 So. 2d 800 (La. App. 4th Cir.), writ denied sub
is considered to be in a retired status although he continues to work and is paid for his work. However, for retirement benefit purposes, his final average compensation and creditable service remain fixed, or "frozen," as of the date of commencement of participation in DROP. The member's retirement benefits, based on his final average compensation and creditable service, which otherwise would . . . be payable to him, are not paid to him but are credited to a DROP account during his participation in DROP. The funds in the DROP account are invested, and the member is credited with his proportionate share of the account's earnings and growth, or losses. At the member's termination of both his employment and his participation in DROP, the amount credited to him in the DROP account is paid to him either in a lump sum or in installments. Additionally, he then commences to receive his regular monthly retirement benefits, which previously had been deposited in the DROP account.  

* * * *

The deposits being credited to him in the DROP account are not a result of his efforts and earnings during his participation in DROP; they are the result of his employment and earnings prior to his retirement and prior to his participation in DROP.  

Whether the employee enters DROP upon his retirement during the legal regime or thereafter is immaterial. His participation in DROP does not affect the amount of his retirement benefits. He does not "earn" or receive additional retirement benefits by participating in DROP. The assumption that he does was the basic

124. Rigby, Matrimonial Regimes, supra note 21, at 410–11 (footnotes omitted). See also LA. REV. STAT. ANN. § 11:447 et seq. (Deferred Retirement Option Plan ("DROP") provisions of the State Employees Retirement System); id. § 11:786 et seq. (DROP provisions of the Teachers' Retirement System of Louisiana ("TRSLA")).
125. Sullivan, 801 So. 2d at 1096; Bullock v. Owens, 796 So. 2d 170, 174–75 (La. App. 2d Cir. 2001).
error in *Schlosser*, as well as in the wife’s contention in *McKinstry v. McKinstry* that if she elected to enter the Teachers’ Deferred Retirement Option Plan ("DROP"), her husband should not receive credit for the “increased retirement benefits” that she claimed she would receive from her participation in DROP.

IV. VALUATION OF COMMUNITY ASSETS

Louisiana Revised Statutes Section 9:2801(A)(4)(a), regulating the procedure in an action to partition community property, provides that the court shall value the assets as of the time of trial on the merits. The act does not provide a formula for determining the value of the community assets. It has been suggested that an inflexible formula for determining the value of a business would be impractical:

Business valuations methods are not an exact science and are basically guides to determine a fair market value for buyers and sellers of a given business. Here, the evaluation is made for the purpose of resolving community property disputes. Given the dynamics of businesses and business practices, factoring in circumstances that may be unique to

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The purpose of [La. R.S. 9:2801(4)(a)] is to provide an occasion for the court to get a handle on the situation. It does not mean that the court is frozen by any statutory time level or particular valuation at any particular time or for any particular purpose, but simply to place values on the assets for the purpose of accounting, allocation and adjudication, in accordance with the further provisions of La. R.S. 98:2801(4)(b, c, d and e).

Id.

129. *See McDonald*, 909 So. 2d at 696; *Starr v. Starr*, 557 So. 2d 1026, 1028 (La. App. 4th Cir. 1990).
the parties, an inflexible formula for determining value is said to be impractical.\textsuperscript{130}

The courts have had occasion to decide only a limited number of business valuation issues in community property partition actions. Although Section 9:2801(A)(4)(a) mandates valuation as of the time of the trial on the merits of the partition action, if the parties do not present valuation evidence as of that date, a court does not err in making its valuations based upon the evidence submitted.\textsuperscript{131} The court is not required to value assets as of the date of trial when the parties do not submit current appraisals or evaluations.\textsuperscript{132} In view of the broad discretion granted a trial court in the partition of community property, the court is not required to accept at face value a party’s valuation of assets.\textsuperscript{133} The trial court’s choice of one expert’s method of valuation over that of another will not be overturned unless it is manifestly erroneous.\textsuperscript{134} Where expert testimony differs, it is the trier of fact who must determine the more credible evidence.\textsuperscript{135} The fact-finder is entitled to assess the credibility and accept the opinion of an expert just as with any other witness, unless the stated reasons of the expert are patently unsound.\textsuperscript{136} The effect and weight to be given to expert testimony depends upon the underlying facts.\textsuperscript{137} In deciding to accept the opinion of one expert and reject that of another, a trial

\begin{itemize}
  \item \textsuperscript{130} Head v. Head, 714 So. 2d 231, 234 (La. App. 2d Cir. 1998). See also McDonald, 909 So. 2d at 699; Gill v. Gill, 895 So. 2d 807, 813 (La. App. 2d Cir. 2005); Ellington v. Ellington, 842 So. 2d 1160, 1166–67 (La. App. 2d Cir.), \textit{writ denied}, 847 So. 2d 1269 (La. 2003); Schiro v. Schiro, 839 So. 2d 304, 308 (La. App. 5th Cir. 2003); Collier v. Collier, 790 So. 2d 759, 762 (La. App. 3d Cir.), \textit{writ denied}, 803 So. 2d 30 (La. 2001); Achee v. Nat’l Tea Co., 686 So. 2d 121, 125 (La. App. 1st Cir. 1996); Preis v. Preis, 649 So. 2d 593, 595–96 (La. App. 3d Cir. 1994).
  \item \textsuperscript{131} Ellington, 842 So. 2d at 1165.
  \item \textsuperscript{132} \textit{Id.} at 1165.
  \item \textsuperscript{133} \textit{Id.} at 1166.
  \item \textsuperscript{134} McDonald, 909 So. 2d at 699; Ellington, 842 So. 2d at 1166.
  \item \textsuperscript{135} Chance v. Chance, 694 So. 2d 613, 617 (La. App. 2d Cir. 1997), \textit{overruled on other grounds} by Mason v. Mason, 927 So. 2d 1235 (La. App. 2d Cir. 2006).
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} Ellington, 842 So. 2d at 1167; Chance, 694 So. 2d at 617.
\end{itemize}
court will virtually never be manifestly erroneous. The trial court’s determination of the value of a business is a factual one which will not be disturbed absent manifest error. Thus, if the trial court’s valuations are reasonably supported by the record and do not constitute an abuse of discretion, its valuation determination should be affirmed.

If a business has accounts receivables, their value may be discounted for collectibility and the cost of collecting the accounts. The average collection rates may be used in valuing accounts receivable.

Goodwill of a professional person is not a factor in the valuation of the professional’s practice because his goodwill results from his professional competence and his relationship with his patients or clients, and not from any affiliation between the legal entity, of which he is an owner, and the patients or clients. Goodwill of a community-owned corporation, commercial, or professional business may be included in its valuation.

138. Chance, 694 So. 2d at 617.
139. McDonald, 909 So. 2d at 699; Chance, 694 So. 2d at 617.
140. Chance, 694 So. 2d at 618.
141. Id.; Barrow v. Barrow, 669 So. 2d 622, 627 (La. App. 2d Cir.), writ denied, 675 So. 2d 1080 (La. 1996), vacated on other grounds, Talbot v. Talbot, 864 So. 2d 590 (La. 2003). See also Rigby, supra note 123, at 486.
142. Chance, 694 So. 2d at 617. See also Rigby, supra note 123, at 486.
143. LA. REV. STAT. ANN. § 9:2801.2, enacted by 2003 La. Acts No. 837, § 1. This section provided:

In a proceeding to partition the community, the court may include, in the valuation of a community commercial business, the goodwill of the business. Goodwill shall not be included in the valuation of a business when goodwill results solely from the identity, reputation, or qualifications of the owner or from his relationship with customers of the business.

Id.

In 2004 the legislature broadened the scope of the exclusion of goodwill in the valuation of a commercial business through an amendment to this statute. As amended, Section 9:2801.2 provides:

In a proceeding to partition the community, the court may include, in the valuation of any community-owned corporate, commercial, or professional business, the goodwill of the business. However, that portion of the goodwill attributable to any personal quality of the spouse awarded the business shall not be included in the valuation of the business.
Previously, the value of goodwill was excluded from the valuation when it resulted “solely” from the named attributes of the owner or from his relationship with customers of the business. See LA. REV. STAT. ANN. § 9:2801.2 (2003), amended by 2004 La. Acts No. 177, § 1. Under the 2004 amendment, the exclusion of goodwill in evaluation extends to that portion of the goodwill attributable to "any" personal quality of the spouse awarded the business. LA. REV. STAT. ANN. § 9:2801.2 (2006) (amended 2004). This appears to expand the source of goodwill that may not be considered in valuing the business. See id. However, another source that could not be considered in valuation in the previous act, the relationship of the owner to his customers, was eliminated in the 2004 amendment. See id.

Also to be noted is that the statute, prior to its 2004 amendment, was restricted in its application to a “commercial business.” See LA. REV. STAT. ANN. § 9:2801.2 (2003), amended by 2004 La. Acts No. 177, § 1. The 2004 amendment includes a “professional business.” LA. REV. STAT. ANN. § 9:2801.2 (2006) (amended 2004). Louisiana jurisprudence has not permitted the consideration of goodwill in a professional practice, whether it is conducted as a sole proprietorship or in a partnership, limited liability company, or corporate form. See Rigby, supra note 123, at 486. The amendment appears to broaden the types of business in which goodwill may be included as a factor in the valuation of the business to include a professional business. LA. REV. STAT. ANN. § 9:2801.2 (2006) (amended 2004). But it has narrowed the sources of goodwill that may be considered in a particular business in excluding the goodwill of the business that is attributable to any personal quality of the owner. See id.

Additionally, the 2004 amendment applies to any “community-owned” corporate, commercial, or professional business. Id. The “community” does not own anything. Id. The legal regime of community of acquets and gains is one of several systems of principles and rules governing the ownership and management of the property of married persons as between themselves and towards third persons. LA. CIV. CODE ANN. arts. 2325–27 (2006). The community of acquets and gains is not a legal entity (juridical person). LA. CIV. CODE ANN. art. 2336 cmt. (c) (2006).

The disjunctive use of the words “corporate, commercial, or professional business” presents interpretative problems. Obviously, the words “commercial, or professional business” used disjunctively were intended to distinguish between those types of businesses. Was the 2004 amendment intended to restrict the application of the provisions of the section to corporate businesses, excluding those businesses organized as a partnership or a limited liability company or operated as a sole proprietorship? If the provisions were intended to apply only to corporations, there should be no commas after the words “corporate” and “commercial.” However, the structure of the sentence as written implies that the words “corporate,” “commercial,” and “professional,”
However, that portion of the goodwill attributable to any personal quality of the spouse awarded the business shall not be included in the value of the business.\footnote{144}

Goodwill has been defined, \textit{inter alia}, as the value of a business resulting from the probability that the customers of the establishment will continue their patronage.\footnote{145} When a sale of a business to a third party is not contemplated, as in the case of the partition of community property, the value of the business should be determined without a discount because of the ownership of a minority interest in the business or because of lack of marketability of the business.\footnote{146}

If the community asset to be valued is an interest in a partnership or corporation, the court must be careful to value the interest, not just the assets of the business entity.\footnote{147}

Until recently, Louisiana courts, and the courts of nearly all states, rejected the consideration of future tax consequences in the valuation of property received in a community property partition, including a real estate partnership and a medical corporation.\footnote{148}

In \textit{Hansel v. Holyfield}, Mr. Hansel was allocated non-qualified stock options worth $25,673,272, which he had to exercise by

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used disjunctively, all qualify the word “business.” Particularly troublesome is
the disjunctive use of the words “corporate” and “commercial” and of
(amended 2004).


145. \textit{Godwin}, 533 So. 2d at 1010.
\end{verbatim}
specified dates or lose the options. The difference between the "strike price" (the price at which the stock was to be purchased from the employer under the stock option agreement) and the market price of the stock at the time the option is exercised is taxed at rates applicable to ordinary income, and the exercise of the option triggers the tax liability. The income taxes that would be due upon the exercise of the options when they were exercised in the future was estimated to be $10,963,365.14, but the trial court denied credit in the valuation of the options for this future tax liability. The appellate court reversed and allowed Mr. Hansel credit in the valuation of the options for the taxes to be due upon exercise of the options, resulting in a reduction of $5,481,682.57 in the equalizing payment he owed his wife. The court reasoned:

The trial court disallowed tax consequences not because it found the exercise of the options or the imposition of the taxes to be speculative, but, rather, because it found the amount of taxes to be speculative. However, at trial, Mr. Hansel submitted evidence that he is subject to the maximum applicable tax rate (39.5% in federal taxes and 6% in state taxes). Although it is possible that Mr. Hansel may be taxed at a lower rate, the rate of taxation is no more speculative than the value of the stock options themselves. Recognizing the speculative value of a stock option but refusing to recognize the speculative rate of taxation on the value of those options is simply inequitable.

Mr. Hansel argued in the appellate court that his situation was different from that of the spouses in the cases in which future tax consequences in the valuation of assets were disallowed. In those cases, both the fact of whether there would ever be any taxes due upon disposition of the property received in the partition, and

149. 779 So. 2d 939 (La. App. 4th Cir. 2000), writ denied, 789 So. 2d 591 (La. 2001).
150. Id. at 944.
151. Id. at 946–47.
152. Id.
153. Id. at 944.
154. Id.
the amount of the taxes, if any were payable, were speculative.\textsuperscript{155} These speculative issues included whether or not there would ever be a disposition of the property triggering an ordinary or capital gain, the price to be received in the future sale of the property, the basis of the taxpayer in the property when that event occurred, the tax rates applicable to ordinary and capital gains when the event occurred, and the particular tax rates applicable to the taxpayer at that time.\textsuperscript{156} Unlike the other cases in which the tax liability was triggered by a disposition of the property, if Mr. Hansel exercised an option and thus acquired stock, a tax liability was created at that time; only the tax rate of Mr. Hansel at that time was uncertain.\textsuperscript{157}

The income tax consequences of the allocation of assets to a spouse are not per se excluded as an element of the value of an allocated asset. If income taxes related to the allocated asset have already been paid by that spouse,\textsuperscript{158} or if the allocation triggers an immediate and specific tax consequence,\textsuperscript{159} a reduction in value of the allocated asset equal to the taxes paid or owed has been allowed. The tax consequences of the allocation of an asset should be excluded in valuing that asset only when the probability and amount of the tax consequences are too remote or speculative to be useful in the valuation process.

In \textit{Gill v. Gill}, at issue was the proper method, or approach, in the valuation of a community limited liability company ("LLC") in partition proceedings.\textsuperscript{160} The expert testifying for the wife used an income-based approach, while the husband’s expert used an asset-based appraisal.\textsuperscript{161} The husband was the funeral home director and licensed embalmer of a funeral home owned by the spouses, which led the court to find that the future income of the funeral home was

\begin{footnotesize}
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\item[155.] See cases cited infra note 158.
\item[156.] See id.
\item[157.] \textit{Hansel}, 779 So. 2d at 944.
\item[158.] Donaldson v. Donaldson, 831 So. 2d 416, 420 (La. App. 5th Cir. 2002); Overton v. Overton, 694 So. 2d 491, 495 (La. App. 5th Cir.), \textit{writ denied}, 703 So. 2d 26 (La. 1997); Barrow v. Barrow, 669 So. 2d 622, 628 (La. App. 2d Cir.), \textit{writ denied}, 675 So. 2d 1080 (La. 1996), \textit{vacated on other grounds}, Talbot v. Talbot, 864 So. 2d 590 (La. 2003). \textit{See also} Rigby, \textit{supra} note 123, at 484.
\item[159.] See Rigby, \textit{supra} note 123, at 484.
\item[160.] 895 So. 2d 807 (La. App. 2d Cir. 2005).
\item[161.] \textit{id.} at 814.
\end{itemize}
\end{footnotesize}
uniquely tied to the husband's personal skills. Therefore, the court decided that a focus on the net assets of the LLC, including an amount for the goodwill of the established going concern, was the appropriate method of valuation.

A review of the cases involving the valuation of community businesses for partition purposes reveals that the expert opinion testimony generally has concentrated on only two competing valuation methods, also known as approaches to valuation. These are the net asset value method and the capitalization of earnings method. These two competing valuation methods were at issue in Ellington v. Ellington. In that case, the appellate court agreed with the trial court's observation that the definition of fair market value derived from the United States Treasury Regulations is inappropriate and useless in a partition of a community business, as that proceeding does not involve a "willing buyer and willing seller" contemplated in the definition of fair market value contained in the Treasury Regulations. The court concluded that neither statute nor jurisprudence prohibits a court from recognizing that a community business can have different values depending upon which spouse acquires it.

This focus on two valuation methods has sometimes deprived the courts of the opportunity of considering other valuation methods that may be appropriate or useful in the partitioning of a particular community business. Methods for valuing a business

162. Id. at 813–14.
163. Id. at 814.
164. 842 So. 2d 1160 (La. App. 2d Cir.), writ denied, 847 So. 2d 1269 (La. 2003). For a discussion of the issue of goodwill and its treatment in divorce cases in general and the Ellington case in particular, see Haggar, supra note 143.
165. Ellington, 842 So. 2d at 1167–69. Treasury Regulations Section 25.2512-1 essentially provides that fair market value is that value, expressed in cash or its equivalent, at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts. 26 C.F.R. § 25.2512-1 (2004).
166. Ellington, 842 So. 2d at 1169.
167. In McGehee v. McGehee, 543 So. 2d 1126, 1128–29 (La. App. 1st Cir.), writ denied, 548 So. 2d 327 (La. 1989), the value of the "book of business" of an insurance agency was calculated by determining the amount of insurance commissions and applying a multiplier of 1.5. In Preis v. Preis, 649 So. 2d 593,
that are available and may be appropriate in a partition of a particular business, in addition to an asset-based approach and capitalization of earnings approach, are the discounted cash flow approach, market approach, capitalization of excess earnings approach, investment value approach, intrinsic value approach, freely traded value, and others.\textsuperscript{168}

An asset-based approach to the valuation of a going business considers the net asset value of tangible and intangible assets of the

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\textsuperscript{595} (La. App. 3d Cir. 1994), \textit{writ denied}, 649 So. 2d 392 (La. 1995), the value of the community interest of fifty percent of the stock of a law corporation was fixed at twenty-two percent, the percentage of the net income the husband historically received from the corporation, rejecting a valuation based upon fifty percent of the net assets. In \textit{Head v. Head}, 714 So. 2d 231, 235 (La. App. 2d Cir. 1998), the court used a capitalization of income approach in valuing a business. A number of additions were made to net cash flow for "perks" and personal expenses paid by the business, and the adjusted net cash flow was capitalized at a capitalization rate of twenty-five percent, to arrive at the value of the business. \textit{Id.} at 235. In \textit{Moody v. Moody}, 622 So. 2d 1381, 1384–85 (La. App. 1st Cir. 1993), the value of a community corporation was determined by taking the average of the value derived by using five different valuation methods: book value, economic net worth, capitalization of earnings, capitalization of cash flow, and price earnings ratio.

\textsuperscript{168} The purpose of this article is not to present a detailed explanation of each of these approaches to value, or methods for valuing, a business. Its purpose is to simply alert the reader to the existence of these other approaches to value. The reader can discuss with the forensic expert the applicability and appropriateness of one or more of these approaches to value in a particular situation.

business. This approach is a more appropriate one for a business with significant tangible assets.

The two income approaches are capitalization of earnings and discounted cash flow. The former produces a single measure of investment return by taking a retrospective look at earnings and capitalizing those earnings at a chosen capitalization rate. In contrast to this method, the discounted cash flow method is prospective. The appraiser projects future earnings and then discounts them to present value.

The market approach encompasses several methods: comparable companies, actual sales, and industry formulas.

A hybrid method with characteristics of both the asset-based approach and the market approach is the capitalization of excess earnings method. This method requires an appraisal based upon a reasonable return on tangible assets. The remaining or "excess" earnings of the business are deemed goodwill or intangible value, which is then capitalized.

Investment value is value to a particular investor based on his individual investment requirements, as distinguished from market

170. Id.
171. Id. The court in Head apparently used a combination of these approaches. 714 So. 2d at 234–36. After noting that the most appropriate approach to value the corporate stock was capitalization of earnings, the experts calculated "the net cash flow" of the corporation, capitalized the net cash flow at twenty-five percent, and added back in certain "perks" and other fringe benefits received by the spouses from the corporation. Id.
172. Wilder, supra note 169, at 47.
173. Id.
174. Id.
175. Id.
176. Id. at 48.
177. Id.
178. Id. In Schiro v. Schiro, 839 So. 2d 304, 308–09 (La. App. 5th Cir. 2003), one of the experts valuing a community interest in a corporation used a capitalized excess earnings method of determining the value of the corporation, while another expert used adjusted book value. See generally Barry S. Sziklay, What is Value?, 25 FAM. ADVOC. 6 (2003); Fishman & O'Rourke, supra note 168.
value, which is impersonal and detached. Market value has been called the value of the marketplace and does not assume any particular buyer or seller. Investment value is the specific value to a particular investor or class of investors for individual investment reasons. For example, a business may have a higher value to one potential buyer than to the public generally if that business has synergism with a company already owned by him.

Intrinsic value is used primarily in determining the value of stock and other securities. It represents an analytical judgment of value based upon the perceived characteristics inherent in the investment, not tempered by the value to any one investor (as in investment value) or the market generally (as in market value), but by how these characteristics are perceived by the analyst. Intrinsic value is determined by a rigorous or fundamental analysis of the company’s assets, earning power, dividends, capital structure, management quality, and other factors. The goal is to determine the “true” or “real” worth of the stock, whether or not that is reflected in market price.

Freely traded value is the price at which a closely held company’s stock should or would trade if it were publicly

179. The court in Ellington v. Ellington, 842 So. 2d 1160, 1168–69 (La. App. 2d Cir.), writ denied, 847 So. 2d 1269 (La. 2003), referred to this approach to valuation:

The court is not aware of either statutory or jurisprudential law prohibiting courts from recognizing that a community business can have different values depending upon which spouse acquires it.

* * * *

In the instant case, the trial court determined that the value it placed on NECC was dependent upon which spouse would receive the business. The record, particularly the testimony of the parties and their sons, as well as their respective expert witnesses, supports this conclusion.

180. Fishman & O’Rourke, supra note 168, at 318; Cowley, supra note 168, at 29.

181. Sziklay, supra note 178, at 6; Fishman & O’Rourke, supra note 168, at 320; Cowley, supra note 168, at 25.

182. Fishman & O’Rourke, supra note 168, at 320.

183. Sziklay, supra note 178, at 8; Cowley, supra note 168, at 30.


185. Sziklay, supra note 178, at 8.

The valuator analyzes publicly held companies that are in a business similar to that of the closely held company being valued or which sell to or buy from similar customers. Making appropriate adjustments for size and other factors, the analyst derives his freely traded value figure for the closely held company.

V. MANAGEMENT OF COMMUNITY PROPERTY

Bel v. State Farm Mutual Automobile Insurance Co. involved a claim under a Personal Liability Umbrella Policy ("PLUP") with a $1,000,000 limit of liability. The underlying automobile liability insurance policy had 100/300 coverage as well as 100/300 uninsured/underinsured motorist ("UM") coverage. The PLUP was issued to the wife, who was the only person listed on the declarations page as the named insured. However, the husband had executed a waiver rejecting UM coverage under the PLUP on all vehicles they owned. The husband was killed in an automobile accident involving an uninsured/underinsured motorist. The wife

188. Id.
189. Id. Sziklay, supra note 178, at 9, proposes a new standard of value—a standard of value not necessarily based on transferability—called "Divorce Value," which he describes as an amalgamation of various standards of value: fair-market value, investment value, intrinsic value, and fair value (the value of the stock of a dissenting shareholder). He defines Divorce Value as follows:

Divorce value is the standard of value to be used in valuing ownership interests in privately-held businesses in matrimonial-dissolution matters. It represents the value of a business ownership interest to a marital estate for the sole purpose of enabling a family court to equitably distribute, in whole or in part, the value of the business-ownership interest as an asset of the marital estate. It does not necessarily represent a value for purpose of exchange as does fair-market value, investment value, intrinsic or fundamental value, or fair value.

Divorce value may ignore or consider the effects of valuation adjustments, such as discounts and premiums, that would otherwise be taken into consideration in light of the facts of the case, applicable laws, and cases in the particular state of the ongoing litigation.

Id.
190. 845 So. 2d 459 (La. App. 1st Cir.), writ denied, 845 So. 2d 1058 (La. 2003).
sued the PLUP insurer for damages to herself and their children. Louisiana Revised Statutes Section 22:1406(D)(1)(a)(ii) at that time provided that the UM rejection (waiver) may be “signed by the named insured or his legal representative.” The policy provided, in the definitions, that “named insured” also includes a spouse who resides in the same household as the person listed as the named insured on the declarations page, a standard provision. Therefore, the court concluded that the husband was authorized to execute the rejection of UM coverage under the Insurance Code. Concluding that “the community property laws govern Douglas Bel’s ability to reject UM coverage, despite the language contained in Louisiana Revised Statutes 22:1406(D)(1)(a)(i),” the court also examined whether he was authorized to execute the rejection of UM coverage under the Matrimonial Regimes Act. The court held that the policy was community property because community funds were used to purchase the policy, citing Louisiana Civil Code article 2338. The court quoted the equal management provisions of Louisiana Civil Code article 2346 and concluded that since:

there are no applicable exceptions in law to this codal provision, the community property laws clearly provide . . . that either spouse can take action to dispose of or manage community property . . . [and the husband] had the

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192. Bel, 845 So. 2d at 462.

193. Id.

194. Id. at 463.

195. Id. See also LA. CIV. CODE ANN. art. 2338 (2006) (classifying as community property any property acquired during the existence of the legal regime with community things).

196. LA. CIV. CODE ANN. art. 2346 (2006) (each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law).
authority to reject/dispose of UM coverage in accordance with Louisiana Civil Code art. 2346.\textsuperscript{197}

The court correctly noted that the joint concurrence provisions of article 2347 were not applicable.\textsuperscript{198} Curiously, there is no mention of the exclusive management provision of article 2351, which provides that "[a] spouse has the exclusive right to manage, alienate, encumber, or lease movables issued or registered in his name as provided by law."\textsuperscript{199} Louisiana Revised Statutes Section 22:624, a provision of the Insurance Code, sets forth the required contents of all types of insurance policies issued in Louisiana and provides, in part:

A. The written instrument, in which a contract of insurance is set forth, is the policy.
B. A policy shall specify:
   (1) The names of the parties to the contract . . . . \textsuperscript{200}

The court noted, "only Mary Bel is listed on the declaration page as the named insured."\textsuperscript{201} The policy was "issued . . . in [her] name as provided by law."\textsuperscript{202} It appears that Mrs. Bel had exclusive management rights to the community policy and that Mr. Bel’s rejection of UM coverage was invalid, unless the provision of the Insurance Code, as interpreted by the court, controls over the management provisions of the Matrimonial Regimes Act.\textsuperscript{203}

VI. CONCURRENCE

\textit{Holland v. Barrios} reflects a misunderstanding both as to the nature of the concurrence required of spouses in certain acts of

\begin{itemize}
  \item \textsuperscript{197} Bel, 845 So. 2d at 463.
  \item \textsuperscript{198} Id. at 463 n.5.
  \item \textsuperscript{199} LA. CIV. CODE ANN. art. 2351 (2006).
  \item \textsuperscript{200} LA. REV. STAT. ANN. § 22:624 (2004).
  \item \textsuperscript{201} Bel, 845 So. 2d at 463 n.2.
  \item \textsuperscript{202} Id. at 463.
  \item \textsuperscript{203} The wife claimed that the quoted portion of the Insurance Code that allowed any named insured to reject UM coverage and have that waiver bind any other insured under the policy was unconstitutional. \textit{Id.} However, the court did not pass on the constitutionality of Section 22:1406(D)(1)(a)(i) for the assigned reason that "we find that . . . the community property laws govern [the husband’s] ability to reject UM coverage under the PLUP . . . ." \textit{Id.} 
\end{itemize}
management of community property and the result of lack of concurrence when concurrence is required.\textsuperscript{204} The husband executed an agreement to sell a community immovable to a third party; his wife signed as a witness.\textsuperscript{205} They subsequently donated the immovable to their children.\textsuperscript{206} The third party sought specific performance of the agreement to sell and the nullity of the donation.\textsuperscript{207} The Barrios' children asserted that the agreement to sell was a nullity because the wife did not sign the agreement as an owner, but only as a witness.\textsuperscript{208} They contended that the agreement was an absolute nullity and could not be "ratified" by the wife.\textsuperscript{209} Without questioning these contentions, the court of appeal concluded that since the wife "did not sign the document as a party, but merely as a witness, . . . the agreement is unenforceable because it purports to alienate, encumber or lease community property based on Mr. Barrios' signature alone."\textsuperscript{210}

\begin{itemize}
  \item \textsuperscript{204} 892 So. 2d 675 (La. App. 5th Cir. 2004).
  \item \textsuperscript{205} Id. at 676.
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} Id.
  \item \textsuperscript{208} Id.
  \item \textsuperscript{209} Id.
  \item \textsuperscript{210} Id. at 680. This article preempts the issue of whether a contract to buy and sell an immovable creates real rights and real obligations and thus constitutes an alienation or encumbrance of the immovable. \textit{See} A.N. Yiannopoulos, \textit{Property} § 235, \textit{in} 2 \textit{Louisiana Civil Law Treatise} 475–76 (4th ed. 2001 & Supp. 2005). This issue was neither raised nor decided in \textit{Holland v. Barrios}.

Not all agreements involving community immovable property require the concurrence of both spouses. \textit{Cabibi \& Cabibi v. Hatheway}, 570 So. 2d 104, 110 (La. App. 4th Cir. 1990), \textit{writ denied}, 572 So. 2d 91 (La. 1991), was a case involving an attorney/client agreement signed only by the husband, in which the wife contended that she was not responsible for the attorney fees because she did not give her husband permission to sign the contract. The lawsuit filed pursuant to the attorney/client agreement sought the recission of the sale of immovable property acquired as community property. \textit{Id}. The court rejected the wife's contention:

Furthermore, we reject Bertucci's argument that Civil Code Article 2347 is applicable. That article requires the signatures of both spouses when the alienation, encumbrance or lease of an immovable is involved. The contract with Cabibi was an employment contract for his representation in a lawsuit for damages. Although recission of the sale was an element of the damages sought, we do not consider that fact as
The concurrence requirements of the Matrimonial Regimes Act do not mandate that both spouses be *parties* to the act of alienation, encumbrance, or lease. They require, in the stipulated instances, the *concurrence* of both spouses for certain acts of management of community property.\(^{211}\) If a spouse sells a community immovable, the other spouse is not required also to be a vendor of the community immovable. If a spouse mortgages a community immovable, the other spouse is not required also to be a mortgagor of the community immovable. The other spouse is not required to be "a party to the contract," as stated by *Holland*.\(^{212}\) The other spouse is simply required to concur in the transaction.\(^{213}\) The codal articles do not specify any required form for that concurrence. However, the concurrence of a spouse is a juridical act.\(^{214}\) Therefore, it appears that there should be some action on the part of a spouse that expresses consent.

A review of the prior Louisiana Civil Code article and the debate resulting from the proposed adoption of the concurrence rules confirm this view.

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requiring the spouse's signature on the employment agreement. Furthermore, when the real property was transferred as part of the settlement with Mobil, Bertucci did sign the act of sale.

*Id.*

In *Cajun Capital, Inc. v. Bourque*, 532 So. 2d 272, 273 (La. App. 3d Cir. 1988), the husband signed a listing agreement with a realtor granting the realtor the exclusive right to sell a community enterprise, a flower and gift shop. The Bourques contended that the listing agreement was a nullity because the wife did not concur pursuant to Louisiana Civil Code article 2347, which requires the concurrence of both spouses for the alienation, encumbrance, or lease of all or substantially all of the assets of a community enterprise. *Id.* The court held that the listing agreement did not create a real obligation under Louisiana Civil Code article 1763 with respect to the community enterprise and thus did not require the concurrence of the wife. *Id.* at 274.

\(^{211}\) *See* LA. CIV. CODE ANN. arts. 2347–49, 2353 (2006).

\(^{212}\) *Holland*, 892 So. 2d at 679. The court held the agreement to be unenforceable because the wife "did not sign the document as a party, but merely as a witness." *Id.* at 680.

\(^{213}\) To concur means to agree or to consent. BLACK'S LAW DICTIONARY 309 (8th ed. 2004).

\(^{214}\) LA. CIV. CODE ANN. art. 2347 cmt. (c) (2006).
With limited exceptions, under the prior law, the husband, as head and master of the partnership or community of gains, could administer its effects, dispose of the revenues which they produced, and alienate them by onerous title, without the consent of his wife. 215 Louisiana Civil Code article 2334 of the Civil Code of 1870, as amended by 1962 Louisiana Acts Number 353, contained the following restrictions on the authority of the husband to lease, mortgage, or sell immovable community property:

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.

Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife’s written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated. 216

Under this article, the wife was not required to be a vendor, mortgagor, or a lessor of the community immovable. If community property stood in the name of the wife, the husband could sell or mortgage it, but only with the wife’s “written authority or consent.” 5 217 If title to community immovable property stood in the names of both spouses, the husband could lease, mortgage, or sell it, requiring “the wife’s written authority or consent” only if she had filed the described declaration in the mortgage and conveyance records of the parish in which the property was located. In neither case was the wife required to be a party to the transaction; she had to give her “written authority or

217. Id.
consent” to her husband’s act in leasing, selling, or mortgaging the community immovable.

The proposal to adopt the concurrence language in the 1978 and 1979 revisions of the Louisiana Civil Code articles governing community property evoked considerable commentary. Although commentators agreed that neither the written authority nor consent required under the old law nor the concurrence requirements of the proposed law made a spouse a party to a transaction or imposed personal liability on that spouse whose consent or concurrence was required for certain transactions, those commentators expressed concern that the wife might be required, as a practical matter, to become a party, or a principal, to the transaction and thus incur personal liability arising from the transaction. This result would negate the protection afforded to


219. See Bilbe supra note 218, at 418–19. Bilbe correctly explains:

[T]he requirement of concurrence for alienation, encumbrance or lease of community immovables will result in frequent demands that wives express their concurrence by personally committing themselves as parties to these transactions. Because many creditors are only too happy to obtain the commitment of an additional party, it is particularly important to emphasize that a spouse can satisfy [the] concurrence requirement without incurring personal responsibility.

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[T]he entitlement of a contracting party to the personal responsibility of both spouses depends upon the agreement he has entered into. For example, a married man who signs a contract to sell immovable property incurs a personal responsibility to the buyer. However, if his wife is not a party to this agreement, she incurs no personal responsibility whatsoever. Thus, if she is willing to sign a formal document consenting to her husband’s conveyance of the property, he, if his title is otherwise merchantable, is in a position to fulfill his contractual commitment, and the purchaser who has not bargained for the wife’s participation as a vendor should have no basis for complaint. If, on the other hand, a purchaser in a contract to sell obtains the signatures of both spouses as parties to the transaction, he is entitled to
the wife under the prior law. Underlying these concerns was the recognition that the written authority or consent requirement under the prior law and the concurrence requirement under the present law do not make a spouse a party to the transaction, and that a spouse does not incur liability for the obligations arising out of the transaction as the result of his or her consent or concurrence to the transaction. The requirements of written consent of the wife under prior law and concurrence of the spouses under present law, in certain types of transactions involving enumerated classes of community property, were imposed because of the importance of these types of property and the transactions involving them to the well-being of the family. It might have been better had the legislature prescribed the form in which that concurrence must be expressed in the new legislation, as it did in the prior law, especially with reference to the alienation, encumbrance, or lease of community immovables. However, to permit the granting of concurrence in any manner in which the giving of consent is recognized by the law was a legitimate legislative choice.

The jurisprudence does not provide any definitive guidelines as to what action or inaction constitutes concurrence. In South Central Bell Telephone Co. v. Eisman, the husband executed a written servitude agreement on community property; the wife did not sign the agreement. The appellate court affirmed the factual findings of the trial court that the wife neither gave her consent nor "that her actions comprised a ratification." In Perkins v. B & W Contractors, Inc., at issue was whether the concurrence of the wife was required for the husband to agree to the amendment of restrictive covenants affecting community

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Id. See also Tete, supra note 218, at 505.
220. Tete, supra note 218, at 494.
221. See Bilbe, supra note 218, at 418.
222. 430 So. 2d 256, 257 (La. App. 5th Cir.), writ denied, 437 So. 2d 1154 (La. 1983).
223. Id. at 259.
immovable property. The court held, assuming that the signing of
the amendments fell within the purview of article 2347, that
the lack of concurrence creates only a relative nullity, that the
wife “has not objected to the voting of her interest in those lots in
favor of the amendment,” and that the amendments were valid.
Louisiana Civil Code article 2031 provides that relative nullity
may be invoked only by those persons for whose interest the
ground for nullity was established, which, in this case, was the
wife. The suit was between other owners of subdivision lots;
neither the husband nor the wife were parties to the suit.

In First Federal Savings & Loan Ass’n of Warner Robins,
Georgia v. Delta Towers, Ltd., the issue was whether the
concurrence of the wife was required in the subordination by the
husband of community “in rem” mortgage notes and a vendor’s
lien and mortgage, which the court classified as immovables.
The court held that the subordination was an alienation of
community immovables and that the wife’s concurrence was
required. However, the court found that the wife had renounced
her right to concur by her intervention in the original Act of Credit
Sale and later Act of Modification of the vendor’s lien and
mortgage and of the three promissory notes, although she did not
intervene in the Act of Subordination.

This renunciation of the right of concurrence by the actions of
the wife described by the court presents problems. Louisiana Civil
Code article 2348 provides that a spouse “may expressly renounce
the right to concur” in those instances when the concurrence of a
spouse is required. This article provides that the renunciation

224. 439 So. 2d 652 (La. App. 1st Cir.), writ denied, 443 So. 2d 652 (La.
1983).
227. Perkins, 439 So. 2d at 656.
228. LA. CIV. CODE ANN. art. 2031 (2006).
229. Perkins, 439 So. 2d at 653.
230. 544 So. 2d 1331 (La. App. 4th Cir.), writ denied, 548 So. 2d 1250 (La.
1989).
231. Id. at 1343.
232. Id.
must be express, not implied by some other action or inaction. “Express” means clearly and unmistakably communicated and directly stated. The word is usually contrasted with “implied.” The careful listing in the article of the types or classes of property and the transactions that may be the object of the waiver of concurrence indicates that there must be an intentional renunciation of the right to concur with respect to these enumerated things and acts, not a renunciation that is implied by some action or inaction.

The court further held, even assuming that concurrence of the wife in the subordination was required and that there was no concurrence, that the wife “ratified” the subordination by signing joint tax returns for the year of the subordination and taking advantage of substantial tax benefits attributable to the subordination.

In Kee v. Francis Camel Construction, the husband granted a right of way over community property to the state. The wife signed as a witness, not a party. Both sought damages to the community property caused by a contractor for the state working on the right of way. They contended that the right of way agreement was null and void because it was executed only by the husband. The court found that signing as a witness to the right of way agreement, being aware of the work to be done, not objecting to it or objecting to her husband signing the agreement, constituted a “ratification” by the wife of the right of way agreement.

In Tri-State Bank & Trust v. Moore, the wife did not sign a collateral mortgage on community immovable property executed by her husband. However, she later joined in the execution of a

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234. Id.
236. See id.
237. First Fed. Sav. & Loan, 544 So. 2d at 1344.
238. 532 So. 2d 378, 379 (La. App. 3d Cir. 1988).
239. Id.
240. Id.
241. Id.
242. Id.
243. 609 So. 2d 1091, 1092 (La. App. 2d Cir. 1992).
deed of the same property, in which the sole consideration was recited to be the mortgage executed by her husband. The court held that the execution of the deed was "a ratification of the relatively null mortgage." 244

In French Market Homestead, FSA v. Huddleston, the husband and wife signed a promissory note secured by a mortgage on community immovable property. 245 In foreclosure proceedings, the creditor obtained a judgment against the husband and executed on it under a writ of fieri facias. 246 The wife sought to enjoin the judicial sale of the property, claiming that her concurrence was required to sell the property. 247 The court held that by executing the mortgage on the community immovable, the wife concurred in the encumbrance of the property, and that a natural consequence of that encumbrance was the seizure and sale of the community immovable to satisfy the community obligation. 248 With respect to the judicial mortgage resulting from the judgment, the court held that an encumbrance imposed by law is not subject to the concurrence requirement of a spouse. 249

The use of the concept of ratification to cure a relative nullity in the alienation, encumbrance, or lease of community property because of a lack of concurrence of the other spouse, when such concurrence is required, reflects a conceptual problem in the jurisprudence. 250

A matrimonial regime is a system of principles and rules governing the ownership and management of the property of

244. Id. at 1093.
245. 579 So. 2d 1079, 1080 (La. App. 5th Cir.), writ denied, 586 So. 2d 559 (La. 1991).
246. Id.
247. Id. at 1081.
248. Id. at 1082.
249. Id. See also LA. CIV. CODE ANN. art. 2347 cmt. (a) (2006).
married persons as between themselves and toward third persons.\textsuperscript{251} One of the rules of the legal regime is that each spouse owns a present undivided one-half interest in the community property.\textsuperscript{252} However, the ownership interest of the spouses in community property is subject to the management rules identified in articles 2346 through 2355.1.\textsuperscript{253} Generally, either spouse may, acting alone, manage, control, or dispose of community property.\textsuperscript{254} This equal management right includes the one-half interest that a spouse owns and the one-half interest owned by the other spouse.\textsuperscript{255} The ownership right of each spouse is subject to the management right of the other spouse, including the right to alienate, encumber, or lease the community thing, unless concurrence of the other spouse is required by law.\textsuperscript{256} In exercising these management rights, a spouse does not act as mandatary of the other spouse with respect to the other spouse’s ownership interest in the community thing.\textsuperscript{257} Therefore, this system of rules grants to one spouse the right to lease, alienate, or encumber the property interest of the other spouse in the thing owned by them equally as community property.\textsuperscript{258} There are two modifications to this general rule of equal management. The first modification is the concurrence requirement for certain acts of management with respect to certain designated types of community property.\textsuperscript{259} The second modification is the granting of exclusive management rights in a specified spouse with respect to certain designated types of

\textsuperscript{251} LA. CIV. CODE ANN. art. 2325 (2006). A matrimonial regime may be legal, contractual, or partly legal and partly contractual, LA. CIV. CODE ANN. art. 2326 (2006), or a regime of separation of property, LA. CIV. CODE ANN. art. 2370 (2006). The legal regime is the community of acquets and gains established in Chapter 2 of Title VI, Book III, of the Louisiana Civil Code. LA. CIV. CODE ANN. art. 2327 (2006).

\textsuperscript{252} LA. CIV. CODE ANN. art. 2336 (2006).


\textsuperscript{254} LA. CIV. CODE ANN. art. 2346 (2006).

\textsuperscript{255} LA. CIV. CODE ANN. art. 2336 cmt. (d) (2006).

\textsuperscript{256} LA. CIV. CODE ANN. art. 2346 (2006).

\textsuperscript{257} LA. CIV. CODE ANN. art. 2336 cmt. (d) (2006).

\textsuperscript{258} Id.

\textsuperscript{259} See LA. CIV. CODE ANN. arts. 2347, 2349 (2006).
Neither of these modifications derogates from the principle that one spouse manages, alienates, encumbers, or leases community property; nowhere is there a rule that both spouses must manage, alienate, or encumber community property during the existence of the legal regime. In certain instances, one spouse must have the concurrence, or consent, of the other spouse to act; but in those cases, the other spouse whose concurrence is required is not considered a lessor, vendor, donor, or mortgagor of the community thing. Nor is a spouse the mandatory of the spouse whose concurrence, or consent, is required.

Louisiana Civil Code article 2353 provides that an act with reference to community property entered into by a spouse without the concurrence of the other spouse when such concurrence is required is a relative nullity. Ratification is not the proper juridical act to cure the relative nullity resulting from the lack of concurrence when concurrence is required. Confirmation is the proper juridical act.

Ratification is a declaration whereby a person gives his consent to an obligation incurred on his behalf by another person without authority. Ratification may be express or tacit. On the other hand, confirmation is a declaration whereby a person cures the relative nullity of an obligation. Confirmation may also be express or tacit.

261. See Bilbe, supra note 218, at 418; Tete, supra note 218, at 500.
263. LA. CIV. CODE ANN. art. 2336 cmt. (d) (2006).
266. Tacit means "done or made in silence; implied or indicated, but not actually expressed . . . arising without express contract or agreement." Goree v. Midstates Oil Corp., 18 So. 2d 591, 596 (La. 1944). Tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation. LA. CIV. CODE ANN. art. 1843 (2006).
268. Id.
The Exposé des Motifs of the Projet of Titles III and IV of Book III of the Civil Code of Louisiana explains the differences between "confirmation" and "ratification":

Articles 1842 through 1845 of the revision clarify the law pertaining to confirmation and ratification. Civil Code Article 2272 (1870) spoke of "confirmation or ratification" in a manner that suggested that the two terms were synonymous. The same ambiguity was present in the French original. For that reason, Louisiana courts often spoke of "ratification" when what was truly involved was an act of "confirmation." A person "confirms" a defective act that he himself made. A person "ratifies" an act made on his behalf by another who did not have authority to do so. That distinction was very clear to Toullier. Toullier asserted that the requirements of the French counterpart to Civil Code Article 2272 (1870) did not apply to a ratification. To that effect he cited a decision of the Cour de cassation of December 26, 1815, reported in Sirey, 1816.2.243, in which that court reversed a decision of the court of the city of Nimes, and held that "ratification" is governed by Article 1998 of the Code Napoleon, (which is equivalent to Civil Code Article 3021 (1870)), where no such requirements are prescribed.

Accordingly, Article 1842 of the revision defines "confirmation" essentially as a declaration whereby a person cures the relative nullity of an obligation. The declaration may be implied from voluntary performance, which, in such a case, amounts to a tacit confirmation. A "ratification" is a declaration by which a person gives his consent to an obligation incurred on his behalf by another without authority. Such a declaration may be implied when the person accepts the benefit of the obligation with knowledge that the obligation has been incurred on his behalf by another. The effects of acts of confirmation and ratification are retroactive to the date of the obligation, but
the confirmation or ratification may not impair the rights of third persons.269

As noted in the Exposé des Motifs, a person “confirms” a defective act, a relatively null contract, that he made himself. If a party to a contract did not give free consent at the time the contract was made, it is relatively null.270 A contract that is only relatively null may be confirmed.271 Article 2353 declares that the alienation, encumbrance, or lease of community property by a spouse is relatively null when the concurrence of the other spouse is required by law, unless the other spouse has renounced the right to concur.272

On the other hand, a person “ratifies” an act made on his behalf by another person who did not have authority to do so.273 When a spouse acts without concurrence when concurrence is required, he is not performing an act on behalf of the other spouse without authority to do so. He is acting on his own behalf in alienating, encumbering, or leasing community property. His spouse is not a party to that transaction. Therefore, ratification is not the proper juridical act to cure the relative nullity resulting from lack of concurrence; confirmation is.

As has been pointed out, under pre-1980 law, only the husband, as head and master of the community, could incur a community obligation.274 The wife had neither express nor implied authority to alienate or encumber community property or to bind the community.275 The husband was liable for the act of the wife only if she acted as an agent for the community276 or the

274. See cases cited infra notes 275–78.
obligation was ratified by the husband.\textsuperscript{277} Because she had no authority to bind the husband as head and master of the community, yet purported to do so, it was proper to say that the husband ratified her actions.\textsuperscript{278}

A case in which ratification was properly used is \textit{Frazier v. Harper}.\textsuperscript{279} After a divorce and resulting termination of the community, the husband agreed to the extinguishment of a community interest in a Delta Airlines pension plan and the substitution of an interest in a new pension plan.\textsuperscript{280} The case was decided prior to the enactment of the special rules governing the management of former community property.\textsuperscript{281} Therefore, upon the termination of the community, the former spouses became ordinary co-owners of the community pension benefits accrued as a result of his employment during their community.\textsuperscript{282} Under those co-ownership rules, although the husband could alienate or encumber his share of the pension rights held in indivision without the consent of his co-owner former wife, he could not alienate or encumber the interest of his co-owner former wife without her consent.\textsuperscript{283} He did not have her consent to alienate her interest in


279. 600 So. 2d 59 (La. 1992).

280. \textit{Id.} at 60.

281. \textit{LA. CIV. CODE ANN.} art. 2369.1 (1994), \textit{amended by} 1995 \textit{La. Acts No. 433, § 1} (providing seven special rules for the management of former community property until a partition, or the death or judgment of declaration of death of a spouse, when the community property regime terminated for a cause other than the death or judgment of declaration of death of a spouse). \textit{See also LA. CIV. CODE ANN. arts. 2369.2–69.8} (2006).

282. Louisiana Civil Code article 2369.1, prior to its amendment, provided: "After termination of the community property regime, the provisions governing co-ownership apply unless there is contrary provision of law or juridical act." \textit{LA. CIV. CODE ANN.} art. 2369.1 (1994), \textit{amended by} 1995 \textit{La. Acts No. 433, § 1}. The provisions governing co-ownership added by 1990 \textit{La. Acts No. 990, § 1} are contained in Louisiana Civil Code articles 797–818.

the old pension plan and substitute it with an interest in the new pension plan. However, the Louisiana Supreme Court held that her action in instituting suit for recognition of her interest in the substituted pension plan constituted her ratification of the unauthorized action of her husband in extinguishing her rights under the old pension plan and substituting a new pension plan.

Although not without conceptual difficulty, the better practice in these cases involving acts by a spouse without concurrence when concurrence is required is to use the concept of confirmation. Confirmation is the proper concept since article 2353 declares the transaction to be a relative nullity and article 2031 declares that the proper method to cure a relative nullity is by confirmation.

VII. REIMBURSEMENT CLAIMS

Louisiana Civil Code article 2365 authorizes reimbursement to a spouse who has used his separate property to satisfy a community obligation. However, the third, fourth, and

284. Frazier, 600 So. 2d at 62.
285. Id. See also Garrett v. Walker, 407 So. 2d 1309, 1312–13 (La. App. 3d Cir. 1981), decided under prior law, in which the husband was held to have ratified the imposition of a mortgage imposed on property by the wife when she purchased it. The court found the property to be community property. Id. at 1313. The husband ratified the act of the wife by suing to have the property decreed to be community property and thus seeking by the suit to claim the benefit of the purchase of the property by the wife. Id. A husband at that time was not liable for a debt solely contracted by his wife unless the husband ratified the indebtedness. See McCary’s Shreve City Jewelers, Inc. v. Saucier, 318 So. 2d 671 (La. App. 2d Cir. 1977).
286. The Exposé des Motifs states that a person “confirms” a defective act that he himself made. See supra note 269. However, when a spouse acts without concurrence when concurrence is required, he may not cure the nullity himself by confirming the act; only the other spouse, whose concurrence was required but not obtained, can confirm it.
289. LA. CIV. CODE ANN. art. 2365 (2006). The reimbursement claims of spouses in a legal regime are subject to a ten year prescription commencing upon termination of the community. LeBlanc v. LeBlanc, 915 So. 2d 966, 970 (La. App. 3d Cir. 2005).
290. Gautreau v. Gautreau, 697 So. 2d 1339 (La. App. 3d Cir.), writ denied, 703 So. 2d 1272 (La. 1997); Bergeron v. Bergeron, 693 So. 2d 199 (La. App. 3d
fifth circuits have created a jurisprudential exception to this statutory reimbursement rule. The genesis of this exception was the fifth circuit case of *Gachez v. Gachez*. In *Gachez*, the court denied the husband's reimbursement claim for the car notes he paid with his separate funds on a community automobile while he was using it after the divorce. Noting that automobiles tend to depreciate in value over a period of time and concluding that the use of a vehicle is directly related to its depreciation, the court invoked equity as the basis for denying reimbursement. The fourth circuit adopted the *Gachez* rationale in *Davezac v. Davezac*.

Conversely, the first circuit in *Williams v. Williams*, observing that the fourth and fifth circuits had chosen to treat reimbursement from separate property differently depending on whether the debt paid was on movable or immovable property, correctly noted that Louisiana Civil Code article 2365 "makes no such distinction." The second circuit in *Chance v. Chance* concurred in the *Williams* court's assessment of article 2365: "Apparently, our colleagues of the third, fourth, and fifth circuits have elected to treat such reimbursement claims differently, depending upon whether the

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293. See *Rigby*, supra note 123, at 500, for a criticism of these cases. See also *Rigby, Matrimonial Regimes*, supra note 21, at 421, for the same criticism of *Stewart v. Stewart*, 728 So. 2d 473 (La. App. 3d Cir. 1998), writ denied, 740 So. 2d 114 (La. 1999), in which the court denied a reimbursement claim for maintenance expenses of an automobile used by the claimant spouse. The writer suggested an alternate analysis consistent with the Civil Code articles. *Id.*


295. *Id.* at 614.

296. *Id.*

297. 483 So. 2d 1197 (La. App. 4th Cir. 1986).

mortgage payments pertain to movable or immovable property. Even so, we concur with the first circuit that La. C.C. art. 2365 makes no such distinction.\textsuperscript{299}

However, in \textit{Gill v. Gill}, the second circuit, without mentioning \textit{Chance}, adopted the reasoning of the third, fourth, and fifth circuits when it disallowed an article 2365 reimbursement claim because of the rapid depreciation of automobiles.\textsuperscript{300} Agreeing with the reasoning of these courts, the second circuit stated that the "car note payments by the spouse using the vehicle are considered as payment for the depreciation caused by such use."\textsuperscript{301} Nevertheless, the court neglected to consider that the major factor in automobile depreciation, or the reduction in the automobile's market value, is the introduction of new models rather than the use of the automobile. A new automobile's market value immediately decreases once it is purchased and driven off of the dealer's lot. This immediate decrease in value is not primarily due to the mileage that the car has been driven. More importantly, however, this rule violates the major premise of all but one of the reimbursement rules of the community regime because it is contrary to the plain language of these articles.\textsuperscript{302} Prior to the adoption of the Matrimonial Regimes Act, the measure of reimbursement in all cases was one-half of the enhanced value of the community or separate property benefited by the expenditure of money or labor.\textsuperscript{303} In the revision, this measure of

\begin{itemize}
\item \textsuperscript{299} 694 So. 2d 613, 616 (La. App. 2d Cir. 1997), overruled by Mason v. Mason, 927 So. 2d 1235 (La. App. 2d Cir. 2006).
\item \textsuperscript{300} 895 So. 2d 807, 818 (La. App. 2d Cir. 2000).
\item \textsuperscript{301} \textit{Id.}
\item \textsuperscript{302} \textit{See} LA. CIV. CODE ANN. arts. 2364-67.2 (2006).
\item \textsuperscript{303} LA. CIV. CODE ANN. art. 2408 (1870), \textit{repealed by} 1970 La. Acts No. 709, § 1. Former article 2408 provided:
\begin{quote}
When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.
\end{quote}
\item \textit{Id.}\
\end{itemize}
reimbursement was changed to one-half of the value of the separate or community thing used for all articles except for article 2368.\textsuperscript{304} No provision for charging a spouse for the depreciation occasioned by that spouse's use of the former community property, now co-owned property, may be found in the revised reimbursement articles or the co-ownership articles.\textsuperscript{305} Co-owners of property ordinarily do not owe rent to each other for the use of co-owned property.\textsuperscript{306} Nor should they be charged with the depreciation of the co-owned property.

This issue has had an interesting history in the third circuit. In \textit{Preis v. Preis}, the third circuit adopted the fourth and fifth circuits' rule disallowing reimbursement for mortgage payments on a depreciable automobile when the claimant spouse had the exclusive use of the movable during the period the payments were made.\textsuperscript{307} That rule was extended to reimbursement for telephone equipment in \textit{Jurgelskey v. Pivac}\textsuperscript{308} and reaffirmed in \textit{Bergeron v. Bergeron}.\textsuperscript{309} In the latter case, Judge Woodard questioned the validity of this interpretation of article 2365, stating that it departed "from the plain language of Article 2365" and that "Article 2365 does not make a distinction between movable and immovable property."\textsuperscript{310} Judge Woodard is correct. Writing for the court in \textit{Nash v. Nash}, Judge Woodard wrote that \textit{Preis} and \textit{Bergeron} "are inconsistent with our interpretation of Louisiana Civil Code art.

\textsuperscript{305} In denying reimbursement for the payment of mortgage notes on a depreciable asset when the spouse seeking reimbursement had the use of the asset during the period of time when the payments were made, the second circuit stated, "The car note payments by the spouse using the vehicle are considered as payment for the depreciation caused by such use." \textit{Gill}, 895 So. 2d at 818.
\textsuperscript{306} McCarroll v. McCarroll, 701 So. 2d 1280, 1287 (La. 1997); Young v. Smith, 715 So. 2d 479, 481 (La. App. 2d Cir. 1998).
\textsuperscript{307} 649 So. 2d 593, 596–97 (La. App. 3d Cir. 1994), \textit{writ denied}, 649 So. 2d 392 (La. 1995). See the cases cited \textit{supra} notes 291–92 for a discussion of the rule in the fourth and fifth circuits.
\textsuperscript{308} 614 So. 2d 1331, 1333 (La. App. 3d Cir. 1993).
\textsuperscript{309} 693 So. 2d 199 (La. App. 3d Cir. 1997).
\textsuperscript{310} \textit{Id.} at 203.
2365 and we decline to follow them.\textsuperscript{311} However, in \textit{Sheridon v. Sheridon}, an en banc decision, the third circuit overruled \textit{Nash}.\textsuperscript{312}

The significance and far-reaching effect of the court's decision in \textit{Sheridon} cannot be overemphasized. The court reinstated its depreciable movable rule of \textit{Preis} and \textit{Bergeron}.\textsuperscript{313} However, it went much further. It held that the reimbursement claim under article 2365 for the use of separate property to satisfy a community obligation applies "solely to debts paid during the marriage, and not those paid after divorce."\textsuperscript{314} The court held that the wife was entitled under this article "to reimbursement for community debts she paid with separate funds before termination of the marriage," and that the article does not apply to debts paid after termination of the marriage.\textsuperscript{315} The following is the court's language:

\begin{quote}
Louisiana Civil Code Article 2365 provides:
If separate property of a spouse has been used to satisfy a community obligation, that spouse, upon termination of the community property regime, is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. The liability of a spouse who owes reimbursement is limited to the value of his share in the community after deduction of all community obligations.

The phrase "upon termination of the community property regime" is crucial to our interpretation of La.Civ.Code art. 2365. The Article does not say "upon partition," but specifically uses the words "upon termination." Because of the specific language used, it is clear that the reimbursement scheme contemplated by La.Civ.Code art. 2365 pertains solely to debts paid during the marriage, and not those paid after divorce. Thus, Ms. Sheridon would be entitled, under La.Civ.Code art. 2365, to reimbursement for community debts she paid with separate funds before
\end{quote}

\begin{footnotes}
\item 311. 799 So. 2d 829, 830 (La. App. 3d Cir. 2001), \textit{writ denied}, 808 So. 2d 344 (La. 2002), \textit{overruled by} Sheridon v. Sheridon, 867 So. 2d 38 (La. App. 3d Cir. 2004).
\item 312. 867 So. 2d 38 (La. App. 3d Cir. 2004).
\item 313. \textit{Id.} at 44.
\item 314. \textit{Id.}
\item 315. \textit{Id.}
\end{footnotes}
termination of the marriage. As such, La.Civ.Code art. 2365 is not applicable to the matter before us, and we specifically overrule this holding in Nash.

In doing so, we conclude that the trial court erred in ordering Mr. Sheridon to reimburse Ms. Sheridon one half of the amount she paid on the Pontiac Firebird between October 5, 1999, and November 15, 2001. Thus, we find merit in the assignment of error.

The phrase "upon termination of the community regime" does not relate in any way to the time when the debts subject to reimbursement were paid. Rather, it restates the ancient rule establishing the time when the action for reimbursement may be instituted. There has always been a strong public policy in favor of postponing settlement of the accounts between spouses and claims for reimbursement until the termination of the community. The quoted language reflects the continuation of this public policy.

316. Id.

317. The phrase "upon termination of a (or the) community property regime" or the phrase "upon termination of the community" appears in the introductory article to the Civil Code articles containing the reimbursement rules, La. CIV. CODE ANN. art. 2358 (2006), and in all but one of the reimbursement articles. See LA. CIV. CODE ANN. arts. 2364-67.1 (2006). It does not appear in article 2368. See LA. CIV. CODE ANN. art. 2368 (2006).

318. See Sheridon, 867 So. 2d at 51 (Woodward, J., dissenting in part, concurring in part). This conclusion is reflected in the statute providing the procedural rules for the partition of community property and the settlement of the claims between the spouses arising from a matrimonial regime or from the co-ownership of former community property following the termination of the legal regime. See LA. REV. STAT. ANN. § 9:2801A (2006). Section 9:2801A limits this procedure to an action that would result in a termination of the matrimonial regime or an action instituted after the termination of the matrimonial regime. Id. In the former case, no judgment of partition shall be rendered unless rendered in conjunction with, or subsequent to, the judgment which has the effect of terminating the matrimonial regime. Id. § 9:2802. Section 9:2801A, in its use of the phrase, "the settlement of the claims between spouses arising from . . . the co-ownership of former community property following termination of the matrimonial regime" contemplates reimbursement claims arising after the termination of the legal regime. Id. § 9:2801A. In fact, this is when most reimbursement claims arise.

319. Driggers v. Driggers, 569 So. 2d 1066, 1067 (La. App. 3d Cir. 1990). Under prior law, an exception to this rule was the claim of the wife against the husband for the restitution of the administration of her paraphernal property.
The court in *Sheridon*, after quoting the phrase "upon termination of community regime," holds that the article permits reimbursement solely for debts paid during "the marriage," thus equating the termination of the legal regime with the termination of the marriage.\(^{320}\) It is a rare situation, however, for the community termination date and the marriage termination date to be the same.

In *Sheridon*, the community was terminated effective October 5, 1999, by a judgment of divorce rendered August 31, 2000.\(^{321}\) The four-day trial of the partition action ended November 15, 2001.\(^{322}\) The court denied the wife reimbursement for payments she made on the automobile "between October 5, 1999, and November 15, 2001."\(^{323}\) However, she was married when she made the payments between October 5, 1999, the date the community terminated, and August 31, 2000, the date of the divorce.\(^{324}\) This is inconsistent with the court's ruling that "La. Civ. Code art. 2365 pertains solely to debts paid during the marriage and not those paid after divorce," and that Mrs. Sheridon "would be entitled, under La. Civ. Code art. 2365, to

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320. *Sheridon*, 867 So. 2d at 44. The court stated:

The phrase "upon termination of the community property regime" is crucial to our interpretation of La.Civ.Code art. 2365. The Article does not say "upon partition," but specifically uses the words "upon termination." Because of the specific language used, it is clear that the reimbursement scheme contemplated by La.Civ.Code art. 2365 pertains solely to debts paid during the marriage and not those paid after divorce. Thus, Ms. Sheridon would be entitled, under La.Civ.Code art. 2365, to reimbursement for community debts she paid with separate funds before termination of the marriage. As such, La.Civ.Code art. 2365 is not applicable to the matter before us, and we specifically overrule this holding in *Nash*.

*Id.*

321. *Id.* at 41. *See also* LA. CIV. CODE ANN. art. 159 (2006).
322. *Sheridon*, 867 So. 2d at 41.
323. *Id.* at 42.
324. *Id.*
reimbursement for community debts she paid with her separate funds before termination of the marriage.\textsuperscript{325} Also, inconsistently, the court allowed Mrs. Sheridon reimbursement for one-half of the mortgage payments on the family home that she had made between October 5, 1999, and November 15, 2001, the same period for which she was denied reimbursement for the automobile payments.\textsuperscript{326} This span of time also included a period after the divorce on August 31, 2000.\textsuperscript{327}

In a subsequent third circuit case, \textit{Philmon v. Philmon}, this same inconsistency in the declaration of the law and its application is repeated.\textsuperscript{328} The Philmons were divorced August 4, 2000.\textsuperscript{329} The husband occupied and paid the mortgage payments on the family home from February 1, 2001, through June 18, 2003, the date of the partition judgment in which he was awarded the home.\textsuperscript{330} Relying on \textit{Sheridon}, the court affirmed the reimbursement award for the payments made entirely during this post-divorce period:

Mrs. Haymark contends that \textit{Sheridon} supports disallowance of reimbursement for mortgage payments, however, this reading of \textit{Sheridon} is incorrect. In \textit{Sheridon}, the court allowed Mrs. Sheridon to receive reimbursement for mortgage payments made from October 5, 1999 until November 15, 2001 (period from the date Mrs. Sheridon filed for divorce until the date of partition). The court disallowed the reimbursement of mortgage payments made from November 15, 2001 until August 15, 2002 (the date of partition to the date of judgment). The portion of the opinion Mrs. Haymark quotes pertains to reimbursement for payments made on a community movable and does not pertain to a community immovable.

\textsuperscript{325} Id. at 44.
\textsuperscript{326} Id. at 49. However, the court disallowed reimbursement for the mortgage payments made after the last day of the partition trial, November 15, 2001, and before August 16, 2002, the date upon which the court issued written reasons for judgment. Id.
\textsuperscript{327} Id.
\textsuperscript{328} 886 So. 2d 1222 (La. App. 3d Cir. 2004).
\textsuperscript{329} Id. at 1224.
\textsuperscript{330} Id. at 1225.
Mr. Philmon maintained the family home and paid all the mortgage payments from February 2001 through June 2003. This time period is prior to the community partition and as such, the home remained community property. The Sheridon case supports our decision today as they allowed reimbursement for the period the home was community property, but disallowed reimbursement for the period of time following the partition. Therefore, we affirm the trial court’s decision to award the defendant reimbursement for mortgage payments made on the family home from February 2001 until June 2003.331

There are, however, much more serious concerns than these. Both the introductory article and all but one of the reimbursement articles contain the phrase “upon termination of the [or a] community property regime.”332 If that phrase means what Sheridon suggests, the claims for which reimbursement may be sought have been greatly reduced. The reimbursement claim most commonly urged in a partition action, the use of separate funds to pay a community obligation after termination of the community,

331. Id. at 1227 (citation omitted). The opinion states, in the quoted portion reproduced above, that the time period (for which reimbursement was allowed) is prior to the community partition and as such, the home is considered community property and that “[t]he Sheridon case supports our decision today as they [sic] allowed reimbursement for the period the home was community property . . . .” Id. Of course, the property did not remain community property after the termination of the community regime by the judgment of divorce. See id. It was former community property, now co-owned by the spouses. Id. See also LA. CIV. CODE ANN. arts 2369.1–69.8 (2006). All of the payments for which reimbursement was allowed were made after the judgment of divorce. Philmon, 886 So. 2d at 1227. This is inconsistent with Sheridon’s ruling that article 2365 permits reimbursement only for payments made during the marriage and not those made after divorce. The court’s apparent distinction between payments made on a community movable after divorce, reimbursement for which is not allowed, and those made on a community immovable after divorce, for which reimbursement is allowed, finds no basis in the Civil Code.

In Moore v. Moore, 917 So. 2d 1126, 1131 (La. App. 3d Cir. 2005), the court reaffirmed that in Sheridon it allowed reimbursement for mortgage payments made after termination of the community, after stating that in Sheridon it held that article 2365 “pertains solely to debts paid during the marriage, and not to those paid after termination of the community.”

has been eliminated. The vast majority of reimbursement claims involve the payment of community obligations with separate funds after termination of the community.\textsuperscript{333} Most of these are the result of the payment of community obligations which are outstanding at the time of the termination of the community, paid by one or both spouses out of their current earnings, their separate property.\textsuperscript{334} These include myriad types of community obligations, including a mortgage on the family home, mortgages on automobiles, boats, motors and trailers, unsecured bank loans, and multiple credit card balances.\textsuperscript{335}

Nor may the use of Louisiana Civil Code article 806 be a viable vehicle on which to base the vast majority of reimbursement claims. Louisiana Civil Code article 806 limits reimbursement to three types of claims arising "on account of the thing held in indivision."\textsuperscript{336} This article, contained in the articles regulating ownership in indivision,\textsuperscript{337} applies only when two or more persons own the same thing and is restricted to certain types of claims arising out of the co-owned thing.\textsuperscript{338} First, according to \textit{Roque v. Tate} and its progeny, Louisiana Civil Code article 806 does not authorize reimbursement for the payments made on a mortgage on former community property.\textsuperscript{339} Louisiana Civil Code article 2365 is the controlling article because a mortgage is not a "necessary expense," as that term is used in article 806.\textsuperscript{340} Many of the

\textsuperscript{333}. This observation is based upon the experience of the writer and other family law practitioners.
\textsuperscript{334}. \textit{Id}.
\textsuperscript{335}. \textit{Id}.
\textsuperscript{336}. \textsc{la. civ. code ann. art. 806 (2006)}.
\textsuperscript{337}. \textit{See la. civ. code ann. arts. 797-818 (2006)}. These are ordinary expenses, expenses for ordinary maintenance and repairs, and necessary management expenses paid to third persons. \textit{Id}.
\textsuperscript{338}. \textsc{la. civ. code ann. art. 806 (2006)}.
\textsuperscript{340}. Roque, 631 So. 2d at 1387. This case has been criticized by the writer. \textit{See} Rigby, \textit{supra} note 123, at 510.
reimbursement claims asserted after termination of the community do not arise out of the co-ownership of former community property.\textsuperscript{341} They arise out of the payment of unsecured community obligations such as credit card balances, unsecured loans, utility bills, department store charge accounts, and many others to which the co-ownership rules have no application.\textsuperscript{342}

Combined, the decisions holding that article 806 does not authorize reimbursement for payments made on a mortgage on co-owned former community property because article 2365 is the controlling article for this type of reimbursement claim, and the decisions holding that article 2365 does not allow reimbursement for payments made after divorce on community obligations create a conundrum.

Also, the \textit{Sheridon} ruling results in a disincentive for spouses to pay community obligations after termination of the community. This results in a windfall to the spouse who does not contribute to the payment of the former community obligations, and an unjust burden on the spouse who does. The \textit{Sheridon} error, like the \textit{Gachez} depreciable assets error, must be judicially or legislatively corrected.

\textit{Gill v. Gill} also presented the issue of the proper measure of reimbursement to the husband for mortgage payments made with community funds on a building in which the wife practiced her profession as a certified public accountant and a house in which the couple first resided during their marriage.\textsuperscript{343} Both immovables were the separate property of the wife.\textsuperscript{344} The issue was whether the reimbursement claim was limited to one-half of the principal portion of the payments made with community funds.\textsuperscript{345} Although both claims were rejected for lack of an evidentiary breakdown of the mortgage payments between principal and interest, the case contains a review of the jurisprudence.\textsuperscript{346} If the separate property produces civil fruits during the community regime, the interest

\textsuperscript{341} This is based on the experience of the writer and other family law practitioners.
\textsuperscript{342} \textit{Id}.
\textsuperscript{343} 895 So. 2d 807 (La. App. 2d Cir. 2005).
\textsuperscript{344} \textit{Id} at 810.
\textsuperscript{345} \textit{Id} at 811.
\textsuperscript{346} \textit{Id} at 811–13.
paid is treated as a cost of providing those civil fruits, which are community property absent the filing of a required reservation.\textsuperscript{347} Therefore, as a cost of producing community income, the interest is treated as a community expense and no reimbursement is due for it.\textsuperscript{348} However, if the separate immovable does not produce civil fruits or other income, the measure of reimbursement is one-half of the total payment.\textsuperscript{349} If the separate immovable is a house occupied as the home of the spouses during the legal regime, jurisprudence has disallowed a reimbursement claim for the taxes, insurance, and interest paid, allowing reimbursement for only the principal paid.\textsuperscript{350} The genesis for this jurisprudence is \textit{Hurta v. Hurta}, decided under prior law.\textsuperscript{351}

In \textit{Hurta}, the husband owned as separate property a house which was used as the marital home.\textsuperscript{352} Community funds were used to pay the mortgage note during the marriage, including principal, interest, and taxes.\textsuperscript{353} Former Louisiana Civil Code article 2402 provided that the community consisted of the profits of all of the effects of which the husband (as head and master of the community) had the administration and enjoyment.\textsuperscript{354} The


\textsuperscript{348} \textit{Hurta,} 260 So. 2d at 327. \textit{See also} Munson v. Munson, 772 So. 2d 141, 146 n.13 (La. App. 3d Cir. 2000) and the cases cited therein.

\textsuperscript{349} Munson, 772 So. 2d at 146. This was the result in \textit{Gill v. Gill}, 895 So. 2d 807, 819 (La. App. 2d Cir. 2005), which allowed the wife full reimbursement for the mortgage payments made by her post-termination on the community house occupied by her.

\textsuperscript{350} Hurta, 260 So. 2d at 326–27.

\textsuperscript{351} Id.

\textsuperscript{352} Id. at 324.

\textsuperscript{353} Id.

\textsuperscript{354} LA. CIV. CODE ANN. art. 2402 (1870), \textit{repealed by} 1979 La. Acts No. 709, § 1. Former article 2402 provided:

This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during
fourth circuit held that “a community which uses as its home a house belonging to the husband’s separate estate does receive the ‘profits’ of that home.” 355 Therefore, it concluded that the taxes, insurance premiums, and interest included in the payments were properly paid out of the community and that the “community” did not have a reimbursement claim against the husband for these expenditures. 356 Hurta was followed by Willis v. Willis, which was decided under the present matrimonial regimes law and involved payments on the mortgage both before and after January 1, 1980, the effective date of the present matrimonial regimes law. 357 With respect to the payments made before January 1, 1980, the court applied the Hurta analysis. 358 With respect to the payments made after January 1, 1980, the court correctly stated that the natural and civil fruits of separate property are community property unless reserved. 359 The court then held that the use of the husband’s separate property by the spouses as the marital residence “was an enjoyment of the ‘natural and civil fruits’ of the separate property.” 360 However, the use of a thing is neither a natural fruit nor a civil fruit of that thing. 361 The jurisprudence has continued to rely on Willis and its flawed analysis without reexamining the

the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way ....

Id.
355. Hurta, 260 So. 2d at 327.
356. Id.
357. 454 So. 2d 429 (La. App. 3d Cir. 1984).
358. Id. at 430.
359. Id. at 431.
360. Id.
361. LA. CIV. CODE ANN. art. 551 (2006) (defining fruits as things that are produced by or derived from another thing without diminution of its substance). It states that there are two kinds of fruits: natural fruits and civil fruits. Id. Natural fruits are the products of the earth or of animals. Id. Civil fruits are revenues derived from a thing by operation of law as by reason of a juridical act, such as rentals, interest, and certain corporate dividends. Id. Nowhere is it suggested that the use of a thing is a fruit, natural or civil, of the thing used. In fact, the right to use a thing is one of three types of personal servitudes: usufruct, habitation, and rights of use. See LA. CIV. CODE ANN. art. 534 (2006). The right of use is governed by the provisions of articles 639–645. See LA. CIV. CODE ANN. arts. 639–45 (2006).
issue. It has been suggested that the jurisprudence can be explained by the application of that portion of Louisiana Civil Code article 2363 defining a separate obligation, in part, as one incurred for the separate property of a spouse "to the extent that it does not benefit the community, the family, or the other spouse." The inference is that insofar as it benefits one of these classes, it is a community obligation. The resolution of the issue in terms of the definition of the obligation instead of the reimbursement rules is not without difficulty. The obligation in these cases is the indebtedness incurred prior to marriage, secured by a mortgage. The obligation is not the payments made to satisfy the obligation. The classification of an obligation is determined, in part, by when it is incurred and, if incurred during the existence of the legal regime, by the intent or purpose in incurring the obligation. As with the classification of things, an obligation is classified as separate or community at the moment the obligation is incurred. Having been incurred prior to the establishment of the legal regime, the obligation is the separate obligation of the spouse who incurred it. The obligation is secured by a mortgage on separate property. The classification of funds used to pay a mortgage indebtedness on a house cannot change the classification of the house; neither should a benefit accruing to "the community, the family, or the other spouse" subsequent to the

363. LA. CIV. CODE ANN. art. 2363 (2006) (defining a separate obligation, in part, as "an obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse").
364. Spaht & Hargrave, supra note 19, at § 7.12, at 375 n.49.
368. See LA. CIV. CODE ANN. art. 3278 (2006).
incurring of the obligation, the use by the family of the residence upon which the mortgage was imposed prior to marriage, change the classification of the obligation, in whole or in part. The quoted provision of article 2363 applies to an obligation incurred during the community property regime for the benefit of separate property of a spouse but which also benefits the family. If a spouse incurs an obligation to extensively renovate separate rental property in order to increase the rent to be received from it, the renovations may increase the value of the separate property as well as increase community rental income. Such an obligation is partly community and partly separate. This provision of article 2363 should not be applied so as to retroactively change the separate classification of an obligation incurred prior to the establishment of the community regime.

In the case of the use of mortgaged separate property as a marital residence, the plain language of article 2364 should be applied, and the measure of reimbursement should be one-half of the value of the community money used to satisfy the mortgage indebtedness.

VIII. INTERSPOUSAL DUTIES UNDER LOUISIANA CIVIL CODE

ARTICLE 2369.3

Ellington v. Ellington involved the application of Louisiana Civil Code article 2369.3 in two situations: (1) the operation of a community corporation, and (2) the disposition of a certificate of deposit owned by the corporation. Article 2369.3 imposes a duty on a spouse to preserve and manage prudently, in the manner outlined in the article, former community property under the control of a spouse. In Ellington, the corporation was engaged in the business of buying cotton from farmers, cotton gins, and others and selling it to textile mills and shippers. The first situation involved a claim that the husband had formed, after the termination of the community, two new corporations for the

371. Id.
372. 842 So. 2d 1160, 1163 (La. App. 2d Cir.), writ denied, 847 So. 2d 1269 (La. 2003).
373. LA. CIV. CODE ANN. art. 2369.3 (2006).
374. Ellington, 842 So. 2d at 1163.
purpose of diverting the assets of the community corporation to the two new corporations. The court found that the wife had not proven this claim. The court found that these two new corporations were formed for legitimate purposes, that the transactions between the corporations were at arm's length and in good faith, and that there was no violation by the husband of his article 2369.3 duty to his wife.

In a similar case, Brown v. Brown, the fiduciary duties of officers and directors of a corporation to the corporation and its stockholders were invoked instead of the article 2369.3 duty to the other spouse. When Brown was decided, this approach had a distinct advantage. The corporate officer owed a fiduciary duty to the corporation and its stockholders, and he had the burden of proving that he had not breached his fiduciary duty. A spouse

375. Id. at 1171.
376. Id. at 1175.
377. Id.
379. At the time Brown was decided, Louisiana Revised Statutes Section 12:91 provided:
   Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and its shareholders, and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment and skill which ordinarily prudent men would exercise under similar circumstances in like positions. Nothing herein contained shall derogate from any indemnification authorized by R.S. 12:83.

The amendment of Section 12:91 made substantial changes to the section. See LA. REV. STAT. ANN. § 12:91 (1994 & Supp. 2006). Although retaining the fiduciary duty of the officers and directors to the corporation and its shareholders, it lowered the standard of care and imposed the burden of proof on the person alleging a breach of the duty imposed by the statute. Id. Although Section 12:91 may encompass a violation of duties not owed under Louisiana Civil Code article 2369.3, the advantage of the use of Section 12:91 in the case of former community property has been greatly diminished if not eliminated entirely. Compare LA. CIV. CODE ANN. art. 2369.3 (2006), with LA. REV. STAT. ANN. § 12:91 (1994 & Supp. 2006).
380. Thornton ex rel. Laneco Constr. Sys., Inc. v. Lanehart, 723 So. 2d 1127, 1134 (La. App. 1st Cir. 1998), writ denied, 740 So. 2d 115 (La. 1999); Scurria v. Hodge, 720 So. 2d 460, 465 (La. App. 2d Cir. 1998), writ denied, 739 So. 2d 782 (La. 1999). On the other hand, the spouse alleging a violation of the article
subject to the article 2369.3 duty has the standard of care of a usufructuary.\textsuperscript{381}

The second situation in \textit{Ellington} concerned the "cashing in" of a \$500,000.00 certificate of deposit owned by the corporation in order to liquidate a bank debt owed by the corporation.\textsuperscript{382} The court held that this transaction was not a violation of the husband's article 2369.3 duty.\textsuperscript{383} The application of this article to this transaction is doubtful. The article imposes upon a spouse an affirmative duty to preserve and manage prudently former community property under his control in a manner consistent with the mode of use of that property immediately prior to the termination of the community regime.\textsuperscript{384} Property owned by a corporation is neither community nor separate property of the spouses who own stock in the corporation as community property.\textsuperscript{385} It is owned by the juridical person, the corporation.\textsuperscript{386}

\textsuperscript{381} duty by the other spouse has the burden of proof. \textit{Ellington}, 842 So. 2d at 1172.


\textsuperscript{382} \textit{Ellington}, 842 So. 2d at 1174.

\textsuperscript{383} \textit{Id.} at 1175.

\textsuperscript{384} \textit{See} L. A. CIV. CODE ANN. art. 2369.3 (2006).

\textsuperscript{385} McClanahan v. McClanahan, 868 So. 2d 844, 849-50 (La. App. 5th Cir.), \textit{writ denied}, 882 So. 2d 609 (La. 2004).

\textsuperscript{386} \textit{Id.} (holding assets owned by corporate entity are property of that entity and acquisitions are not community property of owner-spouses). \textit{See also} Taylor v. Taylor, 772 So. 2d 891, 898-99 (La. App. 2d Cir. 2000).

The \textit{McClanahan} case reflects a long line of cases holding that the owner of a juridical person does not own the assets of that juridical person. \textit{See} cases cited \textit{infra} this note. Because of the recent vintage of limited liability companies, most of the jurisprudence applying this distinction involves partnerships and corporations. \textit{Id.} However, the statute authorizing limited liability companies statutorily mandates this distinction. \textit{See} L. A. REV. STAT. ANN. § 12:1329 (1994). This section states: "A membership interest shall be an incorporeal movable. \textit{A member shall have no interest in limited liability company property.}" \textit{Id.} (emphasis added).

This principle is reflected in the Louisiana Civil Code and in the jurisprudence. \textit{See} L. A. CIV. CODE ANN. art. 24, \textit{and} cmts. (d) and (e) (2006).

A partnership is a juridical person, distinct from its partners who compose it. L. A. CIV. CODE ANN. art. 2801 (2006). A partnership has its own patrimony. L. A. CIV. CODE ANN. art. 2801 cmt. (e) (2006). The partners are not the owners
Article 2369.3 regulates the duties owed by a spouse to the other spouse with respect to former community property under the control of that spouse.\(^{387}\) The certificate of deposit in *Ellington* was not former community property of the spouses. It was owned by a juridical person, Noble Ellington Cotton Company, a corporation.\(^{388}\) However, if article 2369.3 were applicable to the certificate of deposit, the disposition of it by the corporation of partnership property. Trappy v. Lumbermen’s Mut. Cas. Co., 86 So. 2d 515, 517 (La. 1956). The partnership, not the partners, is the owner. *Id.* It belongs to the ideal being. Posner v. Little Pine Lumber Co., 102 So. 16, 18 (La. 1924) (citing Succession of Pitcher, 1 So. 929, 932 (La. 1887)). *See also* Harrington v. Harrington, 151 So. 648, 649 (La. App. 2d Cir. 1934).

The Louisiana Supreme Court, in *Due v. Due*, 342 So. 2d 161, 166 (La. 1977), was careful to point out that any contingent fee contracts which were the property of Mr. Due’s law partnership could not be community property:

As to an ancillary point, we should note that the court of appeal correctly held that any contingent fee contracts which are the property of the defendant’s law partnership cannot be considered as assets of the community. The partnership is a separate entity. However, the husband’s interest in the partnership is, to the extent acquired during the marriage, a community asset the value of which should be included in the inventory.

In *Dubuisson v. Moseley*, 232 So. 2d 870, 872 (La. App. 3d Cir. 1970), cited in *Due*, the court held that a checking account of a law partnership “was not a community checking account,” and that “[t]he community only had an interest in the partnership ....”

In *Fastabend v. Fastabend*, 606 So. 2d 794, 798 (La. App. 3d Cir.), *writ denied*, 609 So. 2d 231 (La. 1992), the court correctly held that the accounts receivable of a medical partnership, in which the physician husband was a partner, “are an asset of the partnership itself” and “they are not a community asset.”

Like a partnership, a corporation is a legal entity (juridical person) separate and distinct from the individuals who compose it, and it has a separate and distinct existence apart from its stockholders and officers. Nicholson Mgmt. & Consultants, Inc. v. Bergman, 681 So. 2d 471, 477 (La. App. 4th Cir. 1996), *writ denied*, 685 So. 2d 126 (La. 1997); Korson v. Independence Mall I Ltd., 593 So. 2d 981, 984 (La. App. 5th Cir. 1992); Deroche v. P & L Constr. Materials, Inc., 554 So. 2d 717, 719 (La. App. 5th Cir. 1989), *writ denied*, 559 So. 2d 1359 (La. 1990); Phillips v. Wagner, 470 So. 2d 262, 267 (La. App. 5th Cir.), *writ denied*, 474 So. 2d 948 (La. 1985).

387. LA. CIV. CODE ANN. art. 2369.3 (2006).
388. *Ellington*, 842 So. 2d at 1163.
appears to be a violation of the duty to preserve and manage it in a manner consistent with the mode of use of that property immediately prior to the termination of the community regime.\textsuperscript{389} The certificate of deposit was neither preserved nor managed in the required manner. The court did find, however, that the transaction did not prejudice the corporation or the wife in any way.\textsuperscript{390} The court found that any article 2369.3 violation was not actionable because no damage was caused to the wife by the transaction.\textsuperscript{391}

IX. TRANSACTION OR COMPROMISE

At issue in \textit{Hoover v. Hoover} was whether an extra-judicial community property settlement was a transaction or compromise, which is not subject to attack on grounds of lesion, or an extra-judicial partition, which may be attacked on grounds of lesion.\textsuperscript{392} The supreme court noted that extra-judicial partitions of community property may have aspects or qualities of a transaction or compromise, but the fact that they do does not make the agreement unassailable for lesion.\textsuperscript{393} The court noted the seeming conflict between two Civil Code articles and its resolution of the issue in its earlier decision, \textit{Williamson v. Amilton},\textsuperscript{394} stating: "A partition, even when it takes upon itself the aspect and qualities of a compromise, may be attacked for lesion beyond one-fourth; but the partition once made, if disputes grow out of it, and the parties compromise on those disputes, this compromise is unassailable for lesion."

The court correctly pointed out that community property partition agreements have, by their very nature, some aspects or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{389} LA. CIV. CODE ANN. art. 2369.3 (2006). \textit{Ellington} concluded that Mr. Ellington’s use of the certificate of deposit to reduce outstanding company debt did not rise to the level of mismanagement or diversion. 842 So. 2d at 1175.
\item \textsuperscript{390} \textit{Id.}
\item \textsuperscript{391} \textit{Id.} In \textit{Norman v. Norman}, the fourth circuit held that a spouse, in complying with his article 2369.3 duty, may be required to use his separate funds, which will be reimbursable, to satisfy a community obligation. 775 So. 2d 18, 23–24 (La. App. 4th Cir. 2000).
\item \textsuperscript{392} 813 So. 2d 329, 330 (La. 2002).
\item \textsuperscript{393} \textit{Id.} at 333.
\item \textsuperscript{394} 13 La. Ann. 387 (1858).
\item \textsuperscript{395} \textit{Hoover}, 813 So. 2d at 333 (quoting \textit{Williamson}, 13 La. Ann. at 388).
\end{itemize}
\end{footnotesize}
qualities of a transaction or compromise. Rare indeed would be a negotiated community property partition agreement that was not subject to disputes which are resolved by compromise. The decision is a good, practical solution to a worrisome problem.

X. PREEMPTION AND PARTITION

Louisiana Revised Statutes Section 9:2801.1 provides in part:

When federal law or the provisions of a statutory pension or retirement plan, state or federal, [including but not limited to social security] preempt or preclude community classification of property that would have been classified as community property under the principles of the Civil Code, the spouse of the person entitled to such property shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property.\(^\text{397}\)

In *McKinstry v. McKinstry*, the wife urged the application of this statute with respect to her husband's social security benefits, to offset her Louisiana Teachers' Retirement Plan benefits, which were allocated according to the *Sims*\(^\text{398}\) formula.\(^\text{399}\) However, all the community assets had been previously allocated in the partition proceedings in two judgments rendered before the enactment of Louisiana Revised Statutes Section 9:2801.1, neither one of which had been appealed.\(^\text{400}\) The court held that after all the community property had been divided, a spouse may no longer assert the remedy of the statute.\(^\text{401}\) In fact, the language of the statute mandates that the offsetting allocation of other assets must be done

\(^{396}\) See id. at 332–33.

\(^{397}\) LA. REV. STAT. ANN. § 9:2801.1 (2006) (amended 2003). It should be noted that in all cases except those involving social security benefits, the allocation to the other spouse of community property of equal value is mandatory. *Id.* In the case of social security benefits, the allocation to the other spouse of community property of equal value is discretionary. *Id.* The reason for this disparity of treatment of social security benefits and other preempted property is not clear from the statute. See id.

\(^{398}\) Sims v. Sims, 358 So. 2d 919, 924 (La. 1978).

\(^{399}\) 824 So. 2d 1260, 1261 (La. App. 2d Cir. 2002), *writ denied*, 834 So. 2d 438 (La. 2003).

\(^{400}\) *Id.* at 1262.

\(^{401}\) *Id.*
in a partition action "prior to the division of the rest of the community property." It envisions some type of bifurcation of the process outlined in Louisiana Revised Statutes Section 9:2801 in which this offsetting allocation is done as a preliminary step in the partition action before the allocation of other assets and obligations and the settlement of the claims between the spouses. Unlike Louisiana Revised Statutes Section 9:374(E), which authorizes but does not require the allocation of the use of certain community property during a divorce proceeding or thereafter pending a formal partition proceeding, Section 9:2801.1 mandates the allocation or assignment of the ownership of community property prior to the division of the rest of the community property. It is contrary to the long established

403. See id.
404. Compare id. § 9:374E, with id. § 9:2801.1. Paragraph (2) of Section 9:374E provides that upon court order, each spouse shall provide the other a complete accounting of all community assets subsequent to said allocation and in compliance with Louisiana Civil Code article 2369.3, providing the duty to preserve and prudently manage community property. Id. § 9:374E. The duty to account is apparently not limited to the community property, the use of which has been allocated, but includes all community property. Id. Article 2369.3 applies only to former community property under the control of a spouse. See LA. CIV. CODE ANN. art. 2369.1 (2006). See also supra notes 370–91. Additionally, article 2369.3 is not an accounting provision; it mandates duties with respect to the preservation and management of former community property under the control of a spouse. LA. CIV. CODE ANN. art. 2369.3 (2006). In contrast, article 2369 imposes an accounting obligation on a spouse who has community property under his control at the moment of the termination of the community. See LA. CIV. CODE ANN. art. 2369 (2006). See also LA. CIV. CODE ANN. art. 2369.3 cmt. (c) (2006) (explaining the differences between the two articles). The provision in Section 9:374E(2) does not appear to create a new accounting duty; it simply provides that the accounting that may be ordered after the allocation of the use of community property shall be "in compliance with Civil Code Article 2369.3," which imposes the duty to preserve and prudently manage (former) community property. LA. REV. STAT. ANN. § 9:374E(2) (2006). Since article 2369.3 does not establish a duty to account, the meaning of the reference is obscure. See LA. CIV. CODE ANN. art. 2369.3 (2006). However, this language might have been meant to impose the articles 2369 and 2369.3 duties on a spouse with respect to the property of which he has been allocated the use, during the period he has the use of it. If so, it involves more than an accounting duty. It imposes a preservation and prudent management duty. Id. However, that duty is already imposed by article 2369.3 upon a spouse who has
public policy against the piecemeal partition of community property.\textsuperscript{405} The legislation restricts the flexibility of the court in dividing the community assets and liabilities so that each spouse receives property of an equal net value.\textsuperscript{406} It is particularly troublesome that Section 9:2801.1 requires the allocation of offsetting assets prior to the division of the rest of the community property.\textsuperscript{407} In a community property partition proceeding, the allocation of assets and liabilities is not done in isolation with respect to each other or to an equalizing payment. If a disproportionate amount of assets are allocated to one spouse for

in his control former community property during the period prior to its partition. \textit{Id.} It may have been intended to impose an additional accounting duty, like that in article 2369, on a spouse at the termination of the period of the use of the property. See \textit{La. Civ. Code Ann.} art. 2369 (2006). This would be a new accounting duty, as that imposed by article 2369 is limited to property under the control of a spouse at the termination of the community property regime. \textit{Id.} If so, two problems are presented. The reference to article 2369.3 and the requirement that the accounting be in compliance with that article cannot be correct. Also, the accounting duty is not limited by the language of the statute to the property, the use of which has been allocated to a spouse. It requires that "each spouse" shall provide an accounting to the other spouse "of all community assets." \textit{La. Rev. Stat. Ann.} \&sect; 9:374E (2006). The obligation to account imposed by article 2369 means to provide an explanation of what happened to the property. \textit{In re Succession of Caraway}, 639 So. 2d 415, 420 (La. App. 2d Cir. 1994). As written, the article imposes a duty on a spouse to account not only for the property he has been using, but to explain what happened to the property his former spouse has been using. \textit{La. Civ. Code Ann.} art. 2369 (2006). The duty to account for "all community assets" also includes property the use of which was not allocated, but which is in the possession of the other spouse. \textit{Id.} The statute imposes duties with which a spouse may not be able to comply. \textit{La. Rev. Stat. Ann.} \&sect; 9:374E (2006). If it imposes a duty to account, it should be limited to the duty to account for the property the use of which he has been allocated. If it imposes an article 2369.3 duty to preserve and manage prudently in the manner described in that article, it should be limited to the property the use of which he has been allocated. If both duties are imposed, they likewise should be limited to that former community property.

\textit{405.} Guillaume v. Guillaume, 603 So. 2d 235, 238 (La. App. 4th Cir. 1992); Marshall v. Marshall, 551 So. 2d 6, 7 (La. App. 4th Cir. 1989); Hicks v. Hicks, 497 So. 2d 44, 45 (La. App. 3d Cir. 1986); Johnson v. Johnson, 473 So. 2d 112, 114 (La. App. 3d Cir. 1985).


\textit{407.} \textit{Id.}
one of the reasons listed in Section 9:2801A(4)(c) or for other reasons, equality can be achieved by a disproportionate allocation of liabilities to that spouse, or by an equalizing payment, or both.\textsuperscript{408} There may not, in fact, be assets available to offset the value of the preempted assets, which cannot be allocated as community property under the statute. The statute only permits the allocation of assets as an offset.\textsuperscript{409} The statute does not authorize the allocation of community liabilities or the ordering of an equalizing payment to remedy the unequal division of assets.\textsuperscript{410} In households of limited means, social security benefits may constitute a major portion of the property of the parties.\textsuperscript{411} The same may be true in households in which the employed spouse is subject to the Railroad Retirement Act of 1974\textsuperscript{412} or those in which a spouse is receiving military disability payments.\textsuperscript{413} In these and other instances, there may not be sufficient assets available to offset the preempted assets.

Louisiana Revised Statutes Section 9:2801.1 also presents a serious federal preemption issue. As noted, it mandates allocating non-preempted community assets to one spouse equal in value to the preempted assets which belong to the other spouse and may not be allocated. In \textit{Boggs v. Boggs}, the United States Supreme Court held that the federal Employee Retirement Income Act of 1974 ("ERISA") preempts Louisiana community property laws.\textsuperscript{414} In \textit{Boggs}, the two sons of the first wife sued the second wife for a

\textsuperscript{408} \textit{Id.} § 9:2801A(4)(c) and (d).
\textsuperscript{409} \textit{Id.} § 9:2801.1.
\textsuperscript{410} \textit{See id.}
partition of the survivor annuity benefits received by the second wife, claiming a testamentary disposition of these rights from their mother.\textsuperscript{415} No claim was asserted against the South Central Bell ERISA retirement plan.\textsuperscript{416} The Court held that the statutory objective of the qualified joint and survivor annuity provisions was to assure a stream of income to a surviving spouse.\textsuperscript{417} The fact that the claim was against only the beneficiary and not the retirement plan did not prevent preemption, as the diversion of income from the surviving spouse occurs regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit.\textsuperscript{418}

In an earlier case, \textit{Free v. Bland}, the United States Supreme Court held that federal regulations governing United States Savings Bonds and Savings Notes determined not only the ownership of the bonds, but also the ownership of the proceeds of the bonds.\textsuperscript{419} In \textit{Free}, community funds were used to purchase the bonds, which were registered in the names of the husband and wife as co-owners.\textsuperscript{420} Under federal regulations, upon the death of the wife, the husband became the owner of the bonds.\textsuperscript{421} Under Texas law, he was required to reimburse the wife’s separate estate for the bonds.\textsuperscript{422} The United States Supreme Court held that the state rule requiring reimbursement was preempted by federal law and regulations.\textsuperscript{423} A Louisiana state court reached the same conclusion in \textit{Succession of Harrell}.\textsuperscript{424}

\textit{Boggs} relied heavily on \textit{Free}, which held that to award full title of savings bonds to the co-owner but require him to account to the decedent’s estate for half of the value of the bonds, when “[v]iewed realistically,” renders the award of title

\textsuperscript{415} Id. at 837–38.
\textsuperscript{416} Id. at 856–57.
\textsuperscript{417} Id. at 843.
\textsuperscript{418} Id. at 847–48.
\textsuperscript{419} 369 U.S. 663, 670 (1962).
\textsuperscript{420} Id. at 664–65.
\textsuperscript{421} Id.
\textsuperscript{422} Id. at 665.
\textsuperscript{423} Id. at 670.
\textsuperscript{424} 622 So. 2d 253 (La. App. 1st Cir. 1993).
Allocating other community property to offset the value of the preempted asset under Louisiana Revised Statutes Section 9:2801.1 has the same functional effect as permitting a reimbursement or other monetary claim by the other spouse for the value of the preempted assets. Such a "back door" approach is not permissible, whatever the mechanism that is used to offset the preempted assets.

Whether a state statute is preempted by federal law or regulation is not a constitutional issue, but a matter of statutory interpretation. If a state law is preempted by federal law, the state law is not rendered unconstitutional. This distinction has important consequences in Louisiana practice. With limited exceptions, the long standing jurisprudential rule in Louisiana is that litigants must raise constitutional attacks in the trial courts. Litigants may not raise constitutional challenges for the first time in the appellate courts. The constitutional challenge also must be specially pleaded and the grounds for the claim particularized.

A party asserting the unconstitutionality of a state statute in a declaratory judgment action must serve the Louisiana Attorney General with a copy of the proceeding. In other proceedings in which the constitutionality of a statute is raised, the Attorney General should be served notice and/or a copy of the pleading.

Pleading preemption in the trial court does not appear to be mandatory because it is not a contention that the state statute is unconstitutional, nor is it required under Louisiana's scheme of


426. Capitol City Towing & Recovery, Inc. v. State, 842 So. 2d 321, 321 (La. 2003). See Capitol City Towing & Recovery, Inc. v. State, 873 So. 2d 706, 710 (La. App. 1 Cir.), writ denied, 876 So. 2d 94 (La. 2004), for the resolution of the preemption issue after the case was transferred to the court of appeal.

427. City of Baton Rouge v. Goings, 684 So. 2d 396, 397 (La. 1996). In contrast, a state statute which conflicts with or violates a substantive constitutional provision, such as the Fifth Amendment, does raise a constitutional issue. Id.


429. Reno, 870 So. 2d at 314.

430. Id.
fact pleading because it is an issue of law. However, failure to raise the preemption issue in the trial court in some manner may preclude an appellate court from considering the issue because of the jurisprudential rule that generally appellate courts will not consider issues raised for the first time on appeal.

XI. USE OF EXPERT WITNESSES

The issue of whether expert witnesses may testify in the trial of a community property partition action was revisited in Boone v. Boone. The case involved the classification of distributions to the husband by a community Subchapter S corporation after the termination of the community. The wife contended that they were civil fruits of the community stock of the corporation and thus were community property; the husband contended that they resulted primarily from his skill, industry, and labor after termination of the community and hence were his separate property. The husband’s principal expert witness was a board-certified tax attorney, who used the Paxton v. Bramlette “ratio of labor to capital approach” in his analysis and concluded that the post-community distributions to the husband were in the nature of income produced by the husband’s skill, industry, and labor subsequent to the termination of the community and hence were his separate property.

The opinion does not reflect a disagreement as to whether an expert witness could be used to resolve the classification issue. The objection to the use of this expert witness was that “he had no expertise in family law or community property law,” and, therefore, could not “assist the trier of fact to understand the

432. Foreman, 887 So. 2d at 153; Dean, 879 So. 2d at 116; Mosing, 830 So. 2d at 975.
433. 899 So. 2d 823 (La. App. 3d Cir. 2005).
434. Id. at 825.
435. Id. at 826–27.
437. Boone, 899 So. 2d at 825.
evidence or to determine a fact at issue." The court noted the lack of uniformity in the jurisprudence on the issue of whether to allow attorneys to testify as experts regarding matters of domestic (Louisiana) law. Generally, the courts do not permit it on the theory that the court itself is an expert on domestic law. The court noted that the cases upheld the district court's discretion as to the admissibility and weight of expert testimony. Although the court's opinion reviews the jurisprudence on the issue of whether an attorney's expert opinion is admissible regarding domestic law, the classification of a thing as community or separate is an issue of fact, not law.

The statutory authorization for the use of testimony by experts is Louisiana Code of Evidence article 702. If specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, expert testimony may be used for this purpose. The expert may testify thereto in the form of an opinion, or otherwise.

In Morrison v. Johnston, the court, citing a treatise on Louisiana evidence and Louisiana Code of Evidence article 702, held that in a jury case, expert opinions on Louisiana law are inadmissible. However, in an opinion the next year, State v. Widenhouse, the same appellate court approved of expert testimony by Dr. George Seiden, who taught forensic psychiatry at

439. Boone, 899 So. 2d at 829.
440. Id.
441. Id.
442. See id.
444. See LA. CODE EVID. ANN. art. 702 (2005).
445. Id.
446. Id.
447. 571 So. 2d 788, 791 (La. App. 2d Cir. 1990). The proffered testimony was that of the secretary-treasurer of the Louisiana Board of Dentistry concerning his opinion and interpretation of various rules and regulations promulgated by the Louisiana Board of Dentistry, which have the force and effect of law. Id. at 790-91.
the LSU Medical Center in Shreveport, in which Dr. Seiden described the different legal standards for determining sanity.\(^{448}\) The court admitted his testimony because it aided the jury’s understanding of the basis for the experts’ opinions, and helped the jury understand that they had to decide the question of the defendant’s sanity under Louisiana law rather than making a medical determination.\(^{449}\) The court cited *State v. James*, which held that there was no error in allowing a forensic psychiatrist who taught a forensics course at Tulane University School of Law to testify about the differences in the applicable Louisiana standard and the federal standard for insanity.\(^{450}\)

*Martello v. City of Ferriday* held that the testimony of an attorney who was an expert on class certification was inadmissible because his testimony would consist of legal opinions and conclusions of law.\(^{451}\) *Martello* cited *Wilson v. Wilson*, which held that the domestic law testimony of an expert is not proper, as distinguished from foreign law testimony, on the theory that the court itself is the expert on domestic law.\(^{452}\) *Wilson*, however, held that a trial judge has great discretion in determining who should be permitted to testify as an expert and his judgment will not be disturbed on appeal unless manifestly erroneous.\(^{453}\)

In *Soileau v. Louisiana Department of Transportation*, the appellate court held that the trial court did not err in permitting an expert in traffic engineering to state whether or not he agreed with the legal opinion of another expert and to give his opinion as to whether the American Association of State Highways and Transportation Officials (“AASHTO”) guidelines applied to a

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\(^{449}\) *Id.* at 1386.

\(^{450}\) 459 So. 2d 1299, 1312 (La. App. 1st Cir. 1984), *writ denied*, 463 So. 2d 600 (La. 1985).

\(^{451}\) 813 So. 2d 467, 475 (La. App. 3d Cir.), *writ denied*, 818 So. 2d 769 (La.), *cert. denied*, 537 U.S. 1072 (2002).

\(^{452}\) 542 So. 2d 568, 573 (La. App. 1st Cir. 1989).

\(^{453}\) *Id.*
bridge.\textsuperscript{454} The appellate court held that the trial court did not abuse its discretion in allowing testimony in this area.\textsuperscript{455}

In the case of In re \textit{Theresa D. Steckler Trust}, the trial court, relying on Louisiana Code of Civil Procedure article 192\textsuperscript{456} and Louisiana Code of Evidence article 706,\textsuperscript{457} appointed William Neilson as an expert to advise the court as to the tax status of a trust (and sub-trusts) and to negotiate with the Internal Revenue Service on behalf of the trust.\textsuperscript{458} The appellate court held that the trial court did not err in the first part of the appointment, but exceeded its authority in the second (negotiating with the IRS).\textsuperscript{459} It appears that determining the tax status of a trust would involve legal issues.

In \textit{Wyble v. Allstate Insurance Co.}, the court held there was no error in permitting an adjuster to be questioned as to her appreciation of the Uninsured Motorist law.\textsuperscript{460}

In \textit{Halverson v. Halverson}, a Delta Airlines pension plan was at issue in a partition action.\textsuperscript{461} For assistance in understanding the pension plan and how the \textit{Sims} formula should be applied, the trial court appointed its own expert, Professor Arruebarrena of Loyola School of Law.\textsuperscript{462} Professor Arruebarrena testified at length concerning \textit{Sims}, the Retirement Equity Act of 1984, a Qualified Domestic Relations Order, and other legal issues.\textsuperscript{463} Professor Arruebarrena also suggested that an exception to the \textit{Sims} formula be applied to the facts of the case, which the court did, and which was affirmed on appeal.\textsuperscript{464} Too much should not be read into the decision in \textit{Boone}. The issue in that case was whether the witness was an expert in the

\begin{itemize}
\item \textsuperscript{454} 724 So. 2d 834, 842 (La. App. 3d Cir. 1998).
\item \textsuperscript{455} \textit{Id}.
\item \textsuperscript{456} L.A. CODE CIV. PROC. ANN. art. 192 (2006).
\item \textsuperscript{457} L.A. CODE EVID. ANN. art. 706 (2005).
\item \textsuperscript{458} 678 So. 2d 620, 624–25 (La. App. 4th Cir.), \textit{writ denied}, 682 So. 2d 767 (La. 1996).
\item \textsuperscript{459} \textit{Id}. at 625.
\item \textsuperscript{460} 581 So. 2d 325, 332 (La. App. 3d Cir. 1991).
\item \textsuperscript{461} 589 So. 2d 1153, 1154 (La. App. 5th Cir. 1991), \textit{writ denied}, 600 So. 2d 655 (La. 1992).
\item \textsuperscript{462} \textit{Id}. at 1155.
\item \textsuperscript{463} \textit{Id}. at 1155–56.
\item \textsuperscript{464} \textit{Id}. at 1155, 1157.
\end{itemize}
field of law about which he testified. The issue was not whether his testimony concerning the community or separate classification of property involved an issue of law and therefore was inadmissible. The cases cited by the court all involve an expert witness giving a legal opinion. However, the issue in the case, the classification of the distributions as community or separate, is not an issue of law, but is an issue of fact. The inquiry should be whether the testimony of the expert witness, opinion or otherwise, will assist the trier of fact to understand the evidence or to determine a factual issue. In a community property partition action under Louisiana Revised Statutes Section 9:2801, this includes the classification of things and obligations and the reimbursement claims of the spouses arising out of their matrimonial regime. If the trial court feels that such expert testimony will aid it in its understanding of the evidence being presented or assist it in correctly resolving a factual issue, i.e., classifying things or obligations and determining the existence and measure of reimbursement that may be due a spouse, then the trial court should be granted broad discretion in admitting such testimony into evidence.

XII. THE BURDEN OF PROOF IN THE CLASSIFICATION OF ASSETS

The Louisiana Supreme Court considered in two cases, Ross v. Ross and Lanza v. Lanza, the classification of income which had not been both earned and received during the legal regime. Both involved renewal commissions received as an agent of State Farm. In Ross, the policies were issued prior to marriage and the renewal commissions on these policies were received during the marriage. In Lanza, the policies were issued during marriage.

466. See id.
467. See id.
468. See cases supra note 443.
469. See LA. CODE EVID. ANN. art. 702 (2005).
471. 857 So. 2d 384 (La. 2003).
472. 898 So. 2d 280 (La. 2005).
473. 857 So. 2d at 385.
and the renewal commissions on these policies were received after the termination of the marriage.\textsuperscript{474} In both cases, a legal regime existed between the spouses.\textsuperscript{475} In \textit{Ross}, although there was disagreement both in the court of appeal and supreme court concerning the treatment of the renewal commissions as civil fruits, the supreme court held that effort, skill, and industry were exerted during the community to obtain the renewals and that, insofar as that effort contributed to the renewal commissions, the commissions were community property.\textsuperscript{476} Likewise, in \textit{Lanza}, the supreme court held that the renewal commissions received after marriage were community property insofar as they were due to Mr. Lanza’s effort, skill, or industry during the community.\textsuperscript{477} Although the result was the same in both cases, the burden of proof was placed on different spouses in the two cases.\textsuperscript{478} Louisiana Civil Code article 2340 creates a presumption that things in the possession of a spouse during the existence of the legal regime are community property, but provides that either spouse may prove that they are separate property.\textsuperscript{479} The burden of proof is, of course, on the spouse seeking to rebut the presumption and prove that a thing is separate property.\textsuperscript{480} In \textit{Ross}, the supreme court reversed the court of appeal, which had placed the burden of proof on the wife to prove that substantial labor was expended by Mr. Ross during the existence of their community in order that the

\begin{itemize}
  \item \textsuperscript{474} 898 So. 2d at 281–82.
  \item \textsuperscript{475}  Id. at 282, 285; \textit{Ross}, 857 So. 2d at 389–90.
  \item \textsuperscript{476} 857 So. 2d at 396–97.
  \item \textsuperscript{477} 898 So. 2d at 289–90.
  \item \textsuperscript{478} See \textit{id.} at 291; \textit{Ross}, 857 So. 2d at 396–97.
  \item \textsuperscript{479} LA. CIV. CODE ANN. art. 2340 (2006).
  \item \textsuperscript{480} Talbot v. Talbot, 864 So. 2d 590, 602–03 (La. 2003). The proper burden of proof in overcoming the presumption of community contained in article 2340 is a preponderance of the evidence. \textit{Id.} at 593. This presumption of community is triggered by possession of a thing during the existence of the legal regime. \textit{Id.} at 597. Possession of a thing by a spouse during the community regime does not classify it as a community thing; it only creates a presumption that the thing possessed is a community thing. \textit{Id.} Acquisition of the thing during the existence of the community is not required to trigger the article 2340 presumption. \textit{Id.} The acquisition of a thing during the legal regime may result in its being statutorily classified as community or separate, depending upon the manner in which it was acquired during the existence of the legal regime. \textit{Id.} See Rigby, \textit{supra} note 123, at 481 for a discussion of this distinction.
\end{itemize}
renewal commissions be classified as community.\textsuperscript{481} The commissions were received and therefore possessed during the community and were therefore presumed to be community.\textsuperscript{482} In order to prove that the renewal commissions were his separate property, the burden of proof was on Mr. Ross to prove that he did not expend labor during the existence of the community.\textsuperscript{483} The court of appeal relied on \textit{Kyson v. Kyson}, which made the same mistake in a case involving rentals from separate property received during the community.\textsuperscript{484}

On the other hand, in \textit{Lanza}, the burden of proof was correctly placed on the wife to prove that the renewal commissions were the result of Mr. Lanza's efforts during the community.\textsuperscript{485} In \textit{Lanza}, the renewal commissions were received after the termination of their community, and, therefore, the community presumption resulting from possession during the legal regime did not apply.\textsuperscript{486}

\textsuperscript{481} \textit{Ross}, 857 So. 2d at 396.
\textsuperscript{482} \textit{id.} at 397–98.
\textsuperscript{483} \textit{id.} at 396.
\textsuperscript{484} 596 So. 2d 1308, 1319–20 (La. App. 2d Cir. 1991) (on rehearing), \textit{writ denied}, 599 So. 2d 314 (La. 1992). In \textit{Kyson}, income was produced during the existence of the legal regime from separately owned rental properties of the husband. \textit{id.} at 1309–10. Mr. Kyson executed and filed an article 2339 declaration, reserving as his separate property the civil fruits of his separate property. \textit{id.} at 1309. The rentals were the result of the ownership of the properties, money spent on repairs, improvements, maintenance, and Mr. Kyson's labor, involving cleaning, maintenance, painting, hanging a sign, and meeting prospective renters to show the rental properties. \textit{id.} at 1310. On original hearing, the court held the case to be one in which separate capital was combined with community labor to produce fruits and remanded the case for a proration of the rental income. \textit{id.} at 1312. On rehearing, the court held that it was unable to discern from the record sufficient quantification of Mr. Kyson's time and labor associated with the disputed rental income from which it could draw any conclusion as to how much of the rental income as the result of his labor. \textit{id.} at 1323. The court did not address the presumption and burden of proof under article 2340, but effectively placed on Mrs. Kyson the burden of demonstrating how much of the rental income was the result of her husband's labor and industry during the legal regime. See \textit{id.} The case was correctly criticized by \textit{Spaht & Hargrave}, \textit{supra} note 19, at § 3.8, at 66.
\textsuperscript{485} \textit{Lanza v. Lanza}, 898 So. 2d 280, 290 (La. 2005).
\textsuperscript{486} \textit{id.}
XIII. CLASSIFICATION OF OBLIGATIONS

In *Sequeira v. Sequeira*, the community was terminated effective August 8, 2000, by a judgment rendered October 12, 2000.\(^{487}\) At issue was the classification of several obligations incurred by the husband shortly prior to the filing of the divorce suit by the wife on August 8, 2000.\(^ {488}\) The first was a credit card charge of $3,600.00 on July 25, 2000, for LASIK eye surgery.\(^ {489}\) The court held that the debt was not proved to be a community obligation because the husband failed to prove that the cost of the surgery was incurred for the ordinary and customary expenses of the marriage,\(^ {490}\) citing *Krielow v. Krielow*.\(^ {491}\) In *Krielow*, the supreme court correctly used the ordinary and customary expense language, but used it in determining whether a spouse could obtain reimbursement for separate funds used to pay community obligations in excess of the other spouse’s net share of the community under Louisiana Civil Code article 2365.\(^ {492}\) The supreme court in *Krielow* did not use this test for the classification of an obligation.\(^ {493}\) The issue in *Krielow* was the extent to which the wife could obtain reimbursement for the payment of community obligations with her separate funds, not the classification of the obligations she satisfied with her separate funds.\(^ {494}\) Ordinarily, a spouse seeking reimbursement for separate funds used to satisfy a community obligation or used for the acquisition, use, improvement, or benefit of community property is limited to the value of the other spouse’s share in the community after deduction of all community obligations, i.e., the net value of his one-half interest in the community.\(^ {495}\) There is an exception to this limitation. If separate property has been used to satisfy a

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487. 888 So. 2d 1097, 1100 (La. App. 5th Cir. 2004), *writ denied*, 901 So. 2d 1065 (La. 2005).
488. *Id.* at 1100–01.
489. *Id.* at 1101.
490. *Id.* at 1102.
491. 635 So. 2d 180 (La. 1994).
492. *Id.* at 186–87. *See also* Sherrod v. Sherrod, 709 So. 2d 352, 356 (La. App. 5th Cir.), *writ denied*, 720 So. 2d 687 (La. 1998).
493. *See* Krielow, 635 So. 2d at 187.
494. *Id.* at 182.
community obligation which was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, and education of children of either spouse in keeping with the economic condition of the community, the spouse satisfying the community obligation incurred for one or more of these purposes with separate funds is entitled to reimbursement from the other spouse regardless of the value of the other spouse's share of the community. However, this is not the test for classifying the obligation as community or separate. The test for classifying an obligation as community or separate is whether the obligation was incurred for the common interest of the spouses or for the interest of the non-incurring spouse, or only for the interest of the incurring spouse.

Second, the court erred in placing the burden of proof on the husband to prove that the obligation incurred for the LASIK surgery was a community obligation. The obligation was incurred during the existence of the legal regime and thus is presumed to be a community obligation. The wife filed her

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496. Id.
497. LA. CIV. CODE ANN. arts. 2360, 2363 (2006). There are several special classification rules not falling within these general definitional articles. They include an alimentary obligation imposed by law on a spouse and an obligation for attorney's fees and costs in an action for divorce incurred before the date of the judgment of divorce that terminates the community property regime, both of which are classified as community obligations. See LA. CIV. CODE ANN. arts. 2362, 2362.1 (2006). Also, in the second paragraph of article 2363, two specific types of obligations are classified as separate obligations. See LA. CIV. CODE ANN. art. 2363 (2006). An obligation resulting from an intentional wrong not perpetrated for the benefit of the community and an obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse are classified as separate obligations. Id.
498. See Sequeira v. Sequeira, 888 So. 2d 1097, 1102 (La. App. 5th Cir. 2004), writ denied, 901 So. 2d 1065 (La. 2005).
499. LA. CIV. CODE ANN. art. 2361 (2006). The opinion in Sequeira reveals that the spouses physically separated on July 29, 2000, after the date of the credit card charge for the LASIK surgery. 888 So. 2d at 1102. However, whether or not they were physically separated is of no consequence in the classification of the obligation.
divorce suit eight days later, on August 8, 2000. The burden of proof was on the wife to prove it was a separate obligation.

The husband also claimed a $2,500.00 cash advance from his credit card on July 31, 2000, as a community obligation. There was no evidence as to the reason for the advance or the disposition of the funds that were received. The court erred in placing the burden of proof on the husband to prove that this debt was in the common interest of the spouses or in the wife’s interest. In the absence of evidence, the presumption of community prevails.

500. Sequeira, 888 So. 2d at 1100.
501. See Sims v. Sims, 677 So. 2d 663, 665 (La. App. 2d Cir. 1996). Still undecided is whether the spouse seeking to rebut this presumption must do so by satisfying the “clear and convincing evidence” test previously required. See In re Succession of Moss, 769 So. 2d 614, 618 (La. App. 3d Cir.), writ denied, 776 So. 2d 462 (La. 2000).

In Talbot v. Talbot, 864 So. 2d 590, 600 (La. 2003), the supreme court abrogated the jurisprudence holding that this elevated standard of proof was necessary to overcome the presumption in article 2340 that things in the possession of a spouse during the existence of a regime of community of acquets and gains are community. The supreme court held that the proper standard was a preponderance of the evidence. Id. The legislature has not established any greater burden to overcome the presumption contained in article 2361. Therefore, the article 2361 presumption should be rebuttable by either spouse upon a showing by a preponderance of the evidence that the obligation incurred during the existence of the community regime is a separate obligation.

In Sequeira, the fifth circuit stated that the supreme court in Krielow held that the burden of proof on the party claiming reimbursement is to show by a preponderance of the evidence the nature of the indebtedness. 888 So. 2d at 1101. However, in Krielow, the obligations were community obligations and the referenced language related to the issue of whether or not these community obligations were incurred for the ordinary and customary expenses of the marriage. 635 So. 2d 180, 183 (La. 1994). The burden of proof to establish that the obligations were separate obligations was not at issue in Krielow.

502. Sequeira, 888 So. 2d at 1102.
503. See id.

504. See LA. CIV. CODE ANN. art. 2361 (2006). The inclusion of the introductory clause, “Except as provided in Article 2363,” in article 2361 is unfortunate and is misleading. See id. Read literally, it creates for all separate obligations an exception to the presumption that all obligations incurred during the existence of a community property regime are community obligations. See id. Therefore, the presumption of community classification applies only to those obligations classified as community obligations. See LA. CIV. CODE ANN. arts. 2360, 2362, 2362.1 (2006). The analysis should be similar to that used in
The court also held that, in order to determine whether the funds benefited the community or were for the common interest of the spouses, it is necessary to examine the uses to which they were put. Unfortunately, this language appears frequently in the jurisprudence discussing the classification of obligations. An obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation. A separate obligation is, in part, one that is incurred during the existence of a community property regime though not for the common interest of the spouses or for the interest of the other spouse. The intent or purpose in the incurring of the obligation must necessarily have been formulated and must have existed at the time the obligation is incurred. If the obligation is the result of borrowed money, looking to the uses to which the borrowed funds were put may be useful evidence in determining the true intent of the obligor spouse in the incurring of the obligation, but it may not be controlling. If a husband borrows money from a bank to pay for a vacation for his wife and himself, but is robbed of the borrowed money on his way home, his intent in incurring the

classifying assets. See Rigby, supra note 123, at 478–84. See also Rigby, supra note 123, at 500 n.195, for a criticism of this dichotomy reflected in article 2361. Proof that an obligation incurred during the community regime is one of the types of obligations listed in article 2363 rebuts the community presumption created in article 2361; it is not an exception to the presumption.

505. Sims, 677 So. 2d at 665.
506. Sequeira, 888 So. 2d at 1101.
507. For other cases holding that, in cases of borrowed money, in order to determine whether the obligation benefited the community or was used for the common interest of the spouses, it is necessary to examine the uses to which the borrowed money was put, see Keene v. Reggie, 701 So. 2d 720, 724–25 (La. App. 3d Cir. 1997), McConathy v. McConathy, 632 So. 2d 1200, 1204–05 (La. App. 2d Cir. 1994), writ denied, 637 So. 2d 2d 1052 (La. 1994), Ledet v. Ledet, 496 So. 2d 381, 383–84 (La. App. 4th Cir. 1986), Webb v. Pioneer Bank & Trust Co., 530 So. 2d 1115, 118 (La. App. 2d Cir. 1988). See also Rigby, supra note 123, at 496, for a criticism of this reasoning.
510. See, e.g., cases cited supra note 507.
obligation, not the result of it, should be controlling in the classification of the obligation.

It is evident that the statutory test for the classification of an obligation depends upon the reason or purpose for which it is incurred, and that reason or purpose relates to the interest or benefit of people, the spouses or one spouse, and not property. 511 Statements concerning an obligation benefiting the community contain conceptual errors. A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons. 512 One of these systems of rules is the legal regime of community of acquets and gains. 513 It is not a juridical person or legal entity. 514 It is a particular system of rules governing the ownership and management of the property of married persons. A fortiori, an obligation, or the incurring of it, cannot benefit this system of rules. Even if the word "community" is used to mean community property or a patrimonial mass, 515 the classification of an obligation is not determined by whether the obligation is in the interest of or for the benefit of property, but persons. Many obligations incurred by spouses do not relate to or affect property

511. Sequeira equates the benefit to the community and the common interest of the spouses: "To determine whether funds benefitted the community, or were used for the 'common interest of the spouses,' it is necessary to examine the uses to which they were put." 888 So. 2d at 1101:
514. LA. CIV. CODE ANN. art. 2336 cmt. (c) (2006); Bridges v. Bridges, 692 So. 2d 1186, 1193 (La. App. 3d Cir. 1997).
515. LA. CIV. CODE ANN. art. 2336 cmt. (c) (2006) ("The community of acquets and gains is not a legal entity but a patrimonial mass, that is, a universality of assets and liabilities."). This comment is difficult to reconcile with the statutory definition in article 2325 of a matrimonial regime (of which the community of acquets and gains is one permissible regime) as a system of principles and rules governing the ownership and management of the property of married persons as between themselves and third persons. See LA. CIV. CODE ANN. art. 2325 (2006). It is clear from the logical sequence of the definitional articles, that the legal regime of community of acquets and gains is not either a mass of property and obligations or individual items of property, but is a particular system of rules governing ownership and management of the property of married persons. See LA. CIV. CODE ANN. arts. 2325–27 (2006). For a discussion of a possible source of this error, see infra Part XV.
in any way. Food, a night out, a dinner at a café, a cruise, a trip or other recreation charged to a credit card are examples of such obligations. Other obligations may involve property, but do not benefit community property. If a husband buys his wife an anniversary present, charges it on his credit card, and gives the present to his wife (a donation), the thing purchased and donated as a present is her separate property, but the obligation is community. The community, whether the word is used to denote community property, a patrimonial mass, or a particular system of principles and rules governing the ownership and management of the property of this married couple, has not been benefited in any way from the obligation. The wife has benefited, and perhaps also the husband, but not the community.

A correct analysis of an obligation incurred during the existence of the community regime is reflected in McGee v. McGee. The husband owned land as his separate property. The parties borrowed money to construct a house on the land, which was used as the family home. In the partition, the trial court decreed that the land and all improvements were the separate property of the husband. At issue was the classification of the loan obligation. The court correctly analyzed the obligation in terms of the benefit to the spouses. The obligation was incurred to construct a home in which the spouses lived during their marriage. The court held that the obligation was incurred for the common interest of the spouses and therefore was a community obligation. The result might have been different had the classification issue been determined by whether or not the

516. LA. CIV. CODE ANN. art. 2341 (2006) (defining separate property, in part, as property acquired by a spouse by donation to him individually).
517. LA. CIV. CODE ANN. art. 2361 (2006). The obligation incurred by the husband to purchase the anniversary present was for the interest of his wife, and, arguably, in their common interest.
518. 905 So. 2d 300 (La. App. 1st Cir. 2005).
519. Id. at 301.
520. Id.
521. Id.
522. Id.
523. Id. at 302.
524. Id. at 301.
525. Id. at 302.
community or the community property had benefited from the incurring of the obligation. Seemingly, neither the community nor community property benefited from incurring the obligation; the husband's separate property benefited and so did the spouses. The benefiting of separate property by the use of community money was resolved by the recognition of the reimbursement claim of the wife under Louisiana Civil Code article 2366, not in the classification of the obligation.

XIV. LIABILITY OF SPOUSES FOR COMMUNITY AND SEPARATE OBLIGATIONS

In a previous law review article, the writer critiqued the cases erroneously holding that a spouse is personally liable to the creditor for a community obligation incurred by the other spouse, but not for a separate obligation incurred by the other spouse. This misunderstanding still persists. In Finance One of Houma, L.L.C. v. Barton, the wife, on two occasions, borrowed money from a finance company, executing promissory notes to evidence the obligations created by the loans. She used the proceeds of the loan to play video poker. She filed bankruptcy proceedings. The finance company sued the husband, contending that the obligations were community obligations because of the representations the wife made at the time of the loans concerning the purpose of the loans. The husband contended that he was not liable to the finance company because the obligations were the separate obligations of the wife, not community obligations. The case was tried on the issue of the classification of the debts. The trial court held them to be separate debts because "the monies obtained by Barbara C. Barton

526. See id. at 302.
527. See id. at 302–03.
529. 769 So. 2d 739, 740 (La. App. 1st Cir. 2000).
530. Id.
531. Id.
532. Id.
533. Id.
534. Id.
did not benefit or enrich the community,” and dismissed the suit against Mr. Barton. The finance company appealed, claiming that the debts were community obligations and that the husband was liable to it for the amount owed. The court of appeal correctly held that whether the debts were community or separate is not determinative of the personal liability of the non-incurring spouse for the obligation. The non-incurring spouse is not personally liable either during the existence of the legal regime or after its termination for a debt incurred by the other spouse irrespective of whether the obligation is classified as community or separate. The non-incurring spouse may incur or assume liability for an obligation incurred by the other spouse in the manner provided by the second and third paragraphs of Louisiana Civil Code article 2357. The appellate court affirmed the dismissal of the suit against the husband not because the obligation incurred by his wife was her separate obligation, but because he was not liable for it whether it was a community or a separate obligation. The Civil Code articles regulating the satisfaction of obligations both during the legal regime and after its

535. Id.
536. Id.
537. Id. at 741. The court cited Rigby, supra note 123, at 465, and the cases of Tri-State Bank & Trust v. Moore, 609 So. 2d 1091 (La. App. 2d Cir. 1992), and Lawson v. Lawson, 535 So. 2d 851 (La. App. 2d Cir. 1988).
538. Finance One, 769 So. 2d at 741–42.
539. See LA. CIV. CODE ANN. art. 2357 (2006). It should be noted that in each of these instances the law imposes liability on the non-incurring spouse because of the voluntary act of that spouse occurring subsequent to the termination of the community regime. See id.

One other situation in which post-termination liability is imposed on the non-incurring spouse is a provision in Louisiana Revised Statutes Section 9:2801A regulating the partition of community property and the settlement of the claims of the spouses arising from a matrimonial regime. LA. REV. STAT. ANN. § 9:2801A(4)(c) (2006).

The liability created by this provision is the obligation to the other spouse to extinguish the allocated obligation; the provision does not create any liability to the creditor. See id. Of course, if the spouse to whom the obligation is allocated incurred the obligation, that spouse is already personally liable to the creditor, and that liability is not affected by the allocation.

540. Finance One, 769 So. 2d at 742.
termination do not impose personal liability on a spouse for a community or separate obligation incurred by the other spouse; they simply identify the property available to a creditor for the satisfaction of an obligation which was incurred before or during the community property regime.

Although the classification of an obligation as community or separate does not determine the rights of the creditor, the classification of an obligation has four important functions in the partition of community property and the settlement of claims arising from a matrimonial regime.

XV. CONCLUSION AND SUGGESTIONS

There appear to be two competing concepts as to the nature of the legal regime of community of acquets and gains in the articles governing that regime and the comments to those articles.

The definitional articles clearly classify that regime as one of several systems of principles and rules governing the ownership and management of the property of married persons. The legal regime is a particular set of rules having this function. On the

543. Rigby, supra note 123, at 493.
544. Spaht & Hargrave, supra note 19, at § 7.2, at 367, outlines these results of classifying an obligation as community or separate:

Although the character of an obligation as separate or community is immaterial during the existence of the community regime, at termination of the regime the classification of an obligation becomes important for four reasons: (1) the satisfaction of a community obligation with former community property or its proceeds is a defense to personal liability imposed upon the spouse who alienates former community property; (2) the assumption of responsibility is of one-half of each community obligation incurred by the other spouse, and separate creditors of the other spouse are thereafter precluded from seeking satisfaction from property of the assuming spouse; (3) the determination of reimbursement rights of the spouses; and (4) if there is a judicial partition, only community obligations may be allocated to a spouse and the allocation imposes a personal obligation upon the spouse to discharge it. These conclusions now appear in the official comment to the 1990 amendment to La. Civ. Code article 2363.

547. Id.
other hand, several articles\textsuperscript{548} and a comment\textsuperscript{549} treat the community as a patrimonial mass of assets and liabilities, an assemblage of things and obligations. These differing treatments of the nature of the community may have contributed to some of the analytical errors previously discussed that appear in the jurisprudence, especially in the classification of obligations incurred during the existence of the legal regime.\textsuperscript{550} As previously noted, the Civil Code classification of an obligation incurred during the existence of the legal regime depends upon whether it was incurred for the common interest of the spouses, the interest of the other spouse, or only for the interest of the incurring spouse.\textsuperscript{551} On the other hand, the jurisprudential inquiry is often whether or not the obligation benefited the community.\textsuperscript{552} This benefiting the community language is used twice in the second paragraph of Civil Code article 2363 defining certain types of obligations as separate obligations of a spouse.\textsuperscript{553} It also appears in article 2364.1, which contains one of the reimbursement rules.\textsuperscript{554} Additionally, articles 2336 and 2337 apparently make a distinction between the community as an assemblage of things and obligations and particular community things in their proscription against judicial partition of the community or things of the community\textsuperscript{555} and against disposition of a spouse's undivided interest in the community and in particular things of the community\textsuperscript{556} prior to the termination of the legal regime.

Article 2338 classifies as community property "damages awarded for loss or injury to a thing belonging to the community"\textsuperscript{557} and article 2343 refers to "a thing forming part of the community."\textsuperscript{558}

\begin{itemize}
\item \textsuperscript{549} L.A. CIV. CODE ANN. art. 2336 cmt. (c) (2006).
\item \textsuperscript{550} See discussion cited supra notes 497–527.
\item \textsuperscript{551} L.A. CIV. CODE ANN. arts. 2360, 2363 (2006).
\item \textsuperscript{552} Sequeira v. Sequeira, 888 So. 2d 1097, 1101 (La. App. 5th Cir. 2004), writ denied, 901 So. 2d 1065 (La. 2005). See also cases cited supra note 507.
\item \textsuperscript{553} L.A. CIV. CODE ANN. art. 2363 (2006).
\item \textsuperscript{554} L.A. CIV. CODE ANN. art. 2364.1 (2006).
\item \textsuperscript{555} L.A. CIV. CODE ANN. art. 2336 (2006).
\item \textsuperscript{556} L.A. CIV. CODE ANN. art. 2337 (2006).
\item \textsuperscript{557} L.A. CIV. CODE ANN. art. 2338 (2006).
\item \textsuperscript{558} L.A. CIV. CODE ANN. art. 2343 (2006).
\end{itemize}
The use of the word "community" in these articles and in the comments thereto define the community in terms of property, not as a system of principles and rules. In other articles, the words "property," "separate property," "community property," "thing," or "things" are correctly used to designate the property owned by the spouses either as community property or as separate property.

A historical review might be helpful in understanding a possible source of this confusing use of one word to mean several different things in the same statute.

Planiol's *Traité Elémentaire de Droit Civil* explains that in the French Civil Code the word community has two meanings:

902. The Double Meaning of the Term
The term "community" designates two different concepts:
(1) The Spouses Themselves, Considered as Partners. When we say that the community is a creditor or debtor, we mean that this role is played by the two spouses as one person.
(2) The Common Property. We say, for instance, that a creditor has an action against the community, if the common property of the spouses has been pledged to him.559

If the first meaning of the word "community" in Planiol is used to refer to the spouses, it is consistent with the definitions of community obligations and separate obligations in article 2360 and the first paragraph of article 2363, which define the classification of obligations in terms of the interest of a spouse or spouses.560 This meaning of the word is also consistent with the words "for the benefit of the community" in article 2364.1561 and in the first

561. LA. CIV. CODE ANN. art. 2364.1 (2006). The context of the article supplies no clue as to whether "a criminal act committed by a spouse, which act was not perpetrated for the benefit of the community" refers to an act that does not benefit the spouses or to an act that does not benefit their community property. Id. It cannot logically refer to a system of principles and rules. See LA. CIV. CODE ANN. art. 2325 (2006).
clause of the second paragraph of article 2363,\textsuperscript{562} if these provisions actually refer to a benefit (or lack of it) to the spouses, not to community property. It also could be used in the second clause of the second paragraph of article 2363\textsuperscript{563} to mean "the spouses," the family; or the other spouse, if this is the intended meaning of the text. However, the second meaning of the word "community," i.e., common property, could just as logically be used in these articles.\textsuperscript{564} However, the use of the word "community" in the second paragraph of article 2363 and in article 2364.1 to alternatively mean "the spouses" or to mean their "common property" completely changes both the meaning of these rules, and, in many cases, the classification of the obligation. In each instance, does the phrase "benefit [of] the community" mean benefit to the spouses or benefit to their common property? The need for clarity suggests that the legislative intent be clarified.

The use of the word "community" in articles 2336, 2337, 2343, 2343.1, 2344, 2357, and 2365 necessarily is an application of the second meaning of that word in Planiol, as it cannot mean the spouses in the contexts in which the word is used. It is clear to the writer that when the jurisprudence uses the phrase "benefit the community," it is referring to community property. However, it is not clear whether the word is being used to describe a benefit to a

\textsuperscript{562} This clause reads, "An obligation resulting from an intentional wrong not perpetrated for the benefit of the community . . . ." \textsc{La. Civ. Code Ann.} art. 2363 (2006). This is a provision which is parallel to that of article 2364.1. Like that article, the phrase "for the benefit of the community" could refer either to an intentional tort committed in defense of the persons of the spouses or their community property. \textit{See La. Civ. Code Ann.} arts. 2363, 2364.1 (2006). It cannot logically refer to a system of principles and rules.

\textsuperscript{563} The clause reads, in part, "[A]n obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse, is likewise a separate obligation." \textsc{La. Civ. Code Ann.} art. 2363 (2006).

\textsuperscript{564} The use of the word "community" in the second paragraph of article 2363 to mean "the spouses" is more consistent with the definition of a community obligation in article 2360, as it excludes the spouses, the family, and the other spouse. \textit{See La. Civ. Code Ann.} art. 2360 (2006). The use of the word "community" to mean "community property" does not conform to the definitions of community and separate obligations in articles 2360 and 2363. \textit{See La. Civ. Code Ann.} arts. 2360, 2363 (2006). It excludes community property, the family, and the other spouse, but not both spouses.
universal property of assets and obligations, a particular item of community property, or all of the community property of the spouses.

The comment describing the community of acquets and gains as a universality of assets and liabilities more aptly describes a universal community under French law, which may be established by agreement of the spouses as an alternative to the legal regime. It consists, with a few exceptions, of all of the property, both real and personal, present and to come, and all of the debts of the spouses, present and future. In Louisiana, a community is none of these, but is one regime, or system of principles and rules, governing the ownership and management of the property of married persons.

In addition to other needed amendments to the articles governing matrimonial regimes to correct or eliminate other jurisprudential errors discussed earlier, the use of one word, "community," to mean several things in the same statute should be discontinued. Appropriate language should be substituted to clearly indicate whether each article has as its object a system of rules, the spouses, an assemblage of assets and obligations, or property that is classified as community property. This would be a service to the bench and bar and should eliminate some of the confusion. Additionally, the comments reflecting this dual use of the word "community" should be changed for the same reason. When an article deals with community property, those words should be used. When an article deals with the spouses, that word should be used. When an article deals with the system of rules known as the legal regime, those words should be used.

In the drafting of a civilian code, words must be chosen carefully and precise language should be used to avoid the problem

565. Planiol, supra note 559, at 77, 86.
566. Id. at 133.
567. Id. See Katherine S. Spaht, LOUISIANA MATRIMONIAL REGIMES CASES & MATERIALS 474 (La. State Univ. Publications Inst. 2005) for a translation of article 1497 of the French Civil Code, which permits the spouses to agree that there will be a universal community between them, and article 1526, which defines a universal community.
of defective texts. The use of words having the same sense throughout the Code is desirable. Although the Louisiana Civil Code acknowledges that the language of a law may be ambiguous and may be susceptible of different meanings, and provides for those contingencies, the goal should be language which is clear and unambiguous and which can be applied literally without absurd consequences. The articles of the Civil Code governing matrimonial regimes should be reviewed and revised with this goal in mind.

Nor is the problem just imprecision in the use of language. The Matrimonial Regimes Act should have conceptual consistency throughout. The articles and comments reflect an inconsistency in the nature of the legal regime of community of acquets and gains. If its codal definition as a particular system of principles and rules governing the ownership and management of the property of married persons is accepted as the true nature of that regime, it should be reflected in all the codal articles and comments.

570. See _LA. CIV. CODE ANN._ art. 12 (2006).
571. See _LA. CIV. CODE ANN._ art. 10 (2006).
572. See _LA. CIV. CODE ANN._ art. 9 (2006).