COMMENTS

COMMENTAIRES

The New Community of Acquets and Gains in Louisiana

Introduction

After years of study and debate, the Louisiana Legislature has modified Title VI of Book III of the Louisiana Civil Code, 1870, which treats of matrimonial regimes.[1] As of January 1, 1980, the property rights of all married persons domiciled in the state became subject to the rules governing the legal regime, the community of acquets and gains, unless a couple had entered into an express matrimonial agreement to the contrary.[2] Even those couples who have contractually avoided the legal regime will inevitably be affected by the philosophical changes announced in the new law.

The need for modernization of Louisiana community property law was seriously discussed as early as the nineteen thirties,[3]

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[1] La Civ. Code, arts 2325-2376 (1870), as am. by La Acts 1979, No. 709, § 1.

In the main, this reform was contained in La Acts 1978, No. 627, § 1, which would have come into force on Jan. 1, 1980, with the exception of certain provisions, which would have been effective either in late 1979 or at a later date (La Acts 1978, No. 627, § 9). In the interim, equal management was to be studied and additional legislation proposed. As a result of study and debate, the Act was modified in certain particulars and became La Acts 1979, No. 709. See Spaht, *Interim Study Year* (1979) 39 La L. Rev. 551.

Additional laws modifying areas affected by the reform are the following: La Acts 1979, No. 710 (Successions-Marital Portion), amending La Civ. Code, arts 2432-2437; La Acts 1979, No. 711 (Matrimonial Regimes-Equal Management), repealing or modifying a number of articles of the Civil Code to conform with the new codal provisions. See generally, Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law* (1979) 40 La L. Rev. 83.

[2] Those couples married under the prior legal regime had from Aug. 1, 1979 until Jan. 1, 1980 to execute a matrimonial agreement pre-empting the new legal regime (La Acts 1979, No. 709, §§ 10, 13); see *infra*, note 30, and accompanying text).

Couples living under a regime of separation of property will continue to do so under the new regime (La Acts 1979, No. 709, § 11).

For a discussion of spouses married under a conventional community regime, see *infra*, note 74, and accompanying text. For a discussion of couples moving into the state, see *infra*, note 28, and accompanying text.

[3] See Daggett, *Is Joint Control of Community Property Possible?* (1936) 10 Tul. L. Rev. 589; Daggett, *The Modern Problem of the Nature of the Wife's Interest in Community Property — A Comparative Study* (1931) 19 Cal. L. Rev. 567.

and the Legislature has, over the years, adopted stop-gap measures to bring Louisiana women into the twentieth century.[4] Nevertheless, on the eve of the reform, the legal regime bore a striking resemblance to the model of French and Spanish inspiration contained in the Digest of Civil Laws, 1808.[5] Certain things acquired by the spouses during marriage were classified as community assets and were controlled by the husband as "head and master".[6] During the

[4] A series of laws, beginning in 1912, led to the requirement that the wife's consent be obtained to mortgage, lease or sell community property when her name appeared in the title (La Civ. Code, art. 2334 (1870) *passim*). After 1921, the wife was able to file a declaration requiring her consent to the mortgage or sale of the family home (La Acts 1921, Ex. Sess., No. 35, codified in 9:2801, 9:2802 and 9:2804 (Supp. 1976)). In 1970, the Code of Civil Procedure was amended to give the wife the exclusive right to sue for her earnings (La Acts 1970, No. 344, § 1, amending La Code Civ. P., art. 686; am. and re-enacted by La Acts 1979, No. 711-83). In 1975, the wife was given the power to obligate her earnings for debts she had incurred before or during the marriage (La Act 1975, No. 705, § 1, adding La R.S., 9:3581-85 (Louisiana Equal Credit Opportunity Law) (Supp. 1977), repealed in part by La Acts 1979, No. 709, § 3).

[5] There is much debate as to the origin of the Louisiana community property system. Those who support the thesis that the heritage is French, maintain that the French customary law, the Custom of Paris, remained in practice in the country outside of New Orleans during the Spanish period from 1769 to 1803, and was at least a significant influence in Louis Moreau Lislet and James Brown's Digest (Civil Code), 1808. They reinforce this argument with the study of the similarity of the Projet of the 1808 Digest and the Projet of the French Civil Code, 1804. See Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence* (1978) 53 Tul. L. Rev. 3, 79 *et seq.*; Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder* (1972) 46 Tul. L. Rev. 628; Sweeney, *Tournament of Scholars Over the Sources of the Civil Code of 1808* (1972) 46 Tul. L. Rev. 585; Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance* (1971) 46 Tul. L. Rev. 4.

Those who support the argument of predominantly Spanish influence point to the adoption of the Castilian ganancial community as the legal regime, instead of the French community of movables and acquests of the Custom of Paris and the French Civil Code (Pascal, *Matrimonial Regimes* (1976) 36 La L. Rev. 409, 410; Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales* (1969) 30 La L. Rev. 1). See Pascal, *Sources of The Digest of 1808: A Reply to Professor Batiza* (1972) 46 Tul. L. Rev. 603. But see Baade, *supra*, 87 *et seq.*, who maintains that there are similarities between the Louisiana regime of 1808 and the *Communauté réduite aux acquêts* of the French Civil Code, 1804.

The Digest of Civil Laws, 1808 was followed by the Civil Code, 1825 and the Revised Code, 1870. It is significant that almost 50% of the provisions of the Digest, 1808 still survive in the Revised Code, 1870 (Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey* (1972) 47 Tul. L. Rev. 1).

[6] As an exception to the rule of complete control by the husband, the wife was allowed to obligate the community for "necessaries" which the

marriage, the community assets and liabilities were treated as the husband's patrimony. Thus, the husband could alienate community assets, in most cases without the consent of the wife, and his creditors could enforce their rights against the community. The wife's patrimony during marriage consisted of her separate assets, over which she only recently gained full control.[7] Upon termination of the regime, the wife, or her heirs, could take half of the community assets and accept half of the liabilities, or the wife, or her heirs, could renounce her share of both the assets and the liabilities. Alternatively, the wife, but not her heirs, could accept half the community under benefit of inventory.[8]

The great impetus for comprehensive reform in this area came from the growing influence of the women's movement in the United States, especially as reflected in the Equal Rights Amendment[9] and in recent United States Supreme Court decisions limiting possible statutory discrimination on the basis of sex.[10] Ultimately, the fear that the "head and master" provision of the Louisiana Civil Code[11]

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husband had not provided. Jurisprudence granted this measure of control, citing La Civ. Code, art. 1786 (1870): *General Tire Service* v. *Nash* 273 So. 2d 539 (La App. 1st Cir. 1973). Commentators prefer basing such authority upon arts 119-120 concerning the husband's obligation of support, or arts 2985-3034 setting forth the principles of mandate (Riley, "Contracts and Responsibilities of Husband and Wife in Louisiana Law" in Dainow, *Essays on the Civil Law of Obligations* (1969)).

[7] See *supra*, note 4.

Although La Civ. Code, art. 2384 (1870) *passim*, granted to the wife the right to administer her separate property, art. 2385 *passim*, and interpretative jurisprudence has presumed that the husband was the administrator until the wife's filing of a notarial act reserving the administration to herself. See, *e.g.*, *American Indemnity Co.* v. *Leon Godchaux Clothing Co. Ltd* 294 So. 2d 623 (La App. 4th Cir. 1974); Riley, *A Revision of the Property Law of Marriage — Why Now?* (1973) 21 La B.J. 29, 35.

[8] See Pascal, *Louisiana's 1978 Matrimonial Regimes Legislation* (1978) 53 Tul. L. Rev. 105, 108-9.

[9] H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). The Equal Rights Amendment was rejected by the Louisiana Legislature during the 1978 session.

[10] *Reed* v. *Reed* 404 U.S. 71 (1971). See Spaht, *Background of Matrimonial Regimes Revision* (1979) 39 La L. Rev. 323, 324 *et seq.*; Tyler, *Matrimonial Regime Reform — A Constitutional Necessity* (1978) 38 La L. Rev. 642. But see Pascal, *Revision of the Community of Gains* (La State Law Inst. Papers, 1974).

[11] La Civ. Code, art. 2404 (1870) *passim*.

This was not the only article which could have been attacked as a violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and Art. I, § 3 of the Louisiana Constitution of 1974. See, *e.g.*, La Civ. Code, arts 36, 37, 39, 92, 126, 127, 128, 129, 130, 132, 133, 134, 142, 146, 155, 166, 218, 253, 256, 298, 301, 309, 731,

would be declared unconstitutional was probably the compelling factor in the adoption of the present law.[12]

It is not surprising that the purpose of matrimonial reform, as stated by the Reporter of the Louisiana State Law Institute, the organism created by the Legislature to supervise the Civil Code revision, was "the recognition of the fullest equality of spouses possible".[13] And in this respect the new law represents a significant break with the past, both codified and practised. It deposes the husband as "head and master" of the community, adopting the principle of equal management of the community by both spouses.[14] It also permits the spouses to modify contractually the regime chosen at the time of marriage, thus ending the prohibition of contracts between husband and wife.[15]

Predictably, the thrust of the criticism of the reform is that it unjustifiably reduces the powers of the husband.[16] This is an over-simplification of the effects of the law, however, for in adopting a concept of equality of ownership and control of the community, certain measures of protection for the wife have been abandoned.[17] The result is a reclassification of separate and community property which, in its equality, is certainly more favourable to the husband than the previous regime.[18] In addition, there has been a realloca-

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1005, 1480, 1545, 1555, 2397, 2398, 2436 (1870); Riley, *Proposed Amendments Concerning Discriminatory Laws Based on Sex* (La State Law Inst. Papers, 1974).

[12] In 1978, the Louisiana Supreme Court, in a 4-3 decision, overruled a trial judge's finding that La Civ. Code, art. 2404 (1870) was unconstitutional under the equal protection clause of the Fourteenth Amendment. The Court ruled that the case could be decided without considering the constitutional question. The dissent of Mr Justice Tate left no doubt, however, that art. 2404 would be declared unconstitutional if the question were brought before the Court (*Corpus Christi Parish Credit Union* v. *Martin* 358 So. 2d 295, 303-4 (La 1978)).

[13] See Riley, *supra*, note 7, 41. For a more complete statement of policies espoused by some members of the Council of the Louisiana State Law Institute, see Riley, *Women's Rights in the Louisiana Matrimonial Regime* (1976) 50 Tul. L. Rev. 557, 567.

[14] La Civ. Code, art. 2346 (1870) (as am.).

[15] La Civ. Code, arts 2325-2329 (1870) (as am.). See *infra*, note 110, and accompanying text.

[16] See Pascal, *supra*, note 8, 111-3; Pascal, *Updating Louisiana's Community of Gains* (1975) 49 Tul. L. Rev. 555, 559-65.

[17] La Civ. Code, arts 2336 and 2346 (1870) (as am.). For a discussion of the inequality of treatment of the spouses under the previous regime, see Riley, *supra*, note 7.

[18] La Civ. Code, arts 2338 and 2341 (1870) (as am.). See *infra*, notes 33-41, and accompanying text.

tion, between spouses, of the responsibility for liabilities of the community such that the wife may no longer renounce her half of the community debts at the moment of dissolution.[19]

Indeed, a detailed study of the new provisions reveals that great strides have been made toward achieving the goals of equality set by the members of the Institute. Let us, then, consider in a first part the principal elements of the reform and, in a second part, certain problems which this reform engenders.

I. Principal elements of the new regime

A. *Introductory provisions*

An introductory article provides a definition of a matrimonial regime:

> 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.[20]

The legal regime is designated the "community of acquets and gains".[21] Unless excluded by matrimonial agreement, the legal regime governs the ownership and management of the property of married persons.[22]

The parties may, by matrimonial agreement,[23] establish a con-

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[19] La Civ. Code, arts 2357-2369 (1870) (as am.). See Pascal, *supra*, note 8, 108-9; Pascal, *supra*, note 16, 557-9.

[20] La Civ. Code, art. 2325 (1870) (as am.). This definition follows French doctrine (Planiol et Ripert, *Traité pratique de droit civil français*, 2d ed. (1957), T. 8, no. 2, p. 5; Laurent, *Principes de droit civil*, 5th ed. (1893), T. 21, nos 2-3, pp. 7-10).

Nevertheless, it differs from some commentators in that it defines the legal regime as having effect both between the spouses themselves and between the spouses and third persons. For a criticism of this definition, see Pascal, *supra*, note 8, 130; Pascal, *supra*, note 16, 556; Spaht & Samuel, *supra*, note 1, 88-9.

The comments explain that the word "property" is synonymous with "patrimony", that is, inclusive of assets and liabilities (La Acts 1979, No. 709, § 1, art. 2325, Comments; for the importance of the comments, see La Acts 1979, No. 709, §7).

[21] This expression has been employed historically by the jurisprudence and the doctrine. In the reform, "acquets" is understood to mean "acquisitions", and "gains" means an increase in the value of property through the common skill or labour of the spouses (La Acts 1979, No. 709, § 1, art. 2327, Comment).

[22] La Civ. Code, art. 2328 (1870) (as am.).

[23] The term "matrimonial agreement" is used in this reform to designate contracts executed before and during the marriage. The historical expression "marriage contract" continues to refer to antenuptial agreements only (La Acts 1979, No. 709, § 1, art. 2328, Comments).

tractual regime of complete separation of property.[24] Alternatively, they may simply modify certain aspects of the legal regime by matrimonial agreement. In the latter case, the provisions of the legal regime which have not been excluded, or modified, remain in force, and the matrimonial regime between the parties is classified as partially contractual, partially legal.[25]

The spouses may enter into a matrimonial agreement, before or during the marriage, as to all matters not prohibited by public policy.[26] They may subject themselves to the legal regime at any time during the marriage by matrimonial agreement. However, they may only contract out of the legal regime, or alter a conventional regime during marriage, upon the filing of a "joint petition and a finding by the court that this serves their best interests".[27]

Spouses who move into and acquire domicile in Louisiana will have one year to enter into a matrimonial agreement without court

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[24] La Civ. Code, art. 2328 (1870) (as am.).

[25] A matrimonial agreement must be made by an "authentic act or by an act under private signature duly acknowledged by the spouses" (La Civ. Code, art. 2331 (1870) (as am.)). It becomes effective against immovables when filed in the conveyance records of the parish in which the property is situated, and as to movables when filed for registry in the parish or parishes in which the spouses are domiciled (La Civ. Code, art. 2332 (1870) (as am.)).

[26] La Civ. Code, art. 2329 (1870) (as am.). Art. 2330 provides:

"Spouses may not by agreement before or during marriage, renounce or alter the marital portion or the established order of succession. Nor may the spouses limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property."

This provision has been criticized as limiting the freedom of the spouses to adopt, by matrimonial agreement, a regime of their choice, *i.e.*, a two-fund system or a system of management by one spouse. It would seem that it was never the intention of the Council to limit the choice of conventional regimes. See Spaht & Samuel, *supra*, note 1, 102 *et seq.*

The matrimonial agreement is subject to the general rules of conventional obligations unless otherwise specified in this title. The provision may not prejudice the rights of third persons (La Civ. Code, arts 1502 and 1969 (1870)). Nor can a matrimonial agreement derogate from the provision of La Civ. Code, art. 3183, according to which the property of a debtor is the common pledge of his creditors.

[27] La Civ. Code, art. 2329 (1870) (as am.).

This article represents a retrenchment from La Acts 1978, No. 627, art. 2834, which allowed the parties to change their regime simply by executing an authentic act. There was no provision for judicial review. See *infra*, note 107, and accompanying text.

The provision has been highly criticized, both because it limits the freedom of spouses to modify their regime when necessary, and because of the imposition of judicial review with no clear standard for decisions as to what is in the interest of the spouses. See Spaht & Samuel, *supra*, note 1, 90 *et seq.*

approval.[28] After this time, they will become subject to the legal regime of the state, no matter where they were domiciled at the time of marriage or where their marriage was celebrated.[29]

It is significant that the enacting legislation only gave spouses living under the prior legal regime from August 1, 1979 until January 1, 1980 to modify their future regime by matrimonial agreement. Those who have not done so are now subject to the legal regime for all future assets and liabilities and they are bound by the provisions limiting mutability.[30]

A minor, unless fully emancipated,[31] cannot enter into a matrimonial agreement without the written concurrence of his father and mother, or of the parent having legal custody, or of the tutor of his person.[32]

B. *The legal regime*

1. Classification of property

Under the legal regime, property is either community or separate. Community property includes:

> property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.[33]

As under the previous legal regime, there is a presumption that assets acquired during the marriage belong to the community, but now either spouse may prove that the asset is in fact his separate

[28] La Civ. Code, art. 2329 (1870) (as am.).

[29] La Civ. Code, art. 2334 (1870) (as am.).

[30] La Acts 1979, No. 709, §§ 10, 13. Spouses married under a valid contractual regime in another jurisdiction would presumably not be subject to this provision.

[31] A minor is fully emancipated by judicial decree by virtue of La Civ. Code, art. 385 (as am. by La Acts 1976, No. 155, § 1), or by marriage under La Civ. Code, art. 382 (as am. by La Acts 1978, No. 73).

[32] La Civ. Code, art. 2333 (1870) (as am.).

The previous law required that the minor obtain the consent of the same persons as were required to consent to his marriage. See La Civ. Code, art. 2330 (1870).

[33] La Civ. Code, art. 2338 (1870) (as am.).

When spouses live in community, property donated to them jointly falls into the community. If they do not live in community, the property donated to them remains separate and is held by each in indivision (La Acts 1979, No. 709, § 1, art. 2338, Comments).

property.[34] The natural and civil fruits of the separate property of a spouse are classified as a community asset, unless there has been a declaration by authentic act, or an act under private signature acknowledged by both spouses, reserving such fruits as separate property.[35] This provision is a change from the previous rule which provided that the fruits of the husband's separate property were always classified as community assets.[36] The portion of damages received for personal injuries sustained during the existence of the community and "attributable to expenses incurred by the community as a result of the injury, or in compensation of

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[34] La Civ. Code, art. 2340 (1870) (as am.).

Previously, the husband was required to file a double declaration of use of separate funds and intention to replace them in his separate estate when purchasing an immovable for his separate property. The failure to include the double declaration was fatal to the husband's subsequent claim of paraphernality. On the other hand, the wife was not barred from proving that the immovable was her separate property. See Riley, *supra*, note 7, 34.

Under the reform, the spouses face a rebuttable presumption of community property if the declaration of paraphernality has not been made. See Spaht & Samuel, *supra*, note 1, 114.

A declaration in an act of acquisition that things are acquired with separate funds as separate property may be controverted by the other spouse unless he concurs in the act. It can be contested by the forced heirs and the creditors of the spouses whether or not the other spouse concurred. Nevertheless, the transfer of property by onerous title accompanied by a declaration of paraphernality is not subject to attack by the forced heirs or by creditors (La Civ. Code, art. 2342 (1870) (as am.)).

The same principle would apply where a declaration is made that the property acquired is community, when in fact it may be separate. Under these circumstances, an authentic act evincing donative intent constitutes a donation of one half of the property to the other spouse (*Succession of Daste* 223 So. 2d 848 (La 1969); *Succession of Russo* 246 So. 2d 26 (La App. 4th Cir. 1971)).

[35] La Civ. Code, art. 2339 (1870) (as am.). In the treatment of "fruits", this article includes bonuses, delay rentals and shut-in payments from mineral leases. See Spaht & Samuel, *supra*, note 1, 110.

A declaration affecting the fruits of immovables must be filed in the conveyance records of the parish where the immovable is located (La Civ. Code, art. 2264 (1870)).

[36] Under the previous law, the wife could retain the natural and civil fruits of her separate property by filing a declaration of intention to administer her separate property and to reserve the fruits thereof (La Civ. Code, art. 2386 (1870) *passim*). Because, until such a declaration was filed, the husband was presumed to be the administrator of the wife's separate property, the fruits of that separate property accruing before the execution of the declaration fell into the community (La Civ. Code, art. 2385 (1870) *passim*). See *supra*, note 7.

the loss of community earnings", is also characterized as community property.[37]

The separate property of a spouse consists of:

> property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; and damages or other indemnity awarded to a spouse in connection with the management of his separate property.[38]

One spouse may donate his undivided interest in a thing forming part of the community to the other spouse, thereby transforming that interest into the separate property of the donee. Unless otherwise provided in the act of donation, an equal interest of the donee is also transformed into separate property, and the natural and civil fruits of the thing will be classified as the separate property of the donee.[39]

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[37] La Civ. Code, art. 2344 (1870) (as am.).

If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after the termination of the community property regime is the separate property of the injured spouse.

Personal injuries include injuries to the personality of a spouse and workmen's compensation benefits (La Acts 1979, No. 709, § 1, art. 2344, Comments).

This is a change from the previous law under which all damages awarded to the husband were considered to be community property, unless the spouses were living separate and apart at the time of the accident, because of fault on the wife's part so serious as to have constituted grounds for a separation from bed and board or divorce. The wife's damages remained her separate property even if the spouses were not separated. The reform treats recovery of both spouses in the same way.

Under prior law, if a wife was separated in fact but had not filed for a separation or divorce, the wife's earnings were her separate property whereas the earnings of the husband fell into the community.

[38] La Civ. Code, art. 2341 (1870) (as am.).

The principle of real subrogation is applicable to both separate and community property (*Newson* v. *Adams* (1832) 3 La 231, 233; Yiannopoulos, *Louisiana Civil Law Treatise,* 2d ed. (1980), Vol. 2, 338 *et seq.*

The value of community things used should be estimated at the time of acquisition to determine whether they were "inconsequential" in relation to the separate things employed in the acquisition (La Acts 1979, No. 709, § 1, art. 2341, Comments).

[39] La Civ. Code, art. 2343 (1870) (as am.).

This type of donation may be set aside by the creditors of the donor

Damages received for personal injuries sustained by a spouse during the existence of the community are classified as the separate property of the injured spouse,[40] saving the exception discussed above. This also represents a change from the prior regime under which personal injury damages received by the husband were almost always classified as community property whereas those received by the wife were, in all cases, her separate property.[41]

2. **The concept of ownership under the new regime**

Article 2336 provides:

> Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime.[42]

The community is not a legal entity but a patrimonial mass. An undivided one-half of this mass forms a part of the patrimony of each spouse during the existence of a community property regime. This is a significant departure from the previous law under which the community fell into the husband's patrimony during the legal regime. The wife's ownership of one-half, although considered to be more than an expectancy, could only be fully realized at the termination of the regime.[43]

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through the revocatory action (La Civ. Code, arts 1978-1994 (1870)).

For a discussion of the changes made in the definition of "fruits", see Spaht & Samuel, *supra*, note 1, 110.

[40] La Civ. Code, art. 2344 (1870) (as am.).

[41] See *supra*, note 37.

[42] La Civ. Code, art. 2336 (1870) (as am.).

"The spouses may amicably partition things of the community, without prejudice to the rights of third persons" (La Acts 1979, No. 709, § 1, art. 2336, Comments).

[43] The Louisiana wife's interest in the community property has been characterized as follows: La Acts 1976, No. 444, amending La Civ. Code, art. 2398 (1870) *passim* (present undivided one-half share); *Creech* v. *Capitol Mack, Inc.* 287 So. 2d 497 (La 1973), *aff'd.* 296 So. 2d 387 (La App. 1st Cir. 1974) (imperfect ownership without use); *Phillips* v. *Phillips* 160 La 813, 107 So. 584 (La 1926) (vested one-half interest). See also *Dixon* v. *Dixon's Executors* 4 La Ann. 188, 191 (1832) which, as early as 1832, rejected the French view that the wife had only a mere expectancy. The Louisiana Supreme Court did, for a time, espouse the "mere expectancy" theory: see *Guice* v. *Lawrence* 2 La Ann. 226 (1847), but *Phillips* v. *Phillips* overruled *Guice* and revived *Dixon* on this point (Samuel, *The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality* (1979) 39 La L. Rev. 347, 383; see McClendon, *Louisiana's New Matrimonial Regime Law: Some Aspects of the Effect on Real Estate Practice* (1979) 39 La L. Rev. 441, 460-5).

A separate or community obligation of either spouse can now be satisfied from community property, or from the separate property of the spouse who incurred the obligation.[44] During the existence of the regime, the separate property of one spouse is not liable for the separate or the community obligation of the other.[45] This is another change from the previous law, under which the husband was responsible for all community debts to the full extent of the community and his separate property, whereas the wife could renounce an insolvent community or accept under benefit of inventory, thereby protecting her separate property from community liabilities.[46]

A spouse cannot alienate, encumber, or lease his undivided interest in the entirety of the community prior to its termination. The theory is that a third party should not own an undivided interest in the community or in the totality of its assets.[47]

3. Management of the community

The reform adopts the principle of equal management:

> Each spouse acting alone may manage, control or dispose of community property unless otherwise provided by law.[48]

The spouse's right of equal management is neither a tacit mandate nor authority deriving from co-ownership. It is an attribute of any regime of community property established by provisions of law.[49]

Equal management is, however, tempered by certain requirements of concurrence:

> The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, furniture or furnishings while located in the family home, all or substantially all of the assets

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[44] When a separate obligation has been satisfied from community funds, the community is entitled to reimbursement. See *infra*, note 66, and accompanying text.

[45] La Acts 1979; No. 709, § 1, art. 2336, Comments.

[46] La Civ. Code, art. 2410 (1870) *passim;* La R.S. 9:2821 (1950) *passim.* See Riley, *supra,* note 7, 34; see also Spaht, *supra,* note 10.

[47] La Civ. Code, art. 2337 (1870) (as am.).

This is a disposition of public order which cannot be derogated from by contract. A violation thereof is an absolute nullity. This does not prevent the alienation, encumbrance or lease of a community thing in full ownership (La Acts 1979, No. 709, § 1, art. 2337, Comments).

[48] La Civ. Code, art. 2346 (1870) (as am.).

[49] La Acts 1979, No. 709, § 1, art. 2346, Comments.

The spouse may not affect the legal relations and responsibilities between the other spouse and another party or parties with whom he has contracted (La Civ. Code, art. 1889 (1870)).

> of a community enterprise and movables issued or registered as provided by law in the names of the spouses jointly.[50]

The donation of community property to a third person requires the concurrence of both spouses, unless it is a "usual or customary gift commensurate with the economic position of the spouses at the time of the donation".[51] The alienation, encumbrance or lease of movable assets of a business by the spouse who is the sole manager thereof is, however, possible, unless the movables are issued in the name of the other spouse or concurrence is required by law.[52] If both spouses manage a business, either can dispose of movable assets under the same rules. A spouse has the exclusive right to dispose of movables registered in his own name and to manage and dispose of his interest in a partnership.[53]

When concurrence is required but has not been obtained, the alienation is relatively null, unless the other spouse has renounced the right to concur:[54]

> A spouse may expressly renounce the right to concur in the alienation, encumbrance, or lease of a community immovable or all or substantially all of a community enterprise. He also may renounce the right to participate in the management of a community enterprise. The renunciation may be irrevocable for a stated term.[55]

A spouse is liable for damages resulting from fraud or bad faith in the management of the community property.[56] And, indeed, a

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[50] La Civ. Code, art. 2347 (1870) (as am.).

Encumbrances arising from law as a result of transactions or judgments such as the vendor's privilege, mechanics or materialman's lien or judicial mortgage are, of course, not subject to concurrence (La Acts 1979, No. 709, § 1, art. 2347, Comments).

[51] La Civ. Code, art. 2349 (1870) (as am.).

[52] La Civ. Code, art. 2350 (1870) (as am.). Concurrence is required when a movable is registered in the name of both spouses (La Acts 1979, No. 709, § 1, art. 2350, Comments).

[53] La Civ. Code, arts 2351 and 2352 (1870) (as am.).

[54] La Civ. Code, art. 2350 (1870) (as am.).

In theory, such a renunciation would not constitute a change in the administration of the community.

[55] La Civ. Code, art. 2348 (1870) (as am.).

The renunciation may be irrevocable until the happening of a certain or uncertain event. Under these circumstances, the renouncing spouse is not a party to the transaction in question, and the resulting obligation cannot be satisfied from that spouse's separate property (La Acts 1979, No. 709, § 1, art. 2348, Comments).

[56] La Civ. Code, art. 2354 (1870) (as am.).

The Louisiana Code of Practice, repealed in 1960, permitted the wife to sue her husband during marriage for any reason whatsoever if the couple were separate in property; but, if theirs were a community regime, she could sue him only for separation of her paraphernalia. In 1960, the rule was changed to conform to the judicial practice of not permitting the wife to

spouse may seek judicial authorization to act alone upon a showing that such action would be in the best interests of the family and "that the other spouse arbitrarily refuses to concur or that concurrence may not be obtained due to the physical incapacity, mental incompetence, commitment, imprisonment, or absence of the other spouse."[57] If the interest of one spouse in the community might be diminished by fraud, fault, neglect, or incompetence of the other, the injured spouse may obtain a judgment decreeing separation of property.[58]

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sue her husband unless they were separated from bed and board, except for the four reasons mentioned, regardless of the spouses' matrimonial regime (La R.S., 9:291). The new legislation provides:

"Unless judicially separated, spouses may not sue each other except for causes of action arising out of a contract or the provisions of Title VI, Book III of the Civil Code; restitution of separate property; for divorce, separation from bed and board, and causes of action pertaining to the custody of a child or alimony for his support while the spouses are living separate and apart, although not judicially separated" (La R.S., 9:291, as am. by La Acts 1979, No. 711, § 2; see Pascal, *supra*, note 8, 131).

This solution represents a retrenchment from the Subcommittee's proposal on the right of the spouses to sue each other during marriage which was phrased in terms of full freedom to sue with one exception, that is, damages for personal injury resulting from an unintentional offence or quasi-offence. See Spaht, *supra*, note 10, 343-4.

There was much debate over the standard of care required of a managing spouse. La Civ. Code, art. 2404 (1870) (as am. by La Acts 1926, No. 96) sanctioned the husband's fraud although interpretative jurisprudence eventually relieved the wife of the burden of proving fraud. The provision adopted was a compromise for those members of the Council who were in favour of adopting the more far-reaching responsibility of the French reform (Fr. Civ. Code, art. 1421; see Riley, *supra*, note 13, 563, 570; Tête, *A Critique of the Equal Management Act of 1978* (1979) 39 La L. Rev. 491, 542-4; Brooks, *Standards of Responsibility* (La State Law Inst. Papers, 1975); see *infra*, note 71, and accompanying text).

For a discussion of the relationship between arts 2354 and 2369 (as am.), see Spaht & Samuel, *supra*, note 1, 144.

[57] La Civ. Code, art. 2355 (1870) (as am.).

The word "family" refers to the limited family concept of art. 3556 (12), as am. by La Acts 1979, No. 711, § 1. See La Code Civ. P., arts, 695, 743, as am. by La Acts 1979, No. 711, § 4, providing for the proper defendant or plaintiff when the managing spouse is absent or mentally incompetent.

[58] La Civ. Code, art. 2374 (1870) (as am.).

"A judgment decreeing separation of property terminates the regime of community property retroactively to the day of the filing of the petition, without prejudice to rights validly acquired in the interim" (La Civ. Code, art. 2376 (1870) (as am.)).

"The creditors of a spouse by intervention in the proceeding, may object to the separation of property or modification of their matrimonial regime as being in fraud of their rights. They also may sue to annul a judgment of separation of property within one year from the date of the rendition

4. **Termination of the legal regime**

The legal regime is terminated by the death of one of the spouses, by a judgment of divorce, separation from bed and board or separation of property, or by a matrimonial agreement establishing another regime.[59]

Obligations incurred by the spouses with third persons, before or during the legal regime, may be satisfied after dissolution from former community funds and from the separate property of the debtor spouse. If a spouse has disposed of former community funds for obligations other than those of the community, he is liable for all obligations of the other spouse up to the value of that community property.[60] Nevertheless, one spouse may, by a written act, assume the responsibility for one-half of each community obligation incurred by the other spouse. The assuming spouse may thereafter dispose of community property without incurring further responsibility for the obligations incurred by the other spouse.[61]

As between the spouses, claims for reimbursement are regulated as follows: community obligations are satisfied from the community fund and separate obligations are satisfied from the separate property of the debtor spouse. A community liability is one which has been incurred for the common interest of the spouses or for the interest of the other spouse.[62] In general, all obligations incurred

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of the final judgment. After execution of the judgment, they may assert nullity only to the extent that they have been prejudiced" (La Civ. Code, art. 2376 (2376 (1870) (as am.)).

[59] La Civ. Code, art. 2356 and 2328 (1870) (as am.); La Acts 1978, No. 627, § 1, arts 2850-2854, concerning acceptance of the community and liquidation at the moment of dissolution, were the subject of much criticism (Tête, *supra*, note 56; McClendon, *supra*, note 43; Pascal, *supra*, note 8, 109-11, 115-8; but see Bilbe, *"Management" of Community Assets Under Act 627* (1979) 39 La L. Rev. 409, 428-36).

The offending provisions were deleted in the final reform. For a detailed discussion of the history of these provisions and possible future amendments to the Civil Code treating liquidation and administration of the community at termination, see Spaht & Samuel, *supra*, note 1, 122-36.

See La Code Civ. P., arts 3001, 3002, 3005, 3032, as am. by La Acts 1979, No. 711, § 3.

[60] La Civ. Code, art. 2357 (1870) (as am.).

Creditors may seize the funds of the former community in the hands of either spouse (La Acts 1979, No. 709, § 1, art. 2357, Comment). For a discussion of the prior law, see *supra*, notes 8, 19 and 46, and accompanying text.

[61] La Civ. Code, art. 2357 (1870) (as am.); see Spaht & Samuel, *supra*, note 1, 137-41.

[62] La Civ. Code, art. 2360 (1870) (as am.); see Spaht & Samuel, *supra*, note 1, 142.

by a spouse during the existence of the legal regime are presumed to be community obligations.[63] An alimentary obligation imposed upon a spouse by law is considered to be a community obligation.[64] A separate obligation is one which is incurred during the existence of the legal regime, but not in the common interest of the spouses:

> An obligation resulting from an intentional wrong not perpetrated for the benefit of the community, or 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, is likewise a separate obligation.[65]

If community property has been used to satisfy a separate obligation of one spouse, the other spouse is entitled to reimbursement of half of the amount, or half of the value that the property had at the time it was used.[66] Likewise, if a community obligation has been satisfied with separate funds, the spouse whose separate funds have been so used is entitled to reimbursement according to the same rule. Reimbursement is due

> to the extent of community assets, unless the community obligation 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. In the last case, the spouse is entitled to reimbursement from the other spouse *even if there are no community assets.*[67]

If community property has been used for the benefit of the separate property of one spouse, the other spouse may demand reimbursement of half the value of the community property at the time it was used.[68] And if separate property has been used for the benefit of the community, the spouse whose separate property has been so employed is entitled to reimbursement of half the value of

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[63] La Civ. Code, art. 2361 (1870) (as am.).

[64] La Civ. Code, art. 2362 (1870) (as am.).

[65] La Civ. Code, art. 2363 (1870) (as am.).

[66] La Civ. Code, art. 2364 (1870) (as am.).

In treating this as an interest-free loan, the reform differs from the prior law which used to allow reimbursement when the separate property increased in value due to community contributions. The measure of reimbursement used to be one-half of the enhanced value (La Civ. Code, art. 2408 (1870) *passim*).

[67] La Civ. Code, art. 2365 (1870) (as am.) [our emphasis].

The jurisprudence previously allowed reimbursement of one spouse's separate property for obligations incurred in the common interest of the spouses when the value of the community increased, the recovery being one-half of the enhanced value of the community (La Acts 1979, No. 709, § 1, art. 2365, Comments).

[68] La Civ. Code, art. 2366 (1870) (as am.).

This represents a change in the law from one-half of the enhanced value to one-half of the value of the funds used. See La Civ. Code, art. 2408 (1870) *passim.*

the property so used at the time it was used, *"if there are community assets from which reimbursement may be made"*.[69] Article 2368 provides:

> If the separate property of a spouse has increased in value as a result of the uncompensated common labor or industry of the spouses, the other spouse is entitled to be reimbursed from the spouse whose property has increased in value one-half of the increase attributed to the common labor.[70]

One spouse owes an accounting to the other for the community property under his control at the termination of the regime. The obligation to account prescribes within three years of termination of the community.[71]

C. *Conventional regimes*

1. **The mixed legal and conventional regime**

A mixed regime is created when the matrimonial agreement modifies the legal community without entirely excluding it. In all respects where the legal regime has not been pre-empted, its rules prevail.[72] The parties are free to determine their own regime as long as they do not derogate from rules of public order.[73] Spouses living under a regime of conventional community established by antenuptial agreement under the existing law shall be subject to the provisions of this Act governing conventional community property regimes as to matters not provided for in the matrimonial

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[69] La Civ. Code, art. 2367 (1870) (as am.) [our emphasis].

This reimbursement was granted previously by the jurisprudence (*Emerson* v. *Emerson* 322 So. 2d 347 (La App. 2d Cir. 1975)).

[70] La Civ. Code, art. 2368 (1870) (as am.).

This is a change in the law which previously did not allow reimbursement for an increase due to the ordinary course of things only. (La Civ. Code, art. 2408 (1870) *passim;* see *Abraham* v. *Abraham* 87 So. 2d 735 (La 1956)).

[71] La Civ. Code, art. 2369 (1870) (as am.).

This duty is analogous to that of a co-owner. The spouse having control of community property ought to be accountable for any loss or deterioration of the things under his control due to his fault, and for the fruits produced by the things since the termination of the community regime. The comments suggest that this obligation will be owed independently of a showing of fraud or bad faith (La Acts 1979, No. 709, § 1, art. 2369, Comments; see Spaht & Samuel, *supra,* note 1, 143-4, in which it is suggested that no showing of fault should be necessary in an accounting).

The filing of a suit for termination of the community interrupts prescription (La Civ. Code, art. 3518 (1870) (as am. by La Acts 1954, No. 532), as interpreted by the jurisprudence; see La R.S. 9:5801).

[72] La Civ. Code, art. 2328 (1870) (as am.).

[73] See *supra,* note 26.

agreement.[74] Presumably, then, the legal regime will govern in areas which are not treated in the antenuptial agreement.[75]

2. **Separation of property regime**

A separation of property regime is established by a matrimonial agreement which excludes the legal regime, or by a judgment decreeing separation of property.[76] Under this regime, each spouse manages his own property without the consent or concurrence of the other spouse.[77]

The spouses are solidarily liable for obligations incurred in providing necessaries for the family.[78] Each spouse contributes to the expenses of the marriage according to the matrimonial agreement. In the absence of a controlling provision, each spouse contributes in proportion to his means.[79] This represents a change from the prior law, which held the wife to contribute up to one-half of her earnings in the absence of a stipulation in the matrimonial agreement.[80]

Spouses living under a regime of separation of property in accordance with the previous law, continue to do so, subject to the provisions of the reform. Thus, for example, they would be affected by all provisions which are of public order as well as modifications of the Civil Code relative to interspousal contracts.[81]

In view of the far-reaching effects of this reform, it is to be expected that its implementation will be difficult. The critics have focused upon a certain number of problems which will be discussed in the second part of this article.

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[74] La Acts 1979, No. 709, § 12.

[75] A question which arises is what provisions of the antenuptial agreement will be sufficient to pre-empt the legal regime. Also, if La Civ. Code, art. 2330 (1870) (as am.) does mean that parties can only adopt an equal management regime, the management provisions of a prior conventional community will necessarily be superseded by the new legal regime. Under La Civ. Code, art. 2327 (1870) all conventional community regimes had to designate the husband the "head and master" of the community. See Spaht & Samuel, *supra*, note 1, 109; Samuel, *supra*, note 43, 400 *et seq.*

[76] La Civ. Code, art. 2370 (1870) (as am.).

[77] La Civ. Code, art. 2371 (1870) (as am.).

[78] La Civ. Code, art. 2372 (1870) (as am.) See Spaht & Samuel, *supra*, note 1, 104-7.

[79] La Civ. Code, art. 2373 (1870) (as am.).

[80] See La Acts 1979, No. 709, § 1, art. 2373, Comment.

[81] La Acts 1979, No. 709, § 11.

II. Controversial aspects of the reform

A. *Equality of ownership and control*

The adoption of a legal regime which consecrates the principles of equal and present ownership, coupled with equal control, brings Louisiana law full circle with its Spanish and French heritage. It is generally agreed that as early as the eighteenth century, well within the period of the Spanish colonization of Louisiana, a Spanish wife was considered to possess a present undivided one-half interest in the ganancial assets.[82] Moreover, although under the Spanish regime, as under community property regimes generally, the husband was given powers of administration and control inconsistent with a concept of equal ownership, the powers of the husband were tempered by the analogy drawn between the legal community and provisions governing partnership.[83] Unfortunately, both the concept of present ownership and the tradition of some tempering of the husband's control were abandoned in the Digest, 1808 and never fully restored in subsequent codes.[84]

The idea of equal control of the community by both spouses was advanced in France, at least as early as 1793, by Cambacérès,

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[82] See Bartke, *Community Property Law Reform in the United States and in Canada — A Comparison and Critique* (1976) 50 Tul. L. Rev. 213, 218; Pugh, *supra*, note 5, 11-2. For an extensive study of the eighteenth century Spanish and French legal influence in Louisiana, see Baade, *supra*, note 5, 43 *et seq.*

[83] See Pugh, *supra*, note 5, 2-5.

[84] The Digest of Laws, 1808 provided:

"The husband is the head and master of the partnership or community of gains; he administers said effects; disposes of the revenues which they produce, and may sell and even give away the same without the consent and permission of his wife, because she has no sort of right in them until her husband be dead" (La Civ. Code, 1808, 3.5.66, p. 336). The codes of 1825 and 1870 omitted the phrase "because she has no sort of right in them until her husband be dead". See La Civ. Code, art. 2404 (1870); La Civ. Code, art. 2373 (1825). For a discussion of the characterization of the wife's interest in the community during the regime, see *supra*, note 43.

La Civil Code, art. 2807 (1870), provides that "[t]he community of property created by marriage is not a partnership". Authorities suggest that this was a significant break with the Spanish tradition both past and present (Pugh, *supra*, note 5, 3).

As early as the nineteen fifties, a noted Louisiana scholar suggested reforming the community property regime by applying the partnership articles (La Civ. Code, arts 2867-2875 (1870)) to couples adopting the legal regime (Morrow, *Matrimonial Property Law in Louisiana* (1959) 34 Tul. L. Rev. 3, 48). And, indeed, this suggestion was one of several presented to the Louisiana Law Institute (Jeter, *Proposed Reform of Matrimonial Property Law of Louisiana* (La State Law Inst. Papers, 1974)).

in a first draft of the projet of the French Civil Code.[85] It was rejected at the time in favour of a system of administration by the husband,[86] and even the recent extensive reforms of the French legal regime have not gone as far in granting managerial equality to the wife.[87] Nevertheless, the idea corresponds to such an extent with the aspirations and life-styles of people living at the end of the twentieth century, that it is now part of community property systems in Belgium,[88] and in seven of the community property states of the United States.[89]

The principal inspiration for the ownership and management provisions of the present Louisiana reform is derived from other community property jurisdictions in the United States, and notably from Washington, California and Arizona.[90] The selective borrowing

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[85] Fenet, *Recueil complet des travaux préparatoires du Code civil* (1827), T. 1, 20-1:

§ II. De la manière dont se règlent les droits des époux lorsqu'il n'y a pas de convention ....

9. A défaut de convention, les droits des époux sont réglés par la loi.
10. Les sommes en numéraire, les effets mobiliers, de quelque nature qu'ils soient, appartenant aux époux à l'instant de leur union, les fruits de leur industrie, ceux de leurs immeubles, les successions mobilières qui leur adviendront pendant leur mariage, leur deviennent communs.
11. Les époux ont et exercent un droit égal pour l'administration de leurs biens.
12. Tout acte emportant vente, engagement, obligation ou hypothèque sur les biens de l'un ou de l'autre, n'est valable s'il n'est consenti par l'un et l'autre des époux.
13. Les actes ayant pour objet de conserver les droits communs ou individuels des époux, peuvent être faits séparément par chacun d'eux.
14. Les époux peuvent s'obliger séparément et réciproquement pour fait de négoce: mais, dans ce cas, déclaration préalable et authentique de leur volonté mutuelle sera nécessaire.
15. Cette déclaration sera faite devant les municipalités ou au greffe des tribunaux; elle sera affichée.

[86] Fr. Civ. Code, art. 1421; see Massip, *The Rights of the Wife in the Matrimonial Regime* (1976) 50 Tul. L. Rev. 549, 550.

[87] *Loi no 65-570 du 13 juillet 1965 portant réforme des régimes matrimoniaux*, art. 1 (J.O., 14 juillet), amending Fr. Civ. Code, arts 214-226, 1387-1581. See Massip, *supra*, note 86.

[88] See Belg. Civ. Code, arts 141-146.

For a study of the regime before the reform of July 14, 1976, see Dekkers, *Précis de droit civil belge* (1955), T. 3, nos 131 *et seq.*

[89] See Bartke, *supra*, note 82, 222-34.

[90] See Wash. Rev. Code, § 26.16.030 (Supp., 1973); Cal. Civ. Code § 5125 (Deering Supp., 1972); Ariz. Stat. Ann., § 25-214 (Supp., 1973). See also, Idaho Code, § 82-912 (Supp., 1974); Riley, *supra*, note 13, 558-9; Riley, *Book III* [,] *Title VI* [,] *Matrimonial Regimes* (La State Law Inst. Papers, 1975); Riley, *Matrimonial Regimes; Minor's Matrimonial Agreements; Management; Debts; Dissolution* (La State Law Inst. Papers, 1975); Riley, *Chapter 3 — Of the*

from other states was not, in this case, in contradiction with Louisiana's civil law heritage, for the community property systems of the other American states are directly or indirectly of Spanish origin.[91] Moreover, it is both predictable and justified, for there has emerged in the United States a sociological and cultural hegemony nurtured by federalism, advanced communication technology, and population mobility. The search for solutions to common contemporary problems will inevitably begin with neighbouring jurisdictions.

The principle of equal and present ownership had gained much support in Louisiana even before the reform, and its adoption seems to have met with little or no criticism.[92] However, the management provisions, the logical extension of the concept and the elements which give it meaning, have been highly criticized, notably for the uncertainty which must follow as to when the concurrence of both spouses will be required. There is fear that in cases where the management of a business, for example, is not clearly in the hands of one spouse, the other spouse may be able to nullify transactions between the apparent manager and third persons. On the other hand, the joining of both spouses in all transactions retards and complicates the normal course of business.[93]

Another criticism goes to the modification of the patrimony of the spouses. While the wife's creditors are pleased to see her patrimony swell to include her separate property and her undivided one-half of the community, the husband's creditors find his patrimony reduced by the half of the community which now falls into the wife's patrimony. For those creditors antedating January 1, 1980, this represents a retroactive reduction of their debtor's patrimony.[94]

These criticisms and others were the basis for arguments in favour of the adoption of a two-fund system, similar to the Partner-

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Community or Partnership of Acquets or Gains (La State Law Inst. Papers, 1974).

For a comparative discussion of the Washington reform, see Cross, *Community Property: A Comparison of the Systems in Washington and Louisiana* (1979) 39 La L. Rev. 479.

[91] See Bartke, *supra*, note 82, 219-21. See also McClendon, *supra*, note 43, 455-67.

[92] See *supra*, note 43, and accompanying text.

[93] See McClendon, *supra*, note 43, 467 *et seq.;* Tête, *supra*, note 56, 502-16; Bilbe, *supra*, note 59, 412-22; Pascal, *supra*, note 8, 113. See also, Spaht & Samuel, *supra*, note 1, 116-21.

[94] See Tête, *supra*, note 56, 530-4; Samuel, *supra*, note 43, 386 *et seq.;* Pascal, *supra*, note 8, 113-5. See generally, McClendon, *supra*, note 43.

ship of Acquests in Quebec,[95] or to the Joint and Several Management System in Texas.[96] Under either plan, each spouse retains the sole management of his separate earnings during the regime, thus protecting and facilitating dealings between married persons and third parties.[97]

The opponents of a two-fund system maintained that it would not in fact allow the spouse who remained in the home without a salary to participate in a meaningful way in the financial affairs of the couple.[98] The final decision was to favour the needs of the non-working spouse within the marital relationship over those of creditors dealing with the spouses.

In addition to the obvious philosophical victory that such a decision represents, it should be remembered that the principle of equal management is no longer new in the United States. All of the community property states, except Texas, have already adopted some form of equal management,[99] which allows Louisiana to profit from previous experiences with this type of regime. Studies from the other states indicate that there are no major inconveniences in

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[95] Que. Civ. Code, arts 1266c-1267d, as am. by S.Q. 1969, c. 77, s. 27. See Groffier, *La société d'acquêts en droit québécois* (1977) 29 Rev. int. dr. comp. 747; Bartke, *supra*, note 82, 247-60.

[96] Tex. Fam. Code, § 5.01.62 (Vernon) (1976). See Spaht, *supra*, note 10, 331. Under the Texas reform, property which would have been owned by either spouse if single, is under that spouse's sole management, control and disposition. If such community property is mixed or combined with community property under the control of the other spouse or any other community property, it becomes subject to the joint management, control and disposition of both spouses, unless the spouses have provided otherwise by power of attorney or other agreement in writing (Tex. Fam. Code, § 5.22 (1976)).

[97] Four management proposals were considered by the Revision Committee: (1) the equal management system, an adaptation of the systems adopted in California, Arizona and Washington; (2) a two-fund system similar to either the Quebec or Texas reforms; (3) a system based upon the partnership articles of the Civil Code; (4) the original Louisiana regime modified, (a) by reducing the husband's managerial powers along the lines of the French reform and, (b) by allowing the wife to retain her salary as separate property under her administration much as she could retain her separate property under the previous regime (Riley, *Five Proposed Policy Statements* (La State Law Inst. Papers, 1976); Riley, *Summary of Six Alternative Management Systems* (La State Law Inst. Papers, 1974); see Pascal, *supra*, note 16, 561).

[98] See Riley, *supra*, note 13, 558-62; Bartke, *supra*, note 81, 229-30, 251-8. But see Pascal, *supra*, note 16, 560-2, 564-5.

[99] See *supra*, note 89, and accompanying text.

the system, and that those which have arisen do not outweigh the benefits to married individuals.[100]

B. *Mutability and interspousal contracts*

A second, and potentially far-reaching, change introduced by the recent reform is the provision permitting interspousal contracts to alter the matrimonial regime during marriage.[101] It is significant that such contracts were allowed in ancient Spain[102] and elsewhere in Europe.[103] They were prohibited in the French Civil Code, 1804, however, but reintroduced in a limited form in the reform of 1965.[104]

The Louisiana codes followed the provisions of the French Code, 1804.[105] The historical reasons advanced in favour of immutability of matrimonial regimes were two-fold: first, that the influence of the husband during the marriage might lead the wife into a contract unfavourable to her separate property and, second, that the marriage contract constituted a *pacte de famille* influencing the rights of third persons which could not afterwards be jeopardized.[106] Curiously, the tradition of mutability is still so deeply entrenched in Louisiana that a provision introduced in the reform of 1978 allowing for complete freedom to alter the matrimonial regime was modified by the final legislation to require judicial approval in all

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[100] See generally, Cross, *supra*, note 90. But see Tête, *supra*, note 56, 495-502. See also McClendon, *supra*, note 43.

[101] La Civ. Code, arts 2328 and 2329 (1870) (as am.). See *supra*, note 27. The provision finally adopted by the Louisiana legislature requires judicial approval as does the French reform (Fr. Civ. Code, art. 1397). It does not, however, require that the spouses wait two years before modifying their regime as does the French reform.

The Quebec reform, *An Act respecting matrimonial regimes*, S.Q. 1969, c. 77, s. 27, amended Que. Civ. Code, art. 1265 to provide in part:

"The consorts may during the marriage modify their matrimonial regime and their contract of marriage provided that, by any modification so made, they do not prejudice the interests of the family or the rights of their creditors". For a general discussion of this article, see Groffier, *L'influence de la volonté des époux sur leur régime matrimonial* (1977) 7 R.D.U.S. 291, 307-12.

[102] See Pugh, *supra*, note 5, 27.

[103] See Planiol, *Treatise on the Civil Law*, 11th ed. (1959), Vol. 3, Part I, § 4, no 814A, p. 34.

[104] Compare Fr. Civ. Code, art. 1395 (1804) with Fr. Civ. Code, art. 1397, as am. by *Loi no 65-570 du 13 juillet 1965 portant réforme des régimes matrimoniaux*, art. 2 (J.O., 14 juillet).

[105] La Civ. Code, art. 2329 (1870) (as am.).

The principle of mutability existed under the prior law in Louisiana to the extent that the revocation of donations between spouses was permitted.

[106] See Morrow, *supra*, note 84, 27-30.

cases, except those where the change involves adopting the legal regime.[107]

Although critics generally agree that the husband's influence is no longer a reason to prohibit altering the matrimonial regime, the mutability provision has been severely attacked for the inconvenience and uncertainty which may result for third parties dealing with the spouses. It is feared that it will be cumbersome and difficult to ascertain the regime governing the parties at the time of any one transaction.[108] However, much of the criticism was directed toward the suggested provision allowing complete freedom of change. Surely, the system of judicial review which was finally adopted will prevent capricious changes, and if the provisions for registration already contained in the reform are not sufficient they could be made more stringent.

A far more significant problem concerns the effect which allowing interspousal contracts may have upon other provisions of the Civil Code. Before the reform interspousal contracts were severely limited.[109] The relevant articles have been repealed, however, in

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[107] See *supra*, notes 26 and 100.

The community property jurisdictions in the United States allow mutability of the matrimonial agreement.

Arizona expressly prohibits alteration of the matrimonial regime after solemnization of the marriage (Rev. Stat., § 25-201(D) (1965)), but is among the seven community property states presently allowing spouses to sever their community estate into equal shares of separate property (Ariz. Rev. Stat., § 25-214 (1965); Cal. Civ. Code, § 5103; Idaho Code Ann., § 32-906 (1963); Nev. Rev. Stat., § 123-080 (1) (1967); New Mexico Stat. Ann., § 57-2-12 (1953); Tex. Fam. Code, § 5.42 (1971); Wash. Rev. Code, § 26.16.050 (1957)).

Six states, excluding Idaho and Louisiana, allow a severance of the community and the creation of a joint tenancy. These states do have a Statute of Frauds requirement for protection of the parties (Ariz. Rev. Stat., § 33-431 (1965); Cal. Civ. Code, § 683; Nev. Rev. Stat., § 123-030 (1967); New Mexico Stat. Ann., § 57-3-2 (1953); Tex. Fam. Code, § 5.42 (1971); Wash. Rev. Code, § 64.28.010 (1972)).

In addition, all community property states allow spouses to destroy the community aspects of their property by gift of their interest in specific pieces of property to the other, thereby converting it into the separate property of the recipient (Sheehan, *Selected Community Property Problems of the Migrant Spouse* (1973) 7 Fam. L.Q. 433, 441).

[108] See Spaht & Samuel, *supra*, note 1, 104; McClendon, *supra*, note 43, 447, 449 *et seq.*; Tête, *supra*, note 56, 533-4; Pascal, *supra*, note 8, 106-8.

[109] La Civ. Code, art. 2446 (1870) *passim* provides:

"A contract of sale, between husband and wife, can take place only in the three following cases:

1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.
2. When the transfer made by the husband to his wife, even though not

favour of virtual freedom of contract between the spouses.[110] The greatest fear voiced by critics is that the rights of forced heirs are now endangered by the possibility of simulated donations between spouses to alter what would normally have constituted the *légitime*.[111] The argument is rendered more cogent by the virtually insurmountable problems of proof which the heirs could encounter in attacking such a transaction.

The point is well taken, although in those cases where the forced heirs of both spouses are one and the same, the problem may be academic. It would seem that the protection of forced heirs would be better achieved by more severe and comprehensive rules for registration of interspousal transactions and stricter requirements of accounting to forced heirs. Indeed, it has been suggested that judicial presumptions of simulation applicable to sales between parents and children may be applied to sales between hus-

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separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

3. When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry.

Saving, in these three cases, to the heirs of the contracting parties, their rights, if there exists any indirect advantage."

See also La Civ. Code, art. 1751 (1870) *passim* which stated as follows:

"Married persons can not, during marriage, make to each other, by an act, either *inter vivos* or *mortis causa*, any mutual or reciprocal donation by one and the same act."

La Civ. Code, art. 1790 (as am. by La Acts 1979, No. 711, § 1), which prohibited contracts between husband and wife under "the cases specially provided by law, under different titles of this Code", was long construed as forbidding contracts between spouses except in cases expressly permitted by law.

[110] See McClendon, *supra*, note 43, 449-51.

[111] La Civ. Code, arts 886-914 (1870); Tête, *supra*, note 56, 535-40. See also, *supra*, note 110, and accompanying text. But see Spaht & Samuel, *supra*, note 1, 90 *et seq.*

A spouse was not a regular heir under the Civil Codes of 1808 and 1825. A series of acts in 1844 (La Acts 1844, No. 152), 1910 (La Acts 1910, No. 57), 1916 (La Acts 1916, No. 80), 1920 (La Acts 1920, No. 160), and 1938 (La Acts 1938, No. 408) gradually ameliorated the position of the surviving spouse. Under art. 915, the surviving spouse is now a regular heir as to a portion of the community where there are no descendants. If there are children of the marriage, the spouse has a legal usufruct by virtue of art. 916. La Acts 1975, No. 680 amended art. 916 to provide that, where the usufruct was confirmed by testament, the usufruct would not be deemed to impinge upon the *légitime*. Finally, in 1976, La Acts 1976, No. 227 added art. 916.1 which provides the surviving spouse with an additional usufruct on community property constituting the family home, which likewise is not considered an impingement on the *légitime* (Tête, *supra*, note 56, 535).

bands and wives.[112] In any event, it would hardly have been possible or desirable to maintain the fiction of the wife's incapacity to contract with her husband in legislation designed to lead a society into the twenty-first century.

C. *Constitutionality of retroactive provisions of the reform*

A third, and potentially serious, criticism of the reform concerns the constitutionality of several provisions providing for its retroactive application. In an effort to extend the benefits of the reform to spouses married under the previous law, the enacting legislation provides that spouses married under the previous legal regime become subject to the new regime,[113] and that spouses married under a conventional community regime will be subject to the new regime in those areas not governed by their antenuptial agreement.[114]

The reform also establishes a major reclassification of property. In some circumstances, it is not clear whether the reclassification will operate retroactively.[115] Finally, in granting the wife equal management as well as equal ownership of the community, the husband's patrimony during the community has been retroactively reduced as to creditors antedating January 1, 1980.[116]

The constitutional arguments against the reform are two-fold. First, if the prior regime can be classified as contractual, it can be argued that the new law is unconstitutional in that it retroactively impairs the freedom to contract.[117] Second, if the prior regime is not contractual, then the reform may be attacked as a deprivation of property without due process of law.[118]

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[112] See *supra*, note 110, and accompanying text, and note 111.

[113] See *supra*, note 30, and accompanying text.

[114] See *supra*, note 74, and accompanying text.

[115] See Samuel, *supra*, note 43, 393-8.

[116] See Samuel, *ibid.*, 386-92.

[117] "No State shall ... pass any ... Law impairing the Obligation of Contracts ..." (U.S. Const. art. I, § 10). The Louisiana constitutional counterpart to the federal contracts clause is art. I, § 23, of the 1974 Louisiana Constitution.

It is significant that the reform has rejected the theory that the legal community constitutes a tacit contract (La Acts 1979, No. 709, § 1, art. 2336, Comments; see La Acts 1978, No. 627, § 1, art. 2833, Comment; but see Pascal, *supra*, note 8, 106).

[118] "[N]or shall any State deprive any person of life, liberty, or property without due process of law ..." (U.S. Const., Amend. XIV, § 1). The Louisiana constitutional counterpart to the federal due process clause is art. I, § 2, of the 1974 Louisiana Constitution.

Retroactive civil laws are not prohibited *per se* either by the United States Constitution or by the Louisiana Constitution. The clause in art. I,

The "impairment of contract" argument would probably be the more successful means of defeating the Louisiana reform. Recent federal court decisions indicate that, if a contract has been severely impaired, the courts will scrutinize the purpose of the legislation and the means chosen to achieve that purpose. It would seem that it is no longer tenable to argue that contracts are made with the intention of applying future legislation.[119] The burden is probably upon the legislator to show that the offending law was enacted with a broad social purpose, and that no less dramatic means could have been employed to achieve the same ends.[120]

On the other hand, it is not clear that the previous legal regime in Louisiana constituted a "tacit contract" between the parties. The "tacit contract" theory developed as a French rule of private international law,[121] but its weaknesses have been recognized by certain French authorities.[122] Indeed, the fact that parties marry without executing an antenuptial agreement, does not indicate "tacit" consent to contract a matrimonial regime according to the dictates of the legal regime.[123]

There are several arguments raised in support of the "tacit contract" theory in Louisiana. A historical argument is based upon a difference in the wording of the Digest, 1808, and the Civil Code, 1825, such that the former could be construed as imposing the legal regime upon all married couples. It has been argued that, by

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§ 9 of the United States Constitution forbiding *ex post facto* laws has been held to apply only to criminal laws (*Calder* v. *Bull* 3 U.S. (3 Dall.) 386 (1798)). The *ex post facto* clause of the Louisiana Constitution probably does not apply to civil laws (*Cooper* v. *Lykes* 49 So. 2d 3 (La 1950)). The clause is found in art. I, § 23, of the Louisiana Constitution of 1974.

[119] See Samuel, *supra*, note 43, 376-9, 402-4.

[120] See Samuel, *ibid*, 356-60.

[121] See Batiffol, *Droit international privé*, 6th ed. (1978), T. 2, nos 616 *et seq.*, pp. 306 *et seq.*; Roubier, *Le droit transitoire* (*Conflits des lois dans le temps*), 2d ed. (1960), no 79, pp. 393-6. See also, Groffier, *supra*, note 101, 298-300.

[122] See Batiffol, *ibid.*, 278; Cornu, *Les régimes matrimoniaux* (1974), 123; Desbois, "France" *in* Rouast, *Le régime matrimonial légal dans les législations contemporaines* (s.d.), t. XIII, pp. 181 *et seq.*; *contra*, *Mazeaud*, *Leçons de droit civil* [,] *Régimes matrimoniaux*, 3d ed. (1969), T. IV, Vol. 1, no 30, pp. 49-50.

[123] See Spaht, *supra*, note 10, 329-30. See generally, Samuel, *supra*, note 43.

It is significant that, under the prior law, couples could only avoid the "head and master" provision by contracting a regime of separation of property. La Civ. Code, art. 2327 (1870), prohibited their derogating by matrimonial agreement "from the rights resulting from the power of the husband over the person of his wife and children, or which belong to the husband as the head of the family". (But see Pascal, *supra*, note 16, 555-6; Pascal, "Matrimonial Regimes" in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term* (1977) 37 La L. Rev. 358, 358-9).

allowing couples to contract out of the legal regime in the 1825 Code, the legislator intended that the legal regime also be considered contractual, a tacit contract in the absence of an express antenuptial agreement.[124]

Secondly, it has been argued that article 2807, which provides that a matrimonial regime is not a partnership but "the effect of a contract", is support for the "tacit contract" theory;[125] however, the history of this provision indicates that it refers to conventional matrimonial regimes rather than to the legal regime.[126] Thirdly, article 1967 has been cited in support of the legislative intention to treat the legal regime as a contract, for that article cites the legislative provisions controlling the community of gains as illustrative of provisions which take effect and regulate a contract in the absence of an agreement between the parties to the contrary.[127] Here again, historical analysis of this article indicates that it more properly refers to a conventional regime.[128] Article 2292, stating that under some circumstances the law will impose obligations between parties, as in the case of "common property", is more appropriate to the legal regime.[129]

Even if the previous legal regime were classified as contractual, however, it may be possible to show that a broad societal purpose has been served by the reform and that less dramatic means to this end were not available. Nor is it a foregone conclusion that a "tacit contract" between the spouses married under the prior legal regime has been severely impaired by the new legislation.[130]

The second constitutional argument would be to the effect that the husband had been deprived of property without due process of law. Under this argument, the attacking party must show that the law in question is arbitrary and irrational.[131] This would be a difficult task. There is already authority for the proposition that, if the wife's interest in the community constitutes more than an expectancy, the legislature can diminish the husband's power to

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[124] See Pascal, *supra*, note 16, 556 *et seq.* But see Samuel, *supra*, note 43, 364-70.

[125] La Civ. Code, art. 2807 (1870).

[126] See Batiza, *supra*, note 5, *in fine*, 98; Samuel, *supra*, note 43, 371.

[127] La Civ. Code, art. 1967 (1870).

[128] See Batiza, *supra*, note 5, *in fine*, 81; Samuel, *supra*, note 43, 372-3.

[129] La Civ. Code, art. 2292 (1870). See Samuel, *supra*, note 43, 374.

[130] It has been suggested that "[t]he new legislation might simply have provided that couples already married would be presumed to contract the new community regime unless one of the spouses, within a stated period of reasonable length, recorded his or her decision to retain the existing regime" (Pascal, *supra*, note 8, 128; see Spaht & Samuel, *supra*, note 1, 107-9).

[131] See Samuel, *supra*, note 43, 352-6.

protect it, in order to increase the control by the wife.[132] And, indeed, under the prior regime, the Louisiana wife had been held to possess more than an expectancy in the community before its termination.[133]

Other American jurisdictions have, more often than not, sought to avoid constitutional issues. There is thus no precedent in this area.[134] The French reform, however, contains a number of analogous retroactive provisions.[135] It remains to be seen how the constitutional issues will be treated at both the state and federal levels.

Conclusion

This legislation is in its infancy. It has been said that it represents a radical departure from the community of gains' traditional structure.[136] This is true, and it follows that the implementation of the reform will engender difficulties at least of a practical order. Much has been said in defence of the new legislation, however, and principally that it responds to the needs of women and men in contemporary North American society. That is reason enough for change, for no state can ignore the needs of its citizens in favour of maintaining its legal tradition, however dear that tradition may be.

It is most significant, however, that in many respects this reform represents a return to concepts of fairness and equality which existed under the Spanish and French systems in Louisiana's history. Far from being untried, variations of the reform have developed in seven other American states, and Belgium adopted similar legislation in 1976. Other jurisdictions have chosen different formulae for reform, but the trend to recognize equal rights in partners to a marriage is common to many contemporary societies.[137]

This change in Louisiana law was long overdue and, despite any criticism, it is most welcome.

Katherine Connell-Thouez*

[132] See Samuel, *ibid.*, 382 *et seq.*, and legislation cited therein. See also, *supra*, note 4.

[133] See *supra*, note 43.

[134] See Samuel, *supra*, note 43, 349-50, 392, 400.

[135] See Samuel, *ibid.*, 385-6, 388-92. See also the Quebec Reform, *An Act respecting matrimonial regimes*, S.Q. 1969, c. 77, s. 28, which amended Que. Civ. Code, art. 1268 to provide that "[t]he provisions governing community of moveables and acquets are applicable to consorts who, on the 1st of July 1970 were married under the regime of legal community."

[136] See Pascal, *supra*, note 16, 566; Tête, *supra*, note 56, 546-9.

[137] See Riley, *supra*, note 13, 565-7; Massip, *supra*, note 86, 549.

* Teaching Fellow, McGill University. The author thanks Prof. Ethel Groffier of McGill University and Mary Elizabeth Paltron of the Louisiana Bar for their comments.