

Louisiana Law Review

Volume 42 | Number 2

Developments in the Law, 1980-1981: A Symposium

Winter 1982

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Repository Citation

C. Lawrence Orlansky, *Termination of the Community*, 42 La. L. Rev. (1982)

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TERMINATION OF THE COMMUNITY

Introduction

Termination of the community of acquets and gains¹ in Louisiana gives rise to a series of complex issues, some of which have not been fully responded to in the latest matrimonial regimes revisions.² Only one Civil Code article³ addresses the matter of satisfaction of pre-dissolution debts upon termination of the community, as between a spouse and third person creditors. Several articles⁴ define the rights of reimbursement between spouses at termination, but the legislation is inadequate in terms of relating the articles on judicial partition⁵ to termination of the regime. Some improvements in Louisiana matrimonial regimes laws have been made. Nevertheless, some old problems still exist; other problems are raised by the new legislation itself. This fact has been recognized by the legislature in the form of a resolution establishing a joint committee "to study the need for and feasibility of developing a specific procedure for the partition of community property between spouses, and settlement of debts and claims for reimbursement upon dissolution of the community for any cause."⁶ Hopefully, some suggestions herein discussed will be considered as the legislature seeks to improve the law regarding termination of the community.

Satisfaction of Pre-Dissolution Obligations

Civil Code article 2357 allows, upon termination, a separate⁷ or

1. LA. CIV. CODE art. 2356 provides: "The legal regime of community property terminates by the death of a spouse or by a judgment of divorce, separation from bed and board, or separation of property." For further discussion of article 2356, see Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 123-24 (1979).

2. 1979 La. Acts, No. 709, § 1.

3. LA. CIV. CODE art. 2357.

4. LA. CIV. CODE arts. 2358, 2364-2368.

5. LA. CIV. CODE arts. 1289-1414.

6. La. S.R. Con. Res. No. 165, 7th Reg. Sess. (1981).

7. LA. CIV. CODE art. 2363 defines separate obligations:

A separate obligation of a spouse is one incurred by that spouse prior to the establishment or after termination of a community property regime, or one 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. 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.

community⁸ obligation incurred prior to dissolution⁹ to be satisfied

8. LA. CIV. CODE art. 2360 defines community 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."

9. Judgments of divorce, separation from bed and board, and separation of property operate retroactively to the date of filing. LA. CIV. CODE arts. 155, 159, 2375. An issue arises as to whether persons who become creditors after filing of the petition but before judgment can be considered "pre-dissolution creditors" for the purpose of applying article 2357. Articles 155, 159, and 2375 all state that the judgment's retroactive effects are to be without prejudice "to rights validly acquired in the interim." The problem centers around *what rights* are "rights validly acquired."

Support may be found in the jurisprudence for the position that a creditor whose transaction with a spouse occurs after filing of a suit which will terminate the community should have his recovery limited to the incurring spouse's separate property. In *Landreneau v. Ceasar*, 153 So. 2d 145 (La. App. 3d Cir. 1963), writ refused, 244 La. 901, 154 So. 2d 769 (1963), the court utilized the prohibition in Civil Code article 150 to rule that an obligation incurred by a husband after filing a suit for separation from bed and board is his separate debt even without the filing of *lis pendens*. See LA. CIV. CODE art. 150 (repealed 1979). Two years earlier, however, in *Shapiro v. Bryan*, 132 So. 2d 97 (La. App. 4th Cir. 1961), a different court had ruled that a third party purchaser of an immovable is *protected* by the public records doctrine and that *lis pendens* had to be filed before a wife could take advantage of the article 150 limitation upon the husband's ability to dispose of immovables.

Article 155 did not provide for a retroactive effect nor the accompanying protection of "rights validly acquired" until a year after *Shapiro*. 1962 La. Acts, No. 178, § 1. That provision was effective at the time of the *Landreneau* decision, although the court did not refer to it. That silence is understandable in that the *Landreneau* creditor clearly did not have a "right validly acquired" under article 155; article 150 expressly prohibited the transaction from binding the community. Of course, the creditor in *Landreneau* did have a right to seize the *property* of his debtor, LA. CIV. CODE art. 3183, and retroactive dissolution had to be without prejudice to *that* right.

The recent repeal of article 150 arguably could signal an intent to allow a *Landreneau* creditor to claim a "right validly acquired" under article 155 and therefore avail himself of article 2357. However, it is submitted that the legislative intent was not to grant a creditor more rights under article 155, but to equalize the position of the spouses by rejecting the discriminatory provisions of article 150. Article 155 was amended at the same time article 150 was repealed; however, that amendment simply substituted gender-neutral terms. 1979 La. Acts, No. 711, § 1. The fact that no other significant changes were made in the language of article 155 indicates that there was no legislative intent to grant more rights than were previously recognized. Therefore, article 2357 apparently will not generally be applicable to those who became creditors after the filing of a petition for separation, divorce, or separation of property.

Nevertheless, in a case like *Shapiro*—involving a third party purchaser of an immovable—the *lis pendens* statutes, LA. CODE CIV. P. arts. 3751-3753, may be imposed upon article 155 in order to protect the third party in the same manner *Shapiro* did. However, since alienation of an immovable now generally requires consent of *both* spouses, LA. CIV. CODE art. 2347, facts identical to *Shapiro* probably would arise infrequently, for example, 1) when a spouse has renounced the right to concur, LA. CIV. CODE art. 2348, or 2) when a matrimonial agreement has given one spouse the exclusive power to alienate community immovables. LA. CIV. CODE art. 2329. This peculiar situation deserves more legislative attention.

from the property of the former community¹⁰ as well as from the separate property¹¹ of the spouse who incurred the debt. Article 2345, which concerns satisfaction of obligations during the existence of the community, is substantially the same as the first paragraph of article 2357.¹² Consideration of article 2345 and the jurisprudence leading to its enactment may help to justify the provisions of article 2357.¹³

Before the latest revisions, an antenuptial creditor of the husband, during the existence of the community, could satisfy the obligation from community property.¹⁴ The antenuptial creditor of the wife did not have similar access to the property of the community,¹⁵ other than to the wife's earnings during the marriage.¹⁶ Whether this disparate treatment was a derogation from the express provisions of the Civil Code,¹⁷ or whether satisfaction from community property by the husband's antenuptial creditor was actually in strict

10. LA. CIV. CODE art. 2338 defines community property:

The community property comprises: 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.

11. LA. CIV. CODE art. 2341 defines separate property:

The separate property of a spouse is his exclusively. It comprises: 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.

12. LA. CIV. CODE art. 2345 provides: "A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation."

13. The policy of article 2357 which allows the antenuptial creditor of one spouse to recover, upon termination, from the property of the former community in the hands of the non-incurring spouse has been criticized as "a valiant attempt" to protect creditors which "goes too far." Riley, *Analysis of the 1980 Revision of the Matrimonial Regimes Law of Louisiana*, 26 LOY. L. REV. 453, 512 (1980).

14. See *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973).

15. *Id.*

16. LA. R.S. 9:3584 (Supp. 1975) (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 3).

17. LA. CIV. CODE art. 2403 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1) provided, in pertinent part: "[T]he debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."

adherence to the Code has been the subject of some dispute.¹⁸ Nevertheless, the reasoning apparently was based on the notion that since the husband, as head and master of the community,¹⁹ had the right to administer and alienate (including the *dation en paiement*) community effects without consent of the wife, his separate creditors should be able to execute against the community.²⁰ The assets of the community were considered part of the husband's patrimony, not the wife's.²¹ Since the property of the debtor is the common pledge of his creditors,²² the reasoning was clearly tenable.

Upon first glance at the present matrimonial regimes articles, one might think that the same reasoning supports the policy of article 2345 and, ultimately, of article 2357. Since Louisiana now has equal management of community property,²³ the separate creditors (including antenuptial creditors) of *either* spouse should be able to satisfy debts from community property. However, equal management does not apply to *all* community property.²⁴ The legislative expansion of sources from which creditors may recover must be based on reasoning other than simply correlating the power to manage and alienate with an exposure to liability. Rather, articles 2345 and 2357 appear to reflect a legislative policy geared toward extending to the wife and her creditors the same rights previously enjoyed by the husband and his creditors. The community is no longer considered part of the husband's patrimony exclusively.²⁵ Being part of the

18. See LA. CIV. CODE art. 2404 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1). For further discussion of this dispute, see Note, *Community of Acquests and Gains—Antenuptial Obligations of the Husband—Article 2403*, 29 LA. L. REV. 409 (1969).

19. See LA. CIV. CODE art. 2404 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1).

20. See *Fazzio v. Krieger*, 226 La. 511, 523, 76 So. 2d 713, 717 (1954) (quoting *Davis v. Compton*, 13 La. Ann. 396, 396 (1858): "As the husband has the right to alienate the effects of the community without the consent of his wife, creditors of the husband before marriage ought also to have the right to seize the effects of the community to satisfy their claims."). This language was again quoted approvingly in *Creech v. Capital Mack, Inc.*, 287 So. 2d at 502, which overruled *United States Fidelity & Guaranty Co. v. Green*, 252 La. 227, 210 So. 2d 328 (1968), a case which had discredited the reasoning. For a full discussion of the rights of creditors under the old provisions, see Comment, *Creditors Rights*, 25 LA. L. REV. 201 (1964).

21. See Pascal, *Louisiana's 1978 Matrimonial Regimes Legislation*, 53 TUL. L. REV. 105, 108 (1978).

22. LA. CIV. CODE art. 3183.

23. LA. CIV. CODE art. 2346. For a full discussion of the management provisions, see Note, *Management of Community Assets: Incorporeal Movables*, 42 LA. L. REV. 770 (1981), this issue.

24. See LA. CIV. CODE arts. 2350-2352 and the comments thereto. See also Note, *supra* note 23.

25. LA. CIV. CODE art. 2336, comment (c) states, in part, "An undivided one-half of this mass forms a part of the patrimony of each spouse"

patrimony of both spouses, the community funds logically are available for satisfaction of the debts of either spouse, whether those debts are separate or community.²⁶

*Creech v. Capitol Mack, Inc.*²⁷ and other jurisprudence allowing the husband's separate creditors to recover against community property involved satisfaction of obligations *during the existence of the community*.²⁸ Upon termination, the husband's separate creditors could recover only from the husband's interest in the community, and then only after partition and payment of community creditors.²⁹ Thus, article 2357, dealing with satisfaction of obligations *after* termination of the regime, cannot be interpreted as an extension of rights to the wife which the husband alone previously enjoyed. The probable intent of the legislature was simply to make certain that termination of the community would have no adverse effect on pre-dissolution creditors, at least as to assets already acquired by the community prior to the moment of termination.³⁰ The first paragraph of article 2357 gives to the pre-dissolution creditor no more and no fewer rights after termination than he held during the existence of the community.³¹

Article 2357 reflects a creditor-oriented scheme, an orientation which pervades the entire scope of the revisions.³² Evidence of the concern for creditors' rights is found in the second paragraph of article 2357, under which a spouse who disposes of property of the former

26. See LA. CIV. CODE arts. 3182 & 3183.

27. 287 So. 2d 497 (La. 1973).

28. See Riley, *supra* note 13, at 507 n.271, 511.

29. See, e.g., Markham v. Allen, 22 La. Ann. 513 (1870); Comment, *supra* note 20, at 232-33. See also Comment, *The Fictitious Community and the Right to Partition*, 30 LA. L. REV. 603 (1970).

30. See Spaht & Samuel, *supra* note 1, at 125.

31. Termination of the community will have an effect on pre-dissolution creditors in terms of future assets available for satisfaction of the debt. For example, the salary of the non-incurring spouse will no longer go into a community fund and will therefore become insulated from the reach of those who became creditors by virtue of transactions with the other spouse. See Bilbe, "Management" of Community Assets under Act 627, 39 LA. L. REV. 409, 429 (1979); Spaht & Samuel, *supra* note 1, at 124-25. Contrast this result with a recent amendment to article 2336 which allows a voluntary non-judicial partition during the community existence. 1981 La. Acts, No. 921, § 1, amending LA. CIV. CODE art. 2336. The effect of a partition *during* the community existence will be a reclassification of presently owned property at a time earlier than termination. Upon termination of a community whose members had previously entered into a voluntary partition, the provisions of article 2357 still will be applicable. However, little or no "property of the former community" may remain from which a pre-dissolution creditor might recover.

32. See LA. CIV. CODE arts. 2330, 2345, 2364 & 2365. See generally Bartke, *The Reform of the Community Property System of Louisiana—A Response to its Critics*, 54 TUL. L. REV. 294, 333-34 (1980); Bilbe, *supra* note 31; Pascal, *supra* note 21; Riley, *supra* note 13; Spaht & Samuel, *supra* note 1.

community for a purpose other than the satisfaction of a community obligation becomes liable for all obligations incurred by the other spouse up to the value of the disposed property.³³ Some theoretical basis exists upon which to conclude that this provision is not unfair to the disposing spouse. Because article 2357 makes *all* assets of the former community available for execution by *all* pre-dissolution creditors of either spouse, the non-debtor spouse injures the position of any pre-dissolution creditor by disposing of the property of the former community. As the articles are concerned generally with protection of creditors,³⁴ a provision which effectively freezes a creditor's position with regard to the assets, or at least the value of the former community, is conceptually not a problem.

Nevertheless, article 2357, which indiscriminately exposes a spouse to liability for disposing of assets of the former community, creates problems which realistically are difficult to dismiss. Other authors have questioned whether the disposition of property of the former community in order to meet "current living expenses" triggers the personal liability of paragraph two.³⁵ Perhaps the legislature should provide an additional exception to personal liability where a spouse disposes of former community assets for the satisfaction of community obligations *or* for the purpose of providing for current living expenses. However, the choice of statutory language must be made carefully, as that choice may have a significant effect on how satisfactorily the issue can be resolved.

The problem is not difficult to imagine. For example, after termination, *W*, perhaps a previously non-working spouse, finds herself working at low wages to pay apartment rent and buy groceries. In order to make ends meet, she decides to sell the car which she has by virtue of a voluntary partition of the former community. Under current law, she apparently would be liable for *all* (separate and

33. The second paragraph of article 2357 provides: "If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up to the value of that community property."

A simple hypothetical illustrates the effect of this provision: *H* and *W* have terminated their community. *H* owes creditor *A* \$500 for an antenuptial debt. *A* may not ordinarily satisfy this debt from the separate property of *W*, *e.g.*, wages she has earned since termination. However, if *W* disposes of any property of the former community for a purpose other than for the satisfaction of a community obligation, paragraph two of article 2357 is triggered, and *W*'s separate property becomes available for the satisfaction of *H*'s antenuptial debt up to the value of the property disposed of by *W*. *W*'s wages may then be garnished by *A* to satisfy the obligation.

34. See note 32, *supra*, and accompanying text.

35. Spaht & Samuel, *supra* note 1, at 126.

community) pre-dissolution obligations³⁶ incurred by *H* up to the value of the car. This result clearly defeats the purpose for which she sold it, i.e., to have money on which to live.

A formula should be devised whereby the welfare of such a spouse could be preserved without serious consequences for the creditors. A term stronger than "current living expenses"—for example, "necessities"³⁷ or "necessaries"³⁸—would provide more certainty as to when the spouse could safely dispose of property of the former community. A broad phrase may be construed to mean that virtually any purpose³⁹ would shield *W* from incurring the liability, thereby injuring the creditors' position. On the other hand, as shown by jurisprudential interpretation of narrowly drawn codal provisions,⁴⁰ a more restricted phrase may put *W* back in the position she apparently is in now: unable to dispose of the property of the former community for any purpose without incurring personal liability. Policy reasons may cause a strong term such as "necessaries" to be construed even more strictly than it has been in jurisprudential treatment of other code articles. For example, the policy previously underlying the ability of the wife to bind the community for necessities, erroneously derived from article 1786,⁴¹ differs from that underlying article 2357 in that the former is more concerned with the welfare of the person requiring the "necessaries." On the other hand, the primary concern of article 2357 is assuring the payment of

36. A literal construction of the provision leads to a suggestion that the liability might extend to *H*'s *post-dissolution* obligations as well. See text at notes 43-46, *infra*.

37. *Cf.* LA. CIV. CODE art. 229 (alimentary duties of ascendants and descendants are "limited to life's basic necessities of food, clothing, shelter, and health care . . .").

38. *Cf.* LA. CIV. CODE art. 1786 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 2) (a husband's authorization of contracts of wife is presumed where the contracts are "for necessities for herself and family, where he does not provide . . .").

39. One argument is that "meeting current living expenses" will *always* be the purpose of *W*'s selling the car in the first place. See Spaht & Samuel, *supra* note 1, at 126.

40. See *Thibodaux v. Richard*, 60 So. 2d 240 (La. App. 1st Cir. 1952); *Johnston v. Pike*, 14 La. Ann. 731, 732 (1859) (emphasizing that the wife's right under article 1786 is "extremely limited"). See also *Russell v. Culpepper*, 344 So. 2d 1372, 1379 (La. 1977) (the obligation of a child to support his parent under article 229 exists only if the parent is "needy").

41. The use of article 1786 in the jurisprudence to permit the wife to bind the community has been strongly criticized as a "misapplication" of that provision. R. PASCAL, LOUISIANA FAMILY LAW COURSE § 5.4 (1979). Professor Pascal has suggested that article 1786 merely treated the married woman's capacity to obligate *herself*, and that the appropriate method by which the wife could bind her husband would be as his *negotiorum gestor*. *Id.*; Pascal, *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Matrimonial Regimes*, 34 LA. L. REV. 255, 258 (1974).

pre-dissolution creditors. Therefore, a tendency might develop to construe narrowly opportunities for a spouse to escape the additional liability.

A legislative provision that could adequately safeguard the interests of creditors, while at the same time providing the kind of freedom from additional liability for the non-incurring spouse that such an amendment would seek to accomplish, is as difficult to perceive as it is necessary. Regardless of any changes made by the legislation, the jurisprudence which develops will need to determine just how far a spouse may go in providing for herself after termination without incurring liability for all obligations incurred by the other spouse.

Whenever a situation arises in which a spouse has disposed of property of the former community, the creditor may have problems tracing the funds which have been received for that property. If *W* sells the car, a determination must be made whether the car was in fact "property of the former community." In addition, if an amendment is enacted which excludes funds so obtained from exposing a spouse to liability when they are used for "current living expenses" or for "necessaries," a finding will have to be made to determine the amount of funds used for that purpose. Tracing the funds may prove to be a difficult burden for the creditor. The disposing spouse will be the only one who actually knows which property belonged to the former community and how much of the funds were used for "current living expenses" or "necessaries." Nevertheless, the burden of proof will be on the plaintiff creditor. Placing this heavy burden on the creditor may militate against inserting an exception to incurring liability for "current living expenses" or "necessaries." Since the general philosophy of article 2357 favors satisfaction of debts, an amendment which would diminish a creditor's opportunity to recover may not be desirable.

If *W* has incurred the liability under article 2357 by selling the car, the degree to which she becomes responsible may prove particularly harsh. The article calls for liability up to the *value* of the community property, which may or may not be equivalent to the amount of money *W* received for the car. In the given hypothetical, *W*'s bargaining position will be understandably weak, as she is in need of money immediately. Being in no position to hold out for a higher price, *W* may settle for a price somewhat below the actual value of the car. The result, if the express provisions of article 2357 are to be followed, would be liability up to the actual value of the car. The formula for liability under the second paragraph thus should be changed to "up to the just value received for such com-

munity property." The term "just" is critical, as it will help prevent opening the door to fraudulent dispositions.⁴²

Another potential problem with the second paragraph could be avoided by simple amendment. The phrase "all obligations incurred by the other spouse" is not followed by a time reference. The precise wording of the paragraph would seem to mean that if *W* sells the car for any reason other than for satisfaction of a community obligation, she becomes liable *even to post-dissolution creditors* of *H*, up to the value of the car. No rational basis exists for such a result. As to post-dissolution creditors—by virtue of the partition—the car is simply part of *W*'s separate property. Consideration of the first paragraph of the article gives support to the position that the legislature did not intend for post-dissolution creditors to take advantage of the non-incurring spouse's disposition of property of the former community. Only those obligations incurred "before or during the community property regime" may be satisfied out of the property of the former community under the first paragraph.⁴³ The first paragraph is significant for the statutory construction of the second; by the express terms of the first paragraph, a post-dissolution creditor of *H* could not execute against the car before *W* sold it. A creditor now should not be allowed to make a claim based on her disposition of that car. He is not a creditor whose position has been prejudiced by the sale.⁴⁴ Although the first paragraph of article 2357 apparently limits the article's application to certain creditors, the second paragraph could be misread. Inserting the phrase "before or during the community property regime" after "all obligations incurred by the other spouse" in the second paragraph

42. If the non-incurring spouse were to try to injure intentionally the position of the other spouse's creditors by disposing of the property of the former community at a fraudulently low price, those creditors may not be able to bring a revocatory action. LA. CIV. CODE arts. 1968-1994. That action permits a creditor to annul contracts of his debtor which are made in fraud of the creditor's rights. The creditor who by virtue of *W*'s disposition is now able to recover from *W*'s separate property has become *W*'s *personal* creditor only because of the disposition itself. Prior to that transaction, such a creditor was merely a creditor *as to the property of the former community*. The disposition creates a personal liability for *W* which previously did not exist. At the time of the disposition the disposing spouse cannot be said to be defrauding "his creditor," LA. CIV. CODE art. 1969, because that spouse is not the *personal* debtor of a creditor who can recover only from property of the former community.

The unavailability of the revocatory action makes the inclusion of "*just* value received" in the second paragraph of article 2357 even more desirable than if the creditor could bring the action. Such an amendment would best serve the interests of affected creditors while recognizing the reality of the disposing spouse's dilemma.

43. LA. CIV. CODE art. 2357.

44. See text at notes 33-34, *supra*.

would be helpful. Such an amendment would do no more than clearly state what was apparently the intent of those who enacted the article.

When a non-incurring spouse disposes of property of the former community for a purpose other than for the satisfaction of a community obligation, he clearly subjects his separate property to execution by his former spouse's pre-dissolution creditors.⁴⁵ However, the final paragraph of article 2357 provides relief for a spouse who wishes to protect his property (including the property of the former community now in his possession) from the separate creditors of the other spouse. The pertinent paragraph states: "A spouse may by written act assume responsibility for one-half of each community obligation incurred by the other spouse. In such case, the assuming spouse may dispose of community property without incurring further responsibility for the obligations incurred by the other spouse."⁴⁶

While an in-depth discussion of the express assumption will not be attempted here,⁴⁷ it is worth noting that the provision does not allow the express assumption to affect community obligations incurred by the *assuming* spouse. The assuming spouse still will be liable for the full amount of any community obligation *he* incurred, whether such a debt is satisfied from his separate property or from the property of the former community now in his possession. As to the one-half of each community obligation incurred by the other spouse, his separate property—previously not available under the first paragraph of article 2357—is now available for execution.

The policy of permitting the separate creditor of one spouse to seize assets of the community whether or not they are in the hands of his debtor has raised at least one constitutional challenge. In *Williams v. First National Bank of Commerce*,⁴⁸ a federal district court held that seizure under a writ of fieri facias of a wife's interest in her wages or other property in order to satisfy an obligation of the husband was a deprivation of property without due process. The finding of a due process violation was based on the fact that the seizure was pursuant to "a judgment in an action in which: (1) the wife was not a party; (b) was not served with the Citation and Petition; and (c) the wife was not placed on notice, through allegations in the Petition and/or notation on the Citation, that the obliga-

45. See note 33, *supra*, and accompanying text.

46. For a full discussion of the express assumption of responsibility, see Spaht & Samuel, *supra* note 1, at 126-33.

47. *Id.*

48. No. 79-3185 (E.D. La., March 11, 1981).

tion was a community obligation."⁴⁹ This decision could have far-reaching effects on the ability of a creditor to seize property of the former community⁵⁰ which is in the hands of a non-debtor spouse, a substantive right which article 2357 clearly gives him.⁵¹

Reimbursement

As previously stated, one underlying policy of article 2357 is to protect the rights of creditors.⁵² Article 2357 makes certain that even if the creditor was not looking toward community assets at the time of the transaction,⁵³ community assets continue to remain available for the satisfaction of the debt. Despite the primary emphasis

49. *Id.*, slip opinion at 1.

50. Although the opinion is brief and the facts of the dispute are not given, apparently the wife's community with her husband had not been terminated. Seemingly, termination, if pertinent at all, only would have imposed an even stronger duty to put the wife on notice.

51. Despite the *Williams* decision, too much concern for the survival of article 2357 may be undue. The court seems to take the position that a creditor may not obtain a judgment against a spouse if that judgment is to be satisfied from the property of the other spouse, who was not given notice of the suit. The problem with the position is that it fails to make the basic distinction between procedural requirements for obtaining a judgment in a lawsuit and procedural requirements for executing that judgment. The real issue in a case like *Williams* is whether the judgment creditor can seize and sell the property of the wife, not whether he should have been allowed to obtain the judgment itself. The *Williams* court is not clear in distinguishing these two different questions, since it cites failure to give notice of *the suit* as the reason for denying *execution of the judgment*.

Louisiana normally does not require notice of the institution of a suit in situations somewhat analogous to *Williams*. For example, while the community properly may not be considered as a "separate entity," it is similar to a partnership in that either spouse generally can obligate community property without the other's consent. LA. CIV. CODE art. 2346. When partnership obligations are sought to be enforced, it is not necessary to make all—or any—partners party to a suit. See LA. CODE CIV. P. arts. 737 & 1263. Cf. LA. CODE CIV. P. art. 1235. Because one partner has the power to bind the partnership—just as one spouse has the power to bind community property—the rule seems fair.

On the other hand, notice to the wife of *the seizure* as provided in article 2293 of the Code of Civil Procedure clearly should be required. At that point the wife could present her claim as to why the disputed property is not subject to seizure (i.e., her separate property) as a means of satisfying the judgment which the creditor is seeking to execute. Cf. *Bonner v. B-W Utilities, Inc.*, 452 F. Supp. 1295 (W.D. La. 1978) (mortgagor's transferee entitled to notice prior to judicial sale of the property). See generally *Buckner v. Carmack*, 272 So. 2d 326 (La. 1973); LA. CODE CIV. P. art. 1092; LA. R.S. 13:3874, 4285 (1950).

While the prudent attorney would investigate what property could be used to satisfy a judgment, should one be issued, whether certain property is subject to seizure is not an issue in defending that suit for judgment. Nevertheless, the prudent approach is to join the spouse in the suit.

52. *Spaht & Samuel*, *supra* note 1, at 125.

53. See *Riley*, *supra* note 13, at 510.

placed on protection of creditors' rights, the legislation shows some concern for the spouses' ability to assert rights as between themselves. The reimbursement provisions,⁵⁴ in most instances,⁵⁵ lessen the financial burden on a spouse who must pay debts for which he should not be held solely responsible.

Upon first glance, the most noticeable difference in the new reimbursement articles and the old article⁵⁶ is the prescribed measure of reimbursement. Formerly, the Civil Code provided that a spouse was entitled to one-half the enhanced value of the other spouse's separate property, whenever that other spouse's separate property had been increased due to "the common labor, expenses or industry."⁵⁷ That same measure of reimbursement still is provided for in only one situation: where the separate property of one spouse is increased "as a result of the uncompensated common labor or industry of the spouses."⁵⁸ In four situations, the new articles provide that the measure of reimbursement is "one-half of the *amount or value*"⁵⁹ of the property used. This measure of reimbursement applies when a separate obligation has been satisfied with community property,⁶⁰ when a community obligation has been satisfied with separate property,⁶¹ when community property has been used for

54. LA. CIV. CODE arts. 2358, 2364-2368.

55. But see note 77, *infra*.

56. LA. CIV. CODE art. 2408 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1) provided:

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 the property, or to the chances of trade.

57. LA. CIV. CODE art. 2408 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1).

58. LA. CIV. CODE art. 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.

59. (Emphasis added).

60. LA. CIV. CODE art. 2364 provides:

If community property has been used to satisfy a separate obligation of a spouse, the other spouse is entitled to reimbursement upon termination of the community property regime for one-half of the amount or value that the property had at the time it was used.

61. LA. CIV. CODE art. 2365 provides:

If separate property of a spouse has been used to satisfy a community obligation, the spouse, upon termination of the community property regime, is entitled

the benefit of separate property,⁶² and when separate property has been used for the benefit of community property.⁶³ In these instances the property used is treated "as an interest free loan."⁶⁴

A literal reading of old article 2408, formerly the sole reimbursement provision, would indicate that the only time reimbursement could be claimed was when an increase in the other spouse's separate property was due to the common labor, expenses, or industry.⁶⁵ An explanation for not allowing reimbursement when separate property was used to increase the value of the community may be that a spouse was assumed to be willing to give to the community without any expectation of reimbursement. The jurisprudence developed a more realistic view which did not so limit the right to recompense.⁶⁶ The new articles on reimbursement have been recognized as merely an "attempt to legislate the jurisprudential application of article 2408."⁶⁷

The incorporation of these articles into the Civil Code is commendable in that they generally clarify the various situations which will entitle a spouse to reimbursement. However, some attention must be given to problems which may arise, as in the following hypothetical situation.

H and *W* have been married for two years. Before the marriage

to reimbursement for one-half of the amount or value that the property had at the time it was used.

Reimbursement may only be made 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 even if there are no community assets.

62. LA. CIV. CODE art. 2366 provides:

If community property has been used for the acquisition, use, improvement, or benefit of the separate property of a spouse, the other spouse is entitled upon termination of the community to one-half of the amount or value that the community property had at the time it was used.

63. LA. CIV. CODE art. 2367 provides:

If separate property of a spouse has been used for the acquisition, use, improvement, or benefit of community property, that spouse, upon termination of the community, is entitled to one-half of the amount used or one-half of the value that the property had at the time it was used, if there are community assets from which reimbursement may be made.

64. LA. CIV. CODE art. 2364, comment (d).

65. See note 56, *supra*.

66. See, e.g., *Emerson v. Emerson*, 322 So. 2d 347 (La. App. 2d Cir. 1975).

67. Spacht & Samuel, *supra* note 1, at 141-42. See LA. CIV. CODE art. 2366, comment (c). A noteworthy fact is that articles 2364-2368 all cite prior article 2408 in their source provisions.

W purchased a duplex, which is her separate property.⁶⁸ The duplex is rented out to tenants. Absent a declaration by *W* reserving the fruits, the rent generated from the duplex during the existence of the community becomes community property.⁶⁹

W hires a painter and pays him \$500 out of community funds to paint the duplex. Two years later, *H* and *W* obtain a separation from bed and board.

The two issues presented are whether *H* is entitled to reimbursement upon termination and if so, the proper amount to be reimbursed. *H* may claim that community property has been used to satisfy a separate obligation and that he should therefore be reimbursed \$250, i.e., one-half of the amount of community property used.⁷⁰ However, *W* can claim that the payment satisfied a *community* obligation because it was incurred "for the common interest of the spouses."⁷¹ Her claim will be based on simple economics. The painting of the duplex will result in increased rent charged to the tenants. Since the rent collected is community property,⁷² the paint job clearly benefits the community. *W* may argue that since *community* funds were used to satisfy a *community* obligation, *H* has no basis upon which he can claim reimbursement.

The issue of whether *H* is to be reimbursed is settled by the fact that the obligation to pay the painter is in part a community obligation and in part the separate obligation of *W*. Civil Code article 2363 contemplates this possibility by 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."⁷³ This flexible provision, when combined with article 2364, apparently would be responsive to a balancing process whereby *H* will be reimbursed for one-half the amount or value of the community property used to the extent that the community was not benefitted. In the

68. Civil Code article 2341 provides, in part, that separate property includes "property acquired by a spouse prior to the establishment of a community property regime." See note 11, *supra*.

69. LA. CIV. CODE art. 2339. See also *Curtis v. Curtis*, 403 So. 2d 56 (La. 1981), a case which demonstrates judicial flexibility in recognizing what is sufficient to constitute a declaration reserving earnings as separate property.

70. See LA. CIV. CODE art. 2364, the text of which appears in note 60, *supra*.

71. See LA. CIV. CODE art. 2360, the text of which appears in note 8, *supra* (emphasis added).

72. See note 69, *supra* and accompanying text.

73. See LA. CIV. CODE art. 2363, the text of which appears in note 7, *supra* (emphasis added). See also LA. CIV. CODE art. 2363, comment (c), which reads: "Thus, an obligation incurred for the separate property of a spouse may be in part a community obligation and in part a separate obligation of the spouse who incurred it." See also Spahnt & Samuel, *supra* note 1, at 142.

given hypothetical, criteria to be considered in determining the extent to which the community was not benefitted would include an assessment of the total increase in rentals which the paint job will provide minus the amount received from increase in rent so attributable before termination. The balancing process will entail a determination of what part of the obligation is a community obligation and what part is the separate obligation of *W*. The latter figure will be the basis for reimbursement to *H*.

The amount of reimbursement due to *H* may differ if the payment for the paint job is considered a use of community property for the "improvement or benefit" of *W*'s separate property pursuant to article 2366. Unlike the article defining separate obligations, article 2366 does not recognize a balancing process. Although the article provides for reimbursement when community funds are used to benefit separate property, it does not address the situation in which this use of community funds also benefits the community. A strict application of article 2366 would result in reimbursement for *H* for one-half of the amount or value of community property used, despite the benefit he received from the increased revenues which the duplex provided after it was painted.

Apparently, treating the payment to the painter under article 2364 would result in a different amount of reimbursement for *H* than if the payment were treated under article 2366. Nevertheless, either treatment obviously is accurate. No rational basis for the reimbursement disparity is evident. Surely the legislature did not intend that a potentially significant difference in reimbursement be based on the arbitrary decision of whether community funds were used to benefit separate property or to satisfy a separate obligation. This potential problem could be avoided by amending article 2366 in a manner that would take into account the extent to which the community itself was benefitted by a use of community property. The remaining amount by which the separate property of a spouse has benefitted could serve as the basis for reimbursement to the other spouse.

Articles 2364 through 2367 provide that a spouse is "entitled to reimbursement upon termination of the community . . ."⁷⁴ The construction of the articles seems to contemplate reimbursement at or *after* termination of the community for action taken *during* the existence of the regime.⁷⁵ If, during the existence of the community, an

74. See LA. CIV. CODE arts. 2364-2367, the texts of which appear in notes 60-63, *supra*.

75. Article 2368, the text of which appears in note 58, *supra*, does not mention termination. As noted in notes 56-58, *supra*, and accompanying text, article 2368 is

antenuptial debt of one spouse is paid out of community funds, the other spouse clearly has a right to reimbursement *upon termination*.⁷⁶ This right to reimbursement may make the effects of article 2345 less burdensome for the non-incurring spouse. Whereas article 2364 provides for reimbursement at termination for actions taken *during* the existence of the regime, no corresponding article provides for reimbursement for actions taken *after* termination. For example, an antenuptial creditor, after termination, executes against property of the former community in the possession of the non-debtor spouse. If the legislative intent was also to reduce the financial burden for the non-incurring spouse despite the application of article 2357, reimbursement should be applicable. *If* reimbursement is possible in this situation, the legislation should provide so specifically.⁷⁷ Perhaps the inclusion of "upon termination" in the provisions was intended only to prevent spouses from trying to claim reimbursement during the community existence, and was not meant to prohibit reimbursement after termination when the action taken was also after termination. If the articles are intended to limit reimbursement to compensate for pre-termination expenditures, a more strained interpretation of articles providing general relief will be necessary in order to compensate the non-incurring spouse who has made a post-termination expenditure.⁷⁸

Partition

Other than the articles on reimbursement⁷⁹ and accounting,⁸⁰ Act 709 has provided no basis upon which to deal with problems which arise *between the spouses* upon termination, such as the right to partition. Although comment (a) to Civil Code article 2336 states that "the coownership of the community is subject to the rules

most similar to prior article 2408. That source article also did not mention termination. See note 56, *supra*. However, article 2368, like the other reimbursement articles, is found in the section entitled "Termination of the Community." Therefore, other than the difference in reimbursement formula, see note 58, *supra*, and accompanying text, article 2368 should be treated in the same manner as the other reimbursement provisions.

76. LA. CIV. CODE art. 2364.

77. To the extent that the comments are helpful, they would seem to militate against a change. Comment (b) to article 2345 mentions reimbursement, while the comment to article 2357 does not. Of course, the entire question becomes moot if the incurring spouse is insolvent, as will often be the case. The creditor has probably sought recovery from the non-incurring spouse because the incurring spouse was not able to pay the debt. In such a situation the right of reimbursement is of little value.

78. LA. CIV. CODE arts. 21, 2364-2368; LA. CIV. CODE arts. 2091-2107. See also Spaht & Samuel, *supra* note 1, at 126-27.

79. LA. CIV. CODE arts. 2358, 2364-2368.

80. LA. CIV. CODE art. 2369.

governing termination of the regime rather than the general rules of the Civil Code governing judicial partition," these specific rules do not provide any procedure, upon termination, for dividing property between the spouses.

Because of the manner in which partitions have been accomplished in the past,⁸¹ the issue of how and when unsecured creditors are to be paid is closely linked to the question of how property is to be divided between the spouses. Despite the comment, "the rules governing termination of the regime" do not provide answers to questions focusing on these two aspects of partition.

Once the community is terminated, the spouses' status as coowners⁸² gives either of them the right to seek a partition of the community property.⁸³ Civil Code articles 1289⁸⁴ and 1308⁸⁵ make it apparent that the general rules of partition can be applied to partition of the community, even though the articles appear under the chapter entitled, "Of the Partition of Successions."⁸⁶ The spouses may agree on how the property should be divided, in which case they may enter into a voluntary partition.⁸⁷ If they cannot so agree, either spouse may petition for a judicial partition.⁸⁸ In the latter case, the judge has discretion⁸⁹ as to the mode of partition—whether in kind⁹⁰ or by licitation.⁹¹ This discretion is limited by statute⁹² and the jurisprudence,⁹³ both of which clearly state a preference for partition in kind.

81. See text at notes 94-100, *infra*.

82. LA. CIV. CODE art. 2336 & comments.

83. See Spaht & Samuel, *supra* note 1, at 137-38; Comment, *Judicial Dissolution of the Marital Community in Louisiana*, 49 TUL. L. REV. 167, 168-69 (1974).

84. LA. CIV. CODE art. 1289 provides: "No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition."

85. LA. CIV. CODE art. 1308 provides: "The action of partition will not only lie between co-heirs and co-legatees, but between all persons who hold property in common, from whatever cause they may hold in common."

86. LA. CIV. CODE arts. 1289-1414. While a conflict appears to exist between this statement and comment (a) to article 2336, the comment probably refers specifically to payment of creditors and reimbursement rights rather than to actual methods of partition.

87. LA. CIV. CODE arts. 1294 & 1322. Voluntary partition is now possible among spouses during the existence of the community. See note 31, *supra*.

88. LA. CIV. CODE arts. 1294 & 1323.

89. LA. CIV. CODE art. 1336; LA. CODE CIV. P. art. 4605.

90. LA. CIV. CODE art. 1337.

91. LA. CIV. CODE arts. 1339-1340.

92. LA. CODE CIV. P. art. 4606.

93. See, e.g., *Babineaux v. Babineaux*, 237 La. 806, 112 So. 2d 620 (1959); *Ballard v. Ballard*, 367 So. 2d 1223 (La. App. 2d Cir. 1979).

Partition and Rights of Creditors

In the past—despite the absence of a statutory foundation—the community was treated as having a fictitious existence after termination for the purpose of paying community debts,⁹⁴ and creditors of community obligations were given a preference over creditors of separate obligations in satisfying their debts from community property.⁹⁵ Due to jurisprudential development, the spouses' ownership of community property at dissolution was deemed to be subject to payment of community creditors.⁹⁶ The spouses' interests were merely contingent, as the amount of community debts had to be determined before the residuum could be divided between the spouses or their heirs.

Consistent with the fictitious community concept was the rule prohibiting piecemeal partitions of the community. Efforts by one spouse, upon termination, to recover a money judgment from the other spouse for his "share" of a particular community asset⁹⁷ or his "share" of all the property belonging to the former community⁹⁸ before payment of debts were typically unsuccessful.⁹⁹ The courts' rejection of such attempts was based on the simple notion that nothing was owed the complaining spouse "unless the liquidation of the community [showed] some net amount remaining after the disposal of the property and payment of the debts."¹⁰⁰

The primary purposes served by the fictitious community were protection of creditors and preference of community creditors over separate creditors as to community assets. The new legislation, by general philosophy and specific provision, makes the fictitious community an inappropriate concept. The community is "not a legal entity but a patrimonial mass."¹⁰¹ It is a peculiar type of coownership; thus describing it as an entity which somehow "continues" after termination is theoretically improper. In addition, the need for the fictitious community in order to protect creditors is diminished by the fact that the new legislation is itself so creditor-oriented.¹⁰² Finally, since article 2357 does not distinguish separate creditors from community

94. See generally Comment, *supra* note 29.

95. See, e.g., *Thompson v. Vance*, 110 La. 26, 34 So. 112 (1903); *Landreneau v. Ceasar*, 153 So. 2d 145 (La. App. 3d Cir. 1963).

96. See, e.g., *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894).

97. *Daigre v. Daigre*, 230 La. 472, 89 So. 2d 41 (1956).

98. *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932).

99. "We have been unable to find any case in the jurisprudence of this court where a piecemeal partition was obtained." *Daigre v. Daigre*, 230 La. at 481, 89 So. 2d at 44.

100. 230 La. at 480-81, 89 So. 2d at 44.

101. LA. CIV. CODE art. 2336, comment (c).

102. See note 32, *supra*, and accompanying text.

creditors at dissolution,¹⁰³ no justification exists for the use of a doctrine to make that distinction.

Even though the fictitious community concept is not appropriate, problems still exist concerning payment of creditors upon termination. The rights of unsecured creditors "remain the most difficult issue in the application of the articles on judicial partition to termination of the community regime."¹⁰⁴ If the spouses enter into a voluntary partition, little difficulty for the creditors is foreseeable. The precise purpose of article 2357 is to provide relief for creditors, particularly after a *voluntary* partition.¹⁰⁵ Even if one spouse's unequal bargaining power causes him to end up with few effects of the former community, his creditors are not thereby prejudiced. They may still execute against the property of the former community, irrespective of which spouse possesses the particular effects. However, as has been pointed out elsewhere,¹⁰⁶ creditors may have problems if one spouse has executed a written assumption of responsibility.¹⁰⁷ If one spouse, in conjunction with the voluntary partition, makes an express assumption in exchange for a greater amount (or all) of the community assets, the creditors of the non-assuming spouse are clearly prejudiced. If their debtor is insolvent, they are no longer protected by the general rule allowing them to execute against that property of the former community which is now in the hands of the other spouse. The assuming spouse will have to pay off only one-half of the community obligations which the other spouse incurred, thus leaving the other half unsatisfied. Commentators have suggested that the revocatory action¹⁰⁸ could be asserted against the voluntary partition by the non-assuming spouse's creditors, as it would be their "sole remedy."¹⁰⁹ Since fraudulent intent must be shown in order to obtain revocation of the disputed contract,¹¹⁰ the plaintiff's burden of proof in such an action is great.

103. See text at notes 8-12, *supra*, and at note 33, *supra*.

104. Spaht & Samuel, *supra* note 1, at 139-40.

105. The general approach of article 2357 apparently contemplates a *voluntary* partition wherein each spouse will have in his possession some "property of the former community."

106. See Spaht & Samuel, *supra* note 1, at 137.

107. The third paragraph of article 2357 provides:

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

108. LA. CIV. CODE arts. 1968-1994.

109. Spaht & Samuel, *supra* note 1, at 137. See also *id.* at 132-33.

110. See generally Tate, *The Revocatory Action in Louisiana Law*, in *ESSAYS ON THE CIVIL LAW OF OBLIGATIONS*—(1969), reprinted in S. LITVINOFF, *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE* 483-86 (1979).

Other than the potential problem posed by the express assumption, the *voluntary* partition is adapted easily to the provisions for payment of creditors upon termination. However, the same cannot be said of the judicial partition. If the judicial partition is "in kind," each spouse will receive particular community effects,¹¹¹ and article 2357 can still serve as the guideline for payment of creditors. However, if the partition is by licitation, the effects of the community are sold, leaving cash to be divided between the spouses.¹¹² "[P]roperty of the former community" arguably is no longer in the possession of the spouses for a creditor to recover from pursuant to the codal provision.¹¹³ If the first paragraph of article 2357¹¹⁴ is to apply to cash, the problem of tracing the assets arises. That is, the creditor will have to identify the money received from the sale. The creditor will then have to follow a subsequent disposition of that money to determine if that disposition is for a purpose other than for the satisfaction of a community obligation. Such a disposition, of course, would trigger the liability of the second paragraph of article 2357.¹¹⁵ The disposing spouse may in fact be relying on the finality of the partition judgment as precluding the application of the second paragraph. Nevertheless, where creditors have not yet been satisfied, article 2357 should still be applicable. Tracing could become extremely complicated, with the result that creditors—contrary to the general policy of the Code revisions—would suffer from termination and subsequent partition of the community.

An alternative interpretation which article 2357 offers is even less attractive. Applying the second paragraph of the provision¹¹⁶ would cause the spouses to incur personal liability for "all obligations incurred by the other spouse," up to the value of the community property sold at judicial sale. The second paragraph probably contemplates a *voluntary* disposition by the non-incurring spouse which then triggers the personal liability. Therefore, the provision should not be read with a *judicial* sale in mind.¹¹⁷ Nevertheless, the legisla-

111. LA. CIV. CODE art. 1337.

112. LA. CIV. CODE art. 1339.

113. LA. CIV. CODE art. 2357.

114. The first paragraph of article 2357 provides: "An obligation incurred by a spouse before or during the community property regime, may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation."

115. The second paragraph of article 2357 provides: "If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up the value of that community property."

116. See note 115, *supra*.

117. See note 105, *supra*

tion does not limit specifically the effect of article 2357. Therefore, the possibility of the provisions's second paragraph being applicable should be considered.

If the judicial sale to effect the partition is treated as a "disposition" in the sense of article 2357, the spouses may be reluctant to seek a judicial partition. If *H* has incurred \$5,000 worth of separate debts, and *W* has incurred none, *H* has nothing to lose by having the partition by licitation treated as a "disposition." However, *W* would risk incurring personal responsibility—depending on the value of the community property she disposes of—for payment of *H*'s separate obligations. Since she otherwise would not have had to pay those debts, the judicial partition clearly would be injurious.

Such a result may be a desirable one in that it may serve to encourage voluntary partitions. Of course, it may also serve to discourage agreement by *H* in the hypo above to a voluntary partition, since a judicial partition may result in *W*'s personal liability. However, "encouragement" or "disincentive" to the extent that it will create a fear of judicial partition does not seem to be a very appealing policy. Paradoxically, a spouse then could not afford to dispose of community property *without* a judicial partition nor *with* one, since both alternatives possibly would lead to increased personal liability. One effect of such a policy might be acquiescence in an inequitable voluntary partition by a spouse who holds an inferior bargaining position. Of course, even the voluntary partition would not remedy the situation unless it is accompanied by an express assumption,¹¹⁸ since without the express assumption, disposition of property of the former community can result in the additional liability. Whereas entering into the express assumption involves responsibility for one-half of each community obligation incurred by the other spouse, the express assumption—in theory a way to limit liability of the assuming spouse—might involve more of a sacrifice than the spouse can afford. Though it would serve to protect creditors, treatment of the judicial sale as a disposition under article 2357 clearly would result in endless liability for the spouses. The result would be particularly unfair in the case of a spouse who has not incurred any separate obligations and who, in addition, holds a bargaining position which is inferior to the other spouse.

One suggestion for the orderly payment of unsecured creditors upon termination of the community was part of a proposal which was rejected by the legislature. The concept of administration of the

118. See note 46, *supra*, and accompanying text.

community was enacted in 1978,¹¹⁹ only to be repealed in 1979.¹²⁰ As part of the administration scheme, the legislation provided that secured creditors, and then unsecured creditors, would be paid before each spouse was given one-half of the remaining community assets.¹²¹ This procedure seems to be the most desirable method of assuring that creditors are not injured by termination of the community. As Professor Bilbe observed, the procedures under the administration scheme would affect the spouses' responsibilities "only as they cause funds to be applied to obligations."¹²² Thus, the right of a spouse's creditor to execute against that spouse's separate property would not be adversely affected.¹²³

The payment scheme under the administration concept would involve payment of secured creditors "with priority from the proceeds of the secured property," with any balance due "paid to them as unsecured creditors."¹²⁴ If, after payment to the secured creditors, the remaining community assets were not sufficient to pay *all* the debts, each unsecured creditor—community or separate—was to be paid "in the proportion that his claim bears to the total obligations of both spouses."¹²⁵ The lack of a distinction between community and separate debts is "clearly well based,"¹²⁶ since no such distinction is made during the existence of the regime with regard to satisfaction of debts from community assets.¹²⁷ After this ratable distribution the administration would be at an end, since there would no longer be a patrimonial mass to administer. If debts have not been satisfied in full, creditors still could recover from the separate property of their debtor.¹²⁸ Presumably, the ability to recover from the debtor's separate property would also apply to creditors who had received nothing from the ratable distribution as a result of their lack of knowledge of the proceedings. Perhaps the administration concept

119. LA. R.S. 9:2851 (Supp. 1978) *repealed by* 1979 La. Acts, No. 709, § 5, provided, in part, that "upon dissolution of the community regime, or pending a suit that may result in its dissolution, either spouse may petition for an administration of the community property in the manner provided in the Louisiana Code of Civil Procedure."

120. For an informative accounting of the fate of the administrator/special commissioner concept in the legislature, see Spaut & Samuel, *supra* note 1, at 133-36.

121. See LA. R.S. 9:2852 (Supp. 1978), *repealed by* 1979 La. Acts, No. 709, § 5.

122. Bilbe, *supra* note 31, at 432.

123. *Id.*

124. LA. R.S. 9:2852(B) (Supp. 1978), *repealed by* 1979 La. Acts, No. 709, § 5.

125. LA. R.S. 9:2852(C) (Supp. 1978), *repealed by* 1979 La. Acts, No. 709, § 5.

126. Bilbe, *supra* note 31, at 433.

127. LA. CIV. CODE art. 2345.

128. LA. CIV. CODE art. 2357. Cf. LA. CIV. CODE art. 2817 & comments thereto (a partnership is "primarily liable" for partnership debts, but individual partners are "secondarily liable").

was rejected for other reasons,¹²⁹ in which case the legislature would not be opposed to adopting the payment procedure which was part of the larger administration scheme.

Partition and the Spouses

The method by which the partition is accomplished also raises questions as to the position of the spouses. In a voluntary partition, the risk of a spouse in a weak bargaining position being forced to settle for a less-than-ideal agreement always exists. By the use of a judicial partition "in kind," however, the spouses would be able to avoid unequal distribution of the community effects. The legislature recently has enacted a new Civil Code article which will help to insure that courts will partition community property fairly.

Article 2369.1 now provides:

When the spouses are unable to agree on a partition of the community, either spouse may obtain a judgment decreeing a partition of the community in kind by allocation of assets and liabilities of equal net value to each spouse. If the community or any part thereof cannot be conveniently divided, the court shall order partition by licitation.¹³⁰

Prior to the adoption of article 2369.1, Louisiana had used the "item theory" to partition the community, as opposed to the "aggregate theory."¹³¹ Both approaches can be identified with the partition "in kind"—as opposed to "by licitation"—since under either theory each spouse receives "his share of the movables and immovables."¹³² The difference in the two theories lies in the manner in which each spouse receives his share. The "item theory" requires that each particular community effect be divided between the spouses. Some items obviously are not susceptible to this method. The Civil Code provisions governing partition state that property indivisible by nature or property which cannot be divided conveniently must be "sold at public auction," *i.e.*, partitioned by licitation.¹³³ Therefore, under the "item theory," the partition of many items was required to be effected by judicial sale.

The use of the phrase "equal net value"¹³⁴ in the new article in-

129. See text at notes 169-73, *infra*.

130. 1981 La. Acts, No. 751, § 1, adding LA. CIV. CODE art. 2369.1.

131. See W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 444-45 (1975).

132. LA. CIV. CODE art. 1337.

133. LA. CIV. CODE art. 1339.

134. (Emphasis added).

dicates that Louisiana is now adopting the more flexible "aggregate theory." Under this approach, different assets of equal value¹³⁵ are allotted to each spouse. The crucial language in the article is "net value," since it suggests that several items may be given to one spouse and several other items given to the other spouse as long as the total, or net, value of the items given each spouse is equal. Certain items which are by their nature indivisible will no longer have to be sold automatically. Rather, one spouse may take possession of such items in exchange for assets of equal net value given to the other spouse.

Despite the wide discretion given to its courts¹³⁶ in directing a partition, Louisiana has been alone among the community property states in never using the aggregate theory.¹³⁷ Prior refusal to adopt the theory inevitably had brought about some unfair results. A simple example, similar to the facts of *Ballard v. Ballard*,¹³⁸ involves a couple who owns 70 percent of the shares of a closely held corporation. The other 30 percent are owned by *H*'s close business associate of many years. If, in a judicial partition, the item theory is used to divide the property "in kind," *H* and *W* would each receive 35 percent of the corporate shares. This "equal" division is far from equal in fact. *H* and his close associate will be able to maintain full control of the corporation, while *W* now has a greatly diminished interest in a business from which she probably will want to disassociate herself.¹³⁹ If *W* decides to sell, little if any competition will surface which could drive up the price, since a minority interest in a close corporation has virtually no marketability. *H* and his associate would very likely purchase the shares at a price well below their actual value. The end result for *W* is that she receives much less in the partition than the actual value of her interest in the business.

135. Some states allow for "equitable division" of assets, whereby "[f]actors such as which spouse has the greater need and which spouse earned or acquired the community assets are to be considered." W. REPPY & W. DEFUNIAK, *supra* note 131, at 464-65. See, e.g., ARIZ. REV. STAT. § 25-318A (Supp. 1977 & 1980); WASH. REV. CODE ANN. § 26.08.110 (repealed). Civil Code article 2369.1 apparently rejects such an approach, using the phrase "equal net value" (emphasis added).

136. LA. CIV. CODE art. 1336; LA. CODE CIV. P. art. 4605.

137. W. REPPY & W. DEFUNIAK, *supra* note 131, at 464. The other community property states are Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington. See, e.g., *Butler v. Butler*, 228 So. 2d 339 (La. App. 1st Cir. 1969). See also Pascal, *Updating Louisiana's Community of Gains*, 49 TUL. L. REV. 555, 581 (1975); Comment, *supra* note 83, at 185-86.

138. 367 So. 2d 1223 (La. App. 2d Cir. 1979).

139. The partition in this situation easily could work unfairly as to both *H* and *W*. If *H* had been the moving force and manager of the corporation, his diminished interest could result in diminished control.

Under the aggregate theory, a clearly better result is reached. A proponent for the aggregate theory urges that "the party who effectively controls the corporation should be permitted to keep the stock intact and the other spouse required to accept other property of equal value. Problems like this can only be resolved by the courts' full utilization of their discretion over the mode of partition."¹⁴⁰

Though falling short of adopting the aggregate approach, Louisiana courts have shown some use of judicial discretion in effecting partitions. The recent case of *Tri-State Concrete Co., Inc. v. Stephens*¹⁴¹ involved co-owners of two tracts of land which the court ruled could not be divided in kind.¹⁴² The defendant in the partition suit was in an inferior bargaining position, and the court recognized that the plaintiff would be able to purchase the property at public auction for a price below actual value. In order to protect the defendant, the court set a minimum price which the property had to bring at public sale.¹⁴³ In so doing, the court spoke in terms that are equally applicable to spouses who seek a judicial partition:

One of the primary objectives of ordering the property sold at public sale . . . is to allow each of the owners to realize the full present value of the property. . . . If the property were sold at public sale for substantially less than the appraised value . . . the purpose of realizing full present value for each of the owners would be entirely frustrated.¹⁴⁴

The setting of a minimum price for purchase at judicial sale serves to protect a spouse with inferior purchasing power, particularly in cases where no third persons will be bidding on the item. However, the new Code article will help to assure fair division of the community without the necessity of selling the effects.

Flexibility was also shown by a court effecting a partition in *Ballard v. Ballard*.¹⁴⁵ In that case, despite defendant's request, the court failed to set a minimum bid. Nevertheless, it did consider unequal bargaining positions in ordering a partition in kind rather than by licitation,¹⁴⁶ even though that decision served to diminish the

140. Comment, *supra* note 83, at 186.

141. 395 So. 2d 894 (La. App. 2d Cir. 1981).

142. See LA. CIV. CODE arts. 1339-1340. It should be kept in mind that co-owners like the ones in this case differ from spouses in that these co-owners have only a few assets to divide rather than the many community effects which accumulate between spouses over the years.

143. 395 So. 2d at 898.

144. *Id.* at 897.

145. 387 So. 2d 1223 (La. App. 2d Cir. 1979).

146. See also *National Am. Bank of New Orleans v. Cleveland*, 273 So. 2d 848 (La. App. 4th Cir. 1973), *writ denied*, 276 So. 2d 701 (La. 1973).

value of the item. The court's decision was contrary to the general rule directing partition by licitation whenever a partition in kind will result in diminution in value or inconvenience.¹⁴⁷ Because of the unequal bargaining positions, the court departed from the norm. The solution under new article 2369.1 will avoid diminishing the value of the item while at the same time not requiring its judicial sale. Though the court's flexibility in *Ballard* is commendable, article 2369.1 will permit an even more equitable decision.

*Dhuet v. Taylor*¹⁴⁸ helps to define the parameters of judicial discretion in effecting partitions. In that case, the court reversed a trial judge's decision that had adjudicated the community property to one spouse upon payment of a sum of money to the other spouse. By declaring that "partition, either in kind or by licitation . . . is the proper procedure for terminating coownership interests in property,"¹⁴⁹ the appellate court imposed a procedural limit on judicial discretion in dividing property among spouses at termination.¹⁵⁰

Louisiana has used a means somewhat analogous to the aggregate theory to partition property. The Civil Code provides for the property to be divided into "lots," which are then allocated among the parties by means of a drawing.¹⁵¹ The formation of the lots always has been considered a way of effecting a partition in kind.¹⁵² However, the allocation has been done in random fashion, the belief being that "it is not within the province of the experts to suggest that a certain part or parts of the property be set apart or allocated to one of the co-owners."¹⁵³

The new Code article does not provide for *how* assets are to be allocated between the spouses; it merely provides that such allocation be "of equal net value." The random manner used for distributing "lots" is particularly inappropriate for the division of community assets among spouses. All the cases found using the lot method in-

147. LA. CIV. CODE arts. 1339-1340.

148. 383 So. 2d 1061 (La. App. 1st Cir. 1980).

149. *Id.* at 1062.

150. Arguably, the *Dhuet* court also placed a limit on the *method* of dividing property among the spouses by refusing to allow judicial allocation of all the property to one spouse upon payment of a sum of money to the other. However, because the appellate court recognized the *procedure*—failure to file suit for partition—as inappropriate, little attention was given to the *method* which the trial court had authorized.

151. LA. CIV. CODE arts. 1364-1367.

152. See, e.g., *Aucoin v. Greenwood*, 199 La. 764, 7 So. 2d 50 (1942).

153. *Raceland Bank & Trust Co. v. Toups*, 173 La. 742, 750, 138 So. 652, 655 (1931). See also *Wyche v. Taylor*, 191 La. 891, 186 So. 602 (1939); *Taylor v. Bell*, 155 So. 2d 68 (La. App. 2d Cir. 1963).

volve heirs¹⁵⁴ or other co-owners¹⁵⁵ who are not spouses. As previously noted,¹⁵⁶ spouses and other co-owners are significantly different in the number and nature of assets which the former hold in a community. A random drawing would be impractical where, for example, the spouse who effectively runs the family business is divested of it in exchange for the house which the other spouse actually prefers. The allocation of assets under article 2369.1 should be handled in a subjective manner that allows *practical* as well as *equal* division.¹⁵⁷

One aspect of the "lot" approach, however, would be helpful and should be utilized in applying the aggregate theory. Civil Code article 1366 allows "a return of money" in order to compensate for lots which are unavoidably unequal.¹⁵⁸ Allowing a money adjustment in the allocation of assets would be a tremendous aid for the court.¹⁵⁹ An allocation of all assets resulting in shares of exactly equal net value for each spouse is difficult to imagine. The power to allow a money adjustment would further the apparent policy of the article and would avoid the necessity of having to resort to judicial sale of many items.¹⁶⁰ Other community property states utilize a money adjustment for unequal—or inequitable—distribution.¹⁶¹ Money adjustment has been a helpful tool in implementing the lot method in Louisiana¹⁶² and should be used in proceedings under the new article.

A curious problem is posed by the new article in that it provides

154. See, e.g., *Rayner v. Rayner*, 171 La. 1050, 132 So. 784 (1931).

155. See, e.g., *Aucoin v. Greenwood*, 199 La. 764, 7 So. 2d 50 (1942).

156. See note 142, *supra*.

157. Although a degree of subjectivity is needed, the use of the term "equal" in the new article suggests that Louisiana courts will not be permitted the same flexibility as courts in the states that allow "equitable" division. See note 135, *supra*. See, e.g., *Nace v. Nace*, 104 Ariz. 20, 448 P.2d 76 (1968), in which the Arizona Supreme Court recognized that "the trial court is not required to divide the property *evenly*, only *equitably*." 104 Ariz. at 23, 448 P.2d at 79 (emphasis added).

158. LA. CIV. CODE art. 1366 provides: "When the lots are of unequal value, such inequality is compensated by means of a return of money, which the coheir, having a lot of more value than the other, pays to his coheirs."

159. If the *Dhuet* opinion can be treated as a limitation on the *method* by which property may be divided between the spouses, see note 150, *supra*, this suggestion might require a reversal of that court's position that one spouse cannot be given all the property upon payment of a money sum to the other.

160. The last sentence of new article 2369.1 provides: "If the community or any part thereof cannot be conveniently divided, the court shall order partition by licitation."

161. See, e.g., *McCune v. McCune*, 120 Ariz. 402, 586 P.2d 651 (Ariz. Ct. App. 1978); *Tammen v. Tammen*, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1st Dist. Ct. App. 1976).

162. *Aucoin v. Greenwood*, 199 La. 764, 7 So. 2d 50 (1942); *Rayner v. Rayner*, 171 La. 1050, 132 So. 784 (1931); *Maddox v. Percy*, 351 So. 2d 1249 (La. App. 1st Cir. 1977); *DeLee v. DeLee*, 328 So. 2d 763 (La. App. 1st Cir. 1976).

for partition in kind "by allocation of assets *and liabilities* of equal net value."¹⁶³ However, unless the creditor expressly novates the debt¹⁶⁴ as to one of the spouses, he apparently will not be bound by the allocation of liabilities. Even if the court directs *H* to pay creditor *A*, nothing prevents *A* from satisfying the debt from the property of the former community which has been allocated to *W*.¹⁶⁵ Although *W* may think that the judicial allocation insulates her from liability to *A*, the situation is in fact no different from one in which *H* and *W* had entered into a voluntary partition. Article 2357 may in fact contemplate a *voluntary* partition,¹⁶⁶ but neither that provision nor article 2369.1 indicates that article 2357 does not operate after a *judicial* partition. In order for article 2369.1 to effectively allocate liabilities, the legislature will have to provide that article 2357 is inapplicable whenever a court has directed allocation of liabilities. The inclusion of "liabilities" in the article reflects a legislative intent to provide truly equal division of the community by making certain that each patrimony is affected similarly. Nevertheless, as the Civil Code already gives creditors the right to execute against the property of the former community, judicial allocation of liabilities apparently will have no effect on them.

Administration of Community, Special Commissioner, or Special Master

Despite some hope that the concept would be "resurrected at a future legislative session,"¹⁶⁷ an amendment to the bill that enacted article 2369.1 deleted provisions which would have permitted either spouse to petition for the appointment of a special commissioner to assist the court in the partition of the community.¹⁶⁸ A provision already exists which gives the notary the power to effect the partition.¹⁶⁹ Nevertheless, the rejection of the special commissioner is another in a series of setbacks for the idea of providing for a neutral third person with more powers than the notary to help the court better assure the spouses of a just partition.¹⁷⁰ Implementing certain aspects of the administration or special commissioner concept would be of some assistance to the court, as well as a protective device for the spouses. In order to avoid confusion with pre-conceived notions

163. LA. CIV. CODE art. 2369.1 (emphasis added), added by 1981 La. Acts, No. 751, § 1.

164. LA. CIV. CODE arts. 2185-2198.

165. LA. CIV. CODE art. 2357.

166. See note 105, *supra*, and accompanying text.

167. Spaht & Samuel, *supra* note 1, at 136.

168. La. H.B. No. 1625 (engrossed version), 7th Reg. Sess. (1981).

169. LA. CODE CIV. P. art. 4605.

170. See note 120, *supra*.

of what duties an "administrator" or "special commissioner" or "special master" actually performs, suggestions which follow will focus on the actual *functions* involved rather than on possible labels or titles for the respective offices. Discussion of prior legislative proposals, of course, will require the use of terminology involved therein.

The provision in Act 627 of 1978 authorizing an administration of the community was not to become effective until procedural rules governing it were adopted.¹⁷¹ Pursuant to a House Concurrent Resolution directing the Louisiana Law Institute to make recommendations "necessary to achieve the policy objectives" of the revisions,¹⁷² procedural articles implementing the administration concept were proposed.¹⁷³ The administrator's powers were "somewhat radical"¹⁷⁴ when compared with those of the notary.¹⁷⁵ The administrator was to have "the duty of collecting, preserving, and managing the property of the community in accordance with law."¹⁷⁶ When it became clear that this concept would fail to gain legislative approval, the less "radical" idea of special commissioner was substituted.¹⁷⁷ Like the proposed administrator, he was assigned the task of "effect[ing] a division of the community between the spouses as soon as is advisable."¹⁷⁸ Unlike the administrator, however, the special commissioner's power was limited to "locating, identifying, listing, and valuing all assets and liabilities of the former community."¹⁷⁹ He was to prepare a tableau listing community property and obligations and to propose a division of the community.¹⁸⁰ The duties of the special commissioner were thus very similar to those of the notary.¹⁸¹

From a conceptual viewpoint, the rejection of the administration concept is understandable. As the administrator was given power to *manage* the property of the community, his task was analogous to

171. 1978 La. Acts, No. 627, § 9.

172. La. H.R. Con. Res. No. 232, 4th Reg. Sess. (1978).

173. La. H.B. No. 801 (engrossed version), 5th Reg. Sess. (1979).

174. Spaht & Samuel, *supra* note 1, at 136.

175. LA. CIV. CODE arts. 1347-1381.

176. La. H.B. No. 801 (engrossed version), 5th Reg. Sess. (1979) (proposed LA. CODE CIV. P. art. 4762).

177. La. H.B. No. 801 (reengrossed version), 5th Reg. Sess. (1979).

178. La. H.B. No. 801 (engrossed version), 5th Reg. Sess. (1979) (proposed LA. CODE CIV. P. art. 4762); La. H.B. No. 801 (reengrossed version), 5th Reg. Sess. (1979) (proposed LA. CODE CIV. P. art. 4757).

179. La. H.B. No. 801 (reengrossed version), 5th Reg. Sess. (1979) (proposed LA. CODE CIV. P. art. 4757).

180. *Id.* (proposed LA. CODE CIV. P. art. 4760).

181. LA. CIV. CODE arts. 1347-1381.

that of a liquidator or a receiver.¹⁸² By allowing the community to be managed by an administrator, the proposal treated the community as an "entity" similar to a corporation. In this light, the idea of administration seems to be inconsistent with the clear legislative desire *not* to have the community considered a separate entity.¹⁸³

The payment of creditors scheme, which was part of the larger administration concept, has been suggested as an orderly method by which to pay unsecured creditors upon termination.¹⁸⁴ However, the reason that scheme would not put an end to a creditor's right to recover from his debtor after ratable distribution is due to the differences between the community and a separate entity such as a corporation. The procedure for liquidation of a corporation provides that a creditor who fails to present his claim after notice of the proceedings may be "perpetually and peremptorily barred" from recovery.¹⁸⁵ That result is in harmony with the notion that the corporation has come to an end and an entity no longer exists from which to recover. A similar problem for creditors of a spouse does not arise upon termination of the community. Satisfaction of debts comes from the *spouses*. The community's dissolution clearly does not terminate a creditor's right to have the debt satisfied.¹⁸⁶ A theoretical inconsistency exists in providing for an administration of the community when that community is not to be recognized as a separate entity.

From a practical viewpoint, however, complex cases may arise in which the court needs to appoint a person to manage and conserve certain assets of the community. For example, a third person given the power to manage and conserve an ongoing business could protect the interests of the spouses in a manner less destructive than an injunction issued to prevent its continued operation.¹⁸⁷ Although the person appointed would not solve the issue of payment of debts,¹⁸⁸ his presence in certain exceptional cases would be justified as a great aid to the court as well as a protection for the spouses.¹⁸⁹

182. See, e.g., LA. R.S. 12:141-149 (1950); 75 C.J.S. *Receivers* §§ 1-431 (1952).

183. See note 101, *supra*, and accompanying text.

184. See text at notes 119-29, *supra*.

185. LA. R.S. 12:147(c) (Supp. 1968).

186. LA. CIV. CODE art. 2357.

187. LA. CIV. CODE art. 149; LA. CODE CIV. P. art. 3944. See also Spaht & Samuel, *supra* note 1, at 134.

188. See text at notes 119-29, *supra*.

189. The court may possess inherent power to protect property by appointing a person to act as a manager or conservator. See LA. CODE CIV. P. art. 191. The court may also be able to authorize a fact finder in complex cases. See text at notes 177-79, *supra*. See note 191, *infra*.

In addition to a person who would manage and conserve particular community assets, the court may need to appoint a special fact-finder in some complicated cases. The appointment of this person—like the appointment of the person who will manage and conserve—should be “the exception and not the rule.”¹⁹⁰ A special fact-finder would be needed only in complex disputed fact situations. The person would make findings regarding, for example, whether a certain item is separate or community property. The power to make initial findings of fact would allow this person to do more than the notary presently does.¹⁹¹ The fact finder could present his findings to the court, and the judge would use them in determining partition and reimbursement rights.¹⁹²

The very purpose for which officers of the court were suggested—in rare cases in which they would be needed—would be to serve as objective forces concerned with the rights of both parties. While valid reasons militate against the administrator or special commissioner as proposed, the appointment of persons to perform the suggested functions upon judicial decision as to its necessity should be given legislative attention.

Conclusion

Some of the changes which have been recommended simply would clarify the intent of the legislature at the time of the drafting of the revisions. As more complicated fact situations appear before the courts, the need for more clarity will become manifest. Other suggestions concern questions which the law has thus far neglected. The fact that a study will be made by a joint committee of the legislature¹⁹³ is a positive indication that the lawmakers seek to fur-

190. Cf. FED. R. CIV. P. 53(b) (reference of an issue to a “master” should be done only in exceptional cases).

191. See *Randazzo v. Randazzo*, 401 So. 2d 1255 (La. App. 1st Cir. 1981), which emphasizes that the notary’s function is “expected to be purely ministerial.” *Id.* at 1256. That case involved rather unusual conduct in the trial court, wherein the notary heard witnesses in the presence of the judge and then made his recommendations. Although the appellate court questioned the “irregularity of the proceedings,” no reversible error was found, and the lower court’s homologation of the notary’s findings was affirmed. *Id.*

The *Randazzo* case is of interest in that it states limits to the notary’s power which should not be exceeded. However, the suggested provision for a fact-finder could be accomplished by expanding the notary’s power so as to allow him to hear witnesses and make initial findings of fact. The manner in which the suggested fact-finder is incorporated into the legislation should be given careful attention, as it is important to delineate clearly the powers that such an official would possess. See, e.g., FED. R. CIV. P. 53. Louisiana Code of Civil Procedure article 191 may authorize the court to appoint such a fact finder, though no guidance is provided.

192. See, e.g., FED. R. CIV. P. 53(e).

193. See note 6, *supra*, and accompanying text.

ther improve the matrimonial regimes law, particularly as it governs termination of the community. Consideration hopefully will be given to some of these suggestions as those improvements are made.

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