

Preserving Your Pocket Book: Narrowing the Unilateral Power of a Co-owner

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Preserving Your Pocket Book: Narrowing the Unilateral Power of a Co-owner

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I. INTRODUCTION

Air-conditioning installation.¹ Property taxes.² Lawn care.³ Insurance payments.⁴ Sewage treatment facilities expansion.⁵ Roof replacement.⁶ All of these expenses have been classified by courts as “necessary” to preserve property. The broad range of these expenditures presents a difficulty: while some are undeniably required to prevent loss or imminent damage, others are merely useful or convenient.

Under the default co-ownership regime in Louisiana, a co-owner may take “necessary steps for the preservation” of the co-owned thing without the consent of any other co-owner.⁷ In addition, the acting co-owner is entitled to reimbursement for these “necessary expenses . . . from the other co-owners in proportion to their shares.”⁸ This scheme gives a Louisiana co-owner more unilateral power to incur necessary expenses than in almost any other jurisdiction.

Under the Louisiana rule, the initial determination of whether an expense is necessary to preserve the property is left entirely to the subjective intention of a single co-owner. Since beliefs about what is or is not necessary will inevitably vary among co-owners, granting such vast unilateral authority is likely to result in conflict among the parties, particularly when reimbursement is demanded. The other co-owners are consequently left with the choice of either writing a reimbursement check or wasting time and money in a courtroom disputing the necessity of the act. The ambiguity of the Louisiana rules causes tension among co-owners, often springing unforeseen expenses and creating excessive litigation.

Due to an increased incidence of co-ownership arrangements across the nation,⁹ a new standard must emerge in Louisiana to

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1. *Knighen v. Knighen*, 809 So. 2d 324, 329 (La. App. 1st Cir. 2001), *writ denied*, 805 So. 2d 207 (La. 2002).

2. *Ainsworth v. Ainsworth*, 860 So. 2d 104, 118 (La. App. 4th Cir. 2003), *writ denied*, 862 So. 2d 995 (La. 2004).

3. *Succession of Steckler*, 712 So. 2d 1066, 1071 (La. App. 5th Cir.), *writ not considered*, 726 So. 2d 17 (La.), *reconsideration denied*, 728 So. 2d 880 (La. 1998).

4. *Harmon v. Harmon*, 617 So. 2d 1373, 1377 (La. App. 3d Cir. 1993).

5. *First Union Real Estate Equity & Mortgage Invs. v. Crown Am. Corp.*, 639 F. Supp. 838, 845 (M.D. Pa. 1986).

6. *Id.*

7. LA. CIV. CODE art. 800 (2006).

8. LA. CIV. CODE art. 806.

9. See N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 587 (1966); Evelyn Alicia Lewis, *Struggling with*

remedy these ills. The Louisiana co-ownership rules should be changed such that a co-owner's unilateral authority is determined according to the exigency of the circumstances, as it is in many other jurisdictions. For instance, if the property faces an imminent threat, a co-owner should be permitted to act alone, as a lapse of time needed to consult with the other co-owners would only further endanger the property. In such circumstances, the acting co-owner should be charged with a duty of good faith to ensure that he acts within reasonable bounds. Absent such an emergency, a co-owner wishing to perform an *ordinary* act of preservation¹⁰ should be expected to do more. Unilateral action is unnecessary in such situations and should generally be prohibited. The law should require that a co-owner consult the others holding an interest in the co-owned property prior to incurring the necessary, yet not imminent, expense. Such a rule would better serve co-owners because, unlike current articles 800 and 806, it gives precise notice of when necessary expenses may be incurred.

This Comment will begin in Part I by explaining the current Louisiana rules granting a co-owner authority to incur, and to be reimbursed for, necessary expenses. The interpretation of these rules by Louisiana courts and scholars will be detailed in Part II. Part III will contain a brief analysis of the historical development of civilian co-ownership provisions, the impact that the past has had on the Louisiana rules, and the current state of co-ownership law in European jurisdictions. Part IV will describe the flaws of the current rule in light of practical examples which display its faulty application and its discouraging effect on real estate investment. Last, Part V will propose a new standard, with an analysis showcasing its more sensible approach and investor friendly effects.

II. THE CURRENT LOUISIANA RULES

The pertinent legislation to this discussion is Louisiana Civil Code articles 800 and 806. Read *in pari materia*, these articles lay the foundation for preservation of co-owned property and reimbursement for expenses flowing from such acts. Specifically, article 800 authorizes unilateral preservation of co-owned property,

Quicksand: The Ins and Outs of Cotenant Possession Value Liability and A Call for Default Rule Reform, 1994 WIS. L. REV. 331, 398-402 (1994); Marshall E. Tracht, *Co-ownership and Condominium*, in ENCYCLOPEDIA OF LAW AND ECONOMICS 62, 64 (1999), <http://encyclo.findlaw.com/1400book.pdf>.

10. Those acts that would prevent *gradual* damage to the property.

providing that “[a] co-owner may without the concurrence of any other co-owner take *necessary* steps for the *preservation* of the thing that is held in indivision.”¹¹

A co-owner acting under article 800 may receive reimbursement for preservatory expenses by way of article 806, which provides in pertinent part that: “A co-owner who on account of the thing held in indivision has incurred *necessary* expenses . . . is entitled to reimbursement from the other co-owners in proportion to their shares.”¹²

The key terms “necessary” and “preservation” are not defined by this section of the Code; however, their true meaning is vital to the proper application of these rules. The definitions of these terms may be aided by the use of other code articles, doctrinal sources, and jurisprudential interpretation.

What is “necessary”? This amorphous term, appearing in both articles 800 and 806, may have a different connotation depending on the context in which it is used. In a co-ownership setting, the meaning of “necessary” is assisted by drawing a distinction between categories of expenses—those that are necessary, useful, or luxurious.¹³ Necessary expenses are those that are “incurred for the preservation of the thing” or to relieve the property of private or public burdens.¹⁴ Examples of such expenses would be property taxes¹⁵ or insurance payments.¹⁶ The jurisprudence also includes repairs other than those needed for ordinary maintenance within the definition of necessary expenses.¹⁷ “Useful” expenses, on the other hand, are defined as those that enhance the value of the property rather than preserve its condition.¹⁸ Finally, “luxurious” expenses are contrasted from the other classes of expenses in that they are “made for the gratification of one’s personal

11. LA. CIV. CODE art. 800 (emphasis added).

12. LA. CIV. CODE art. 806 (emphasis added).

13. A.N. YIANNPOLOUS, PROPERTY § 275, in 2 LOUISIANA CIVIL LAW TREATISE 551–53 (4th ed. 2001).

14. *Id.* (stating that costs of ordinary maintenance and repairs are not necessary expenses). See also LA. CIV. CODE art. 527.

15. *Ainsworth v. Ainsworth*, 860 So. 2d 104, 118 (La. App. 4th Cir. 2003), writ denied, 862 So. 2d 995 (La. 2004).

16. *Harmon v. Harmon*, 617 So. 2d 1373, 1377 (La. App. 3d Cir. 1993).

17. See YIANNPOLOUS, *supra* note 13, at 551 n.8 (citing *Dunlap v. Whitmer*, 69 So. 189 (La. 1914); *Gregory v. Kedley*, 185 So. 105 (La. App. 2d Cir. 1938)).

18. YIANNPOLOUS, *supra* note 13, at 551. Because expenses for ordinary maintenance and repair do not fall within the category of “necessary” expenses, it is likely that they fit within this category of “useful” expenses.

predilections.”¹⁹ Therefore, compared to useful and luxurious expenses, “necessary” expenses may be defined as those that are unavoidable or required under the circumstances to protect the property.

What is “preservation”? Doctrine equates the term preservation with conservation.²⁰ Acts of this type prevent the property from being “destroyed, damaged or lost for the owner.”²¹ While it is clear from doctrine that acts of preservation consist of something less than what is involved with other categories of acts, the boundaries distinguishing one kind of act from another are very blurred.²² Classification of an act as one to preserve property should largely depend on the *purpose* of the act, rather than its nature.²³

In attempting to interpret the terms “necessary” and “preservation,” the potential for subjective alteration of their meanings becomes apparent. Scholarly guidance is unmistakably valuable to the proper interpretation of articles 800 and 806 and has no doubt aided co-owners and courts in resolving difficult exegetical issues. However, practical application of this rule reveals that one co-owner’s idea of an expense necessary to protect property may be very different from that of another co-owner.²⁴ Furthermore, co-owners have also struggled with classifying an act as one to preserve.²⁵ With a few linguistic alterations to the

19. *Id.* Louisiana Civil Code article 1259 also describes luxurious expenses as those for “mere pleasure . . . which are only made for the accommodation or convenience of the owner or possessor of the estate, and which do not increase its value.” LA. CIV. CODE art. 1259.

20. A.N. YIANNPOULOS, PERSONAL SERVITUDES § 87, in 3 LOUISIANA CIVIL LAW TREATISE 182–84 (4th ed. 2000).

21. *Id.* Acts of preservation are further defined by contrasting them from acts of administration and disposition. Dispositive acts tend to deprive or divest an owner of his interest in a real right. *Id.* In contrast to acts of preservation and disposition, both with somewhat concrete definitions, administrative acts make up a residual category consisting of acts of management that “exceed the limits of mere conservatory measures.” *Id.* Scholars admit that classifying acts within one of these categories is not easy. *Id.*

22. *Id.*

23. *Id.* Unfortunately, scholars do not detail whether this purposive approach should be examined from the subjective viewpoint of the actor, objectively in light of the circumstances, or both.

24. See *Miller v. Seven C’s Props., LLC*, 800 So. 2d 406 (La. App. 3d Cir. 2001), writ denied, 811 So. 2d 878 (La. 2002) (co-owners sought declaratory judgment because they could not decide among themselves whether repairs to the property’s levee system were “necessary” to preserve the co-owned thing).

25. See *Allain v. Shell W. E & P, Inc.*, 762 So. 2d 709 (La. App. 1st Cir. 2000) (whether act was of preservation or of management was a material issue of fact that caused a reversal of summary judgment on appeal).

legislation, however, many of these definitional issues can be resolved, thus facilitating the functional application of the rule.

III. BACKGROUND

Why is the Louisiana rule regarding necessary expenses so broad and vague? A glance at the past reveals that Roman preference for full ownership, combined later with French disgust for co-ownership, had a lasting effect on surrounding European jurisdictions, as well as in Louisiana. A gap in Roman-French law governing the rights and duties among co-owners left many civilian jurisdictions on their own to draft such provisions without model legislation. Thus, wide discrepancies now exist among these European rules. In the face of such variance, the Louisiana drafters apparently took a different approach and chose to create a co-ownership provision devoid of much detail.

A. Historical Setting

The flaws of Louisiana's current co-ownership articles can be traced to Roman ideals,²⁶ which expressed a general preference for full ownership and, thus, passively discouraged co-ownership. This favoritism for singular ownership was expressed in many underlying principles of Roman property law. For instance, the Romans believed that each co-owner's interest struck "every molecule of the thing,"²⁷ rather than each co-owner physically owning a percentage of the property itself. Ownership could not be fractionalized in any instance, even when held by many persons.²⁸ Also, if the property itself was to be transferred, it had to be done so *in toto* or not at all.²⁹ The Romans viewed co-ownership as a temporary and exceptional condition, as evidenced by the adage, *nemo in communione potest invitus detineri*.³⁰

26. Louisiana law is heavily built on traditional Roman principles, through the historical influences of French and Spanish law. R. Fritz Niswanger, Comment, *An Unconscionability Formula for Louisiana Civilians?*, 81 TUL. L. REV. 509, 509 (2006).

27. Vanessa A. Richelle, Recent Development, *Campell v. Pasternack Holding Co.: The Right to Partition by Licitation under Revised Civil Code Article 543*, 68 TUL. L. REV. 1642, 1644 (1994) (citing 1 PLANIOL & RIPERT, TREATISE ON THE CIVIL LAW, pt. 2, ch. 4, no. 2497, at 473-74 (La. State Law Inst. trans., 12th ed. 1959)).

28. John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 TUL. L. REV. 916, 926 (1974).

29. *Id.*

30. Translates to "no one can be kept in co-proprietorship against his will." SIR HENRY SUMNER MAINE, ANCIENT LAW, ITS CONNECTION WITH THE EARLY

During the Roman era, it was as if no one in good sense would ever choose co-ownership over “full” ownership and that no person should ever feel compelled to remain in such an unfavorable arrangement. Roman law looked hesitantly upon any arrangement which restricted the rights of a single owner.³¹ Since property in a co-owned scenario must be shared among several proprietors, the privileges of owning property are necessarily impeded by the wishes of others.³² Therefore, while co-ownership existed under Roman law, full ownership was the preferred arrangement.

Hundreds of years later, in the early nineteenth century, the French returned to Roman ideology when revising their post-revolution law.³³ Using Justinian’s *Corpus Juris Civilis* as their model for the Code Civil, French lawmakers sought to eradicate all laws reminiscent of the formerly-empowered feudal monarch.³⁴ The division of property rights was thought to be characteristic of the feudalistic policy that was to be overthrown.³⁵ During the feudalistic age, the survivorship features of co-ownership caused it to fall into favor, as co-ownership “was valuable in avoiding dilution of the feudal obligations through fragmentation of ownership.”³⁶ Combining the pre-existing Roman preference for full ownership with the more contemporary abhorrence for feudalistic ideals, the French drafters refused to endorse co-ownership in the Code Civil.³⁷ Because of the risk that detailed provisions governing the rights and duties among co-owners may

HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 261 (11th ed. 1887) (1861), <http://books.google.com> (enter search terms “Sir Henry Sumner Maine” and “Ancient Law”).

31. Kenneth S. Culotta, *Forma Cinco? Getting the Benefits of Form 5 in Latin American Mining Ventures*, 39 ROCKY MTN. MIN. L. INST. 9, § 9.03(1)(a) (1993).

32. Symeon C. Symeonides & Nicole Duarte Martin, *The New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 84 (1993).

33. Culotta, *supra* note 31, at § 9.03(1).

34. *Id.*; UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 10 (2000).

35. MATTEI, *supra* note 34, at 13.

36. Hines, *supra* note 9, at 585.

37. While article 486 of the Louisiana Civil Code of 1825 recognized co-ownership, there was no such provision in the Code Napoleon of 1804. Article 486 of the 1825 Code provided that: “It is of the essence of the right of ownership that it cannot exist in two persons for the whole of the same thing but they may be the owners of the same thing in common, and each for the part which he may have therein.” LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA, vol. 3, pt. 1, 279–80 (La. State Law Inst. 1940) [hereinafter COMPILED EDITION].

have encouraged co-ownership, the French omitted such rules from the Code Civil.³⁸

The absence of French provisions governing the relationship between co-owners in any detail affected surrounding European countries that were developing codes of their own. Because the French Code Civil was the "stock nineteenth-century ideal of a civil code," it served to guide the codification process in surrounding nations.³⁹ As these jurisdictions had no model provisions to help steer the drafting of their own law controlling the rights and duties of co-owners vis-à-vis one another, they were forced to either follow France's lead by nearly ignoring the relationship or construct rules consistent with the Roman tradition, yet based on the particular cultural idiosyncrasies of each country.⁴⁰ This led to a great variance in co-ownership provisions among European jurisdictions, and the impact of this disparity would be felt years later in Louisiana.

The discrepancies in the European rules on co-ownership are particularly evident in the rules governing situations in which a co-owner may act unilaterally to preserve the property held in indivision.⁴¹ The rules range from the gapingly broad to the

38. *Id.* See also Symeonides & Martin, *supra* note 32, at 73.

39. PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 123 (1999). It should be noted that the Bürgerliches Gezetzbuch (BGB), the German civil code, was also influential to developing civilian jurisdictions. *Id.* Enacted nearly a century after the Code Civil, the BGB did not revert to Roman ideals like its French counterpart, but was rather drafted with "great respect for then-prevailing nationalistic feelings." Saül Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645, 1654 (1997). The BGB did provide detailed provisions fostering the relationship among co-owners, such as those to govern the management and preservation of the co-owned property as well as reimbursement for expenses resulting from such activity. BÜRGERLICHES GEZETZBUCH [BGB] [Civil Code] §§ 741–758 (F.R.G.) (Ian S. Forrester et al. trans., 1975). It is possible that the German inclusion of such rules inspired surrounding jurisdictions to do the same, thus resulting in comparable provisions in the countries of Greece, Italy, and Switzerland. ASTIKOS KODIX [AK] [Civil Code] §§ 785–805 (Constantine Taliadoros trans., 1982) (Greece); CODICE CIVILE [C.c.] [Civil Code] §§ 1100–1116 (Mario Beltramo et al. trans., 1969) (Italy); SCHWIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] arts. 646–654 (Ivy Williams trans., 1987) (Switz.). It should be noted that the provisions of these particular European countries are significant to this analysis due to their overwhelming influence in drafting the Louisiana provisions. See LA. CIV. CODE art. 797 cmt. a (2006).

40. See, e.g., PAN. J. ZEPOS, *GREEK LAW* 106 (1946) (stating that the AK provisions relating to co-ownership reproduce the Greek law in force at the time, i.e., the Roman-Byzantine law, in contrast to other AK provisions that basically reproduced French law).

41. This discussion will examine provisions equivalent to Louisiana's article 800. The European rules will necessarily focus on the countries that were

meticulously narrow. For example, the broad German provision, which is actually the most similar to Louisiana's rule, provides that each co-owner may take "any measure necessary" to preserve the co-owned property without the consent of the other participants.⁴² On the other hand, both the Greek⁴³ and Swiss⁴⁴ codes require exigency as a prerequisite to unilateral action by a co-owner. The Swiss rules further distinguish between imminent acts of preservation and those that are merely "necessary" which occur absent emergency. Under the Swiss rule for the latter category, acts that are essential to the preservation of the value and serviceableness of the object require unanimous consent prior to performance.⁴⁵ In contrast to all of these provisions, the Italian rule does not discuss how much unilateral power a single co-owner has to incur necessary expenses. It merely states that all co-owners must share the costs of preserving the property held in indivision.⁴⁶ Ultimately, an absence of French guidance and the wide variety of

particularly influential to the drafting of Louisiana's provisions. See LA. CIV. CODE art. 797 cmt. a. These countries include Greece, Italy, and Switzerland. The rule in the German BGB will also be referenced occasionally due to its wide influence on surrounding jurisdictions. See STEIN, *supra* note 39, at 123. Thus, later, general references to European or foreign provisions should be read as a shorthand for the rules of these particular nations.

42. The German Code provides, in pertinent part: "Each participant is entitled to take any measure necessary for the preservation of the object without the consent of the other participants; he may require that they give their approval in advance for such a measure." BGB § 744(2).

43. The Greek Code provides, in pertinent part: "In the case of *imminent peril* each of the coparceners shall be entitled even without the consent of the others to take measures required for the preservation of the thing." AK § 788 (emphasis added).

44. The Swiss Code provides, in pertinent part: "However they cannot repeal or restrict the rights to . . . take on his own the necessary steps which have to be taken without loss of time in order to preserve the object from *imminent or increasing damage*." ZGB art. 647 (emphasis added).

45. The Swiss Code further provides: "With the consent of all co-owners maintenance work, repairs and renovations which are essential for the preservation of the value and the serviceableness of the object can be executed provided these acts are not usual acts of management to which each co-owner is entitled singly." ZGB art. 647c (article entitled "necessary measures").

46. The Italian Code provides in one rule that "[e]ach participant shall contribute to the expenses necessary for the conservation and enjoyment of the common thing and to the expenses decided on by the majority . . ." C.c. § 1104 (Italy). Furthermore, the Italian Code provides that "[a] participant who, in case of neglect by the other participants or the administrator, has incurred expenses necessary for the preservation of the common thing has a right to reimbursement." C.c. § 1110.

European legislation on point created the environment in which the Louisiana provisions were drafted.

B. Development of Louisiana Co-ownership Provisions

Like the French Code Civil, Louisiana's first effort at codification, the Digest of 1808,⁴⁷ did not contain a provision recognizing the bare notion of co-ownership.⁴⁸ The Code of 1825, however, imported commentary by the French jurist Pothier to acknowledge this arrangement.⁴⁹ The Code of 1870 reproduced the basic recognition of co-ownership but failed to provide rules governing the relationship itself so as to foster its development.⁵⁰ While recognizing that co-ownership may exist, Louisiana's articles were more interested in providing methods of terminating the relationship rather than regulating the rights of co-owners against one another.⁵¹ It is apparent, then, that at this stage of the development of Louisiana's co-ownership provisions, the Roman tradition, amplified by the Code Civil, dominated. Therefore, until the 1990s, co-ownership in Louisiana was regarded as a temporary arrangement destined for partition.

Co-ownership surged across the nation during the twentieth century, to the point that it became the "dominant form of ownership of residential and agricultural real estate in the United States."⁵² This increase in co-ownership was attributable to many

47. It is unclear whether the drafters of the Digest of 1808 desired a true code or a digest that merely compiled the present law. See Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628, 629 (1972); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 601, 604 n.4 (1972).

48. COMPILED EDITION, *supra* note 37, at 280.

49. LOUISIANA LEGAL ARCHIVES, A REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF 1825 43 (1937). Article 486 of the Code of 1825 provided: "It is of the essence of the right of ownership that it cannot exist in two persons for the whole of the same thing, but they may be owners of the same thing in common, and each for the part which he may have therein." *Id.* Pothier's commentary explained that the right of ownership to the exclusion of all others necessarily means that two persons cannot be the owners of the whole of the same thing. However, he explains that "nothing prevents them from being owners in common," as owning a part of one in a thing in common means that each can only dispose of his part. *Id.*

50. Symeonides & Martin, *supra* note 32, at 73; COMPILED EDITION, *supra* note 37, at 279.

51. Symeonides & Martin, *supra* note 32, at 73.

52. See Lewis, *supra* note 9, at 398-99 n.204; SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 183 (2d ed. 1998). While empirical data on co-ownership of immovable property in Louisiana is lacking,

causes, including changes in tax rates,⁵³ estate planning,⁵⁴ higher costs of living,⁵⁵ and the acquisition of property by unmarried couples.⁵⁶ The Louisiana legislature warmed toward co-ownership and began considering it to be a “present state of affairs, rather than as one that [was] bound to be terminated.”⁵⁷ The rising popularity of co-ownership arrangements led to the necessity of formulating uniform rules to regulate the interactions between the co-owners themselves. Although Louisiana courts at the time recognized some rights and duties that existed between co-owners, these jurisprudential rules were neither adequate nor consistent.⁵⁸ Thus, the Louisiana State Law Institute was called upon to fill this gap in the legislation.⁵⁹

While the development of Louisiana co-ownership provisions was heavily influenced overall by the Greek, Italian, and Swiss rules,⁶⁰ the drafters selected the Greek provision to serve as the source for the current article 800.⁶¹ Additionally, article 806, which provides reimbursement for necessary expenses incurred under

it is reasonable to conclude that this nationwide movement had some impact on local co-ownership trends.

53. Tracht, *supra* note 9, at 65. Income taxation was a factor that might explain the increase in joint tenancies across the country in the 1940s, when income tax rates rose. In an effort to minimize this tax burden, many split the income from income-producing property by dividing the ownership of the property. See Hines, *supra* note 9, at 588.

54. Lewis, *supra* note 9, at 399. Those with small estates began converting the single title of property into a joint title with their desired beneficiary. This avoided probate by allowing the beneficiary to receive the property interest by survivorship. *Id.* at 399 n.206.

55. *Id.* at 400; Hines, *supra* note 9, at 590. Co-ownership was being utilized by strangers in residential settings to make housing more affordable. See also Leigh Gallagher, *Lightening the Load*, FORBES, Jun. 15, 1998, http://www.forbes.com/forbes/1998/0615/6112192a_print.html (as prices rose for vacation homes, parties started sharing ownership to decrease the individual costs of owning a second home).

56. Lewis, *supra* note 9, at 401. The frequency of unmarried couples increased in the 20th century, and naturally following from this trend, the acquisition of property by these couples also increased. *Id.* Because unmarried cohabitants lack the benefit of clear bodies of law, these couples must rely on default co-ownership provisions to regulate their property rights. *Id.*

57. Symeonides & Martin, *supra* note 32, at 75.

58. *Id.* at 74. See generally *Moody v. Arabie*, 498 So. 2d 1081 (La. 1986); *Connette v. Wright*, 98 So. 674 (La. 1923); *Litton v. Litton*, 36 La. Ann. 348 (La. 1884); *Fuselier v. Lacour*, 3 La. Ann. 162 (La. 1848).

59. See Symeonides & Martin, *supra* note 32, at 74.

60. LA. CIV. CODE art. 797 cmt. a (2006).

61. LA. CIV. CODE art. 800 hist. n. See also AK § 788 (Greece).

article 800, was drawn from the Greek and Italian rules.⁶² With minor changes, articles 800 and 806 were adopted by the council as proposed.⁶³ These provisions became effective January 1, 1991,⁶⁴ and they have not been amended to date.

It should be noted at the outset that the drafters of these provisions did not adopt any of the more detailed requirements of the foreign sources consulted. Instead, they opted for a broader rule; the reasoning behind this choice is uncertain. However, it is possible that when faced with such discrepancies in the European provisions, the drafters thought it would be best to express the article in broad terms and leave the details to the jurisprudence. Unfortunately, the jurisprudence has been inadequate in developing these details.⁶⁵ The problem must be revisited, and greater legislative guidance in this area is needed.

C. Comparison of Louisiana's Rules with Foreign Source Provisions

Louisiana's co-ownership provisions were heavily influenced by those in the Greek, Swiss, and Italian civil codes. However, in comparison to Louisiana's article 800, the equivalent foreign articles contain a much higher degree of specificity. The Louisiana

62. LA. CIV. CODE art. 806 hist. n. The AK provides that: "Each of the coparceners shall be responsible vis-à-vis the others in proportion to his share for expenses incurred in connection with the preservation management and use of the common thing." AK § 794. *See also* C.c. § 1104 (Italy).

63. Article 800 originally read that "[e]ach co-owner may without the concurrence of any other co-owner take necessary steps for the preservation of the thing that is held in indivision." Draft, 1990 La. Acts No. 990 (Mar. 12, 1990). For the approved version, "each" was changed to "a." *Id.* There is an absence in the Institute's record of any comment that would suggest any objection regarding the language of the provision. The Council did, however, struggle with the language of article 806. Article 806 originally read: "A co-owner is bound to his co-owners for necessary expenses, including ordinary maintenance or repairs and reasonable management expenses, of the thing held in indivision in proportion to his share." Draft, 1990 La. Acts No. 990 (Oct. 28, 1988). Some members of the Committee expressed concern that the expenses for which a co-owner could be reimbursed were too broad in scope. Meeting of the Property Committee: Ownership in Indivision (Sept. 16, 1989). It was argued that the provision should be limited to those "necessary expenses" that were incurred under article 800. *Id.* However, this position was rejected for the more expensive list of expenses enumerated in the current rule (necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person). *Id.*; LA. CIV. CODE art. 806.

64. 1990 La. Acts No. 990, § 1 (on recommendation of the La. State Law Inst.).

65. Examples of the courts' flawed application of articles 800 and 806 will be demonstrated in Part IV.

rule differs most predominantly from its source provisions in two respects: the requirement of exigency prior to unilateral action and a hesitant tone toward granting unilateral authority.

1. Exigency Requirement

A cursory glance at article 800 as compared to its Greek equivalent reveals an important distinction: the lack of the word "imminent" in the Louisiana rule. While Greek law allows for a co-owner to act unilaterally, he may only do so in the instance of "imminent peril,"⁶⁶ where it would be impractical to acquire consent from the others. Furthermore, the Greek rule is not unusual: the Swiss provision also requires "imminent or increasing damage" in order for a co-owner to perform acts to conserve the property.⁶⁷ The term "preservation" standing alone infers some sort of danger or loss, but the "degree of gravity this danger must have is an open question" in the Louisiana provision.⁶⁸ The addition of an exigency requirement would facilitate the application of article 800 by giving further detail as to the kind of situations in which a co-owner may act and incur expenses unilaterally.

2. Reluctant Tone

Article 800 also departs from the foreign sources consulted by not incorporating a hesitant tone in authorizing unilateral action by a co-owner. The language of the European provisions, even those utilizing broad terminology, suggests a *reluctance* to allow a co-owner to act without the consent of others holding an interest in the property. This is accomplished by either incorporating certain prerequisites that must be satisfied before the act may be performed by a single co-owner,⁶⁹ avoiding the grant of unilateral authority altogether,⁷⁰ or qualifying this grant with a phrase suggesting that consultation with the other co-owners prior to the act may be wise.⁷¹ In contrast, the language of article 800 leaves this reluctance behind not by following any of these techniques,

66. AK § 788.

67. ZGB art. 647 (Switz.).

68. Symeonides & Martin, *supra* note 32, at 114.

69. AK § 788 ("imminent peril" must be present before a co-owner may act "without the consent of the others"); ZGB art. 647 (the co-owned object must be suffering from "imminent or increasing damage" prior to unilateral action).

70. See generally C.c. §§ 1100–1116 (Italy).

71. BGB § 744 (F.R.G.) (the last clause of the German provision states that the acting co-owner "may require that [the other co-owners] give their approval in advance for such a measure").

but by expressly allowing acts of preservation “without the concurrence of any other co-owner.”⁷²

With the mandatory condition of imminent circumstances, the Greek and Swiss provisions communicate a wariness of unilateral action by sanctioning it only in exceptional instances that meet the exigency requirement.⁷³ The Italian co-ownership provisions express this hesitancy through legislative absence, by avoiding the issue altogether. The Italian rules do not expressly allow a co-owner to act unilaterally in any situation, imminent peril or otherwise.⁷⁴ Even the German provision,⁷⁵ which is broadly-worded and closely resembles that of Louisiana, states that the acting co-owner “may require that [the others] give their approval in advance for such a measure.”⁷⁶ The inclusion of this clause in the rule suggests that while a co-owner may act without the concurrence of the others to preserve the property, receiving prior approval for the act might be beneficial. Thus, modern foreign codes acknowledge, or at least give a nod to, the danger of allowing a co-owner to incur expenses unilaterally. The Louisiana provision, however, cuts against this trend by candidly giving each co-owner the right to take steps for preserving the property without the concurrence of any other party.

IV. FLAWS OF ARTICLE 800

In a general sense, the broad nature of articles 800 and 806 are problematic in that a co-owner may affect a thing in which multiple persons have an interest without consulting the others first. In addition, the non-consenting co-owners will be further burdened with the reimbursement for such an expense. More specifically, however, the Louisiana rule is flawed in a number of less apparent ways. First, courts have had difficulty applying the current rule, particularly the vague term “necessary.” Second, the ambiguities of article 800 have led to manipulation of the legislation by co-owners against their fellow co-owners. Finally, the provisions cause unnecessary risk in property investment, as the broad terminology used does not provide adequate notice of when reimbursement may be due.

72. LA. CIV. CODE art. 800 (2006).

73. See AK § 788; ZGB art. 647.

74. See generally C.c. §§ 1100–1116.

75. While the German joint ownership rules were not a source for Louisiana’s provisions, the language of the German rule closely resembles that of article 800.

76. BGB § 744.

A. The Difficult Application of “Necessary”

Recall that doctrine defines “necessary” expenses as those that are “incurred for the preservation of the thing” or to relieve the property of private or public burdens.⁷⁷ It would seem that in light of this definition, classification of an expense as “necessary” would focus on the function of the expense or the purpose for which it was incurred. However, Louisiana courts have struggled with defining and applying this term in a practical setting. Specifically, the jurisprudential application of “necessary” presents three main issues: misapplying “necessary” to hide the true rationale for a decision, avoiding a determination of “necessary” altogether, and developing an improper standard.

First, courts have used the rationale that an expense was “unnecessary” to conceal the fact that reimbursement is denied for other reasons. This technique is problematic because it skews the impression of what kinds of expenses a court will classify as necessary to preserve property. For example, in *Succession of Bell*,⁷⁸ a co-owner sought reimbursement for storage of co-owned movable property. The acting co-owner in *Bell* was one of five daughters, all of whom were co-owners of inherited property passed down from their deceased mother.⁷⁹ While living in the decedent’s home, the daughter placed some of the inherited home furnishings in a commercial storage unit and incurred fees as a result. The daughter attempted to utilize article 800, *in pari materia* with article 806, to receive reimbursement from her co-owners for the storage expenses.

Instead of discussing the daughter’s purpose in light of objective considerations for storing the property, or the possibility that it needed to be in a controlled environment to maintain its condition, the court denied reimbursement on the ground that the co-owner could not have had legitimate concerns of others vandalizing the movables “since [she was] staying in the house.”⁸⁰ The court hinted, however, that it denied reimbursement because the daughter actually placed the furniture in storage to inhibit her co-owners from accessing it, thus lacking good faith in incurring the expense.⁸¹

Although the result was likely correct in *Bell*, the reasoning was faulty in that it suggests that absent bad faith, the daughter *still*

77. YIANNPOLOUS, *supra* note 13, at 551. See also LA. CIV. CODE art. 527.

78. *Succession of Bell*, 964 So. 2d 1067 (La. App. 1st Cir. 2007).

79. *Id.* at 1068–69.

80. *Id.* at 1074.

81. *Id.*

would not have been reimbursed for the storage fees. Yet, in light of objective circumstances, it may not have been so unreasonable for a co-owner to incur such an expense to preserve the property. For instance, because the daughter was living in the decedent's house, the furniture was likely subject to damage by everyday use. A reasonable person might want to place the furniture in storage in an attempt to protect it from this harm, hence preserving the property. Thus, in an objective sense, incurring this expense does not seem completely unnecessary under these facts.

Rather than examining the course of action a reasonable person might take to protect the property, the court merely dismissed the expense as lacking necessity, a rationale that only masks the court's true reasoning. The court made itself quite clear that it denied reimbursement because it believed the daughter did not deserve it—she lacked good faith. Since the *Bell* court did not examine whether the expense was reasonably necessary, this precedent adds further confusion to the already ambiguous term.

Secondly, practical use of the word “necessary” is flawed in that, due to its vague nature, courts avoid its application altogether. Because this term desperately needs definitional development, dodging its use does not aid this endeavor. *Miller v. Seven C's Properties*⁸² demonstrates the jurisprudential avoidance of applying “necessary” in a pragmatic context. The co-owners in *Miller* called upon the court to declare that repairs to be made on the property's levee system were necessary expenses, such that the acting co-owner would be entitled to reimbursement from the others. While avoiding the question of whether or not the repairs were truly necessary, the court merely determined that this was a justiciable controversy subject to declaratory relief and remanded to the trial court to make the complex finding of necessity. This suggests that a court would rather remand a case to string out the litigation in hopes of settlement rather than resolve the issue of whether the expense is “necessary.”

While the court unfortunately passed on the question of necessity, its holding is significant in a different respect. By finding this issue of necessity to be a justiciable controversy, the court suggests that requesting a declaration that the expenses are in fact those contemplated under articles 800 and 806 *before* they are incurred is an intelligent strategy to avoid subsequent conflicts regarding reimbursement.⁸³ Interestingly, the *Miller* court recognized that the broad language of articles 800 and 806 has the

82. 800 So. 2d 406 (La. App. 3d Cir. 2001), *writ denied*, 811 So. 2d 878 (La. 2002).

83. *Id.* at 410–11.

potential to cause conflict among the co-owners, implying that a decision by the parties as to the necessity of the act before it is performed would avoid excessive litigation at a later date.

Lastly, the application of “necessary” is difficult because the only jurisprudential test that somewhat facilitates the necessity determination focuses on improper inquiries. Currently, to resolve whether an act is one of preservation, and thus whether the expenses flowing from it are “necessary,” two factors are considered: (1) the nature and extent of the work necessary to carry out the act; and (2) the impact such work would have on the co-owned thing.⁸⁴

Exploring the magnitude of the act and its effect, however, is the wrong standard. The principal analysis should concern the *purpose* of the act, from both the objective viewpoint of a reasonable person and by examining the subjective motive of the acting co-owner.⁸⁵ Determining why the act was performed will naturally lead to whether or not reimbursement should be ordered, as those expenses that were “necessary,” or incurred to preserve the property, will be recovered by the acting co-owner. The fact that courts are failing to perform the proper analysis in this area should alert lawmakers that the current legislation is inadequate to provide guidance.

B. Co-owner Manipulation

Aside from the courts’ flawed application of articles 800 and 806, perhaps a more dangerous problem is that co-owners themselves are manipulating the broad terms of the legislation to utilize it for purposes beyond its scope. Distortion of the language of these provisions has created complicated legal issues with which courts do not want to get involved.⁸⁶ As a result, excessive amounts of time, money, and judicial resources have been needlessly wasted.⁸⁷ While many instances of legislative

84. *Allain v. Shell W. E & P, Inc.*, 762 So. 2d 709, 716 (La. App. 1st Cir. 2000). *See also* Op. La. Att’y Gen. No. 01-57 (Mar. 20, 2001), which reemphasizes the same test as set out in *Allain* in the context of conservation of natural resources.

85. *See* YIANNPOLOUS, *supra* note 20, at 183 (stating that “[f]rom a functional viewpoint, the distinction of juridical acts into [the three categories] is supposed to furnish guidelines . . . for the determination of the authority of certain persons to act with respect to things under their ownership or control. In this regard, classification actually depends on the *purpose* rather than the *nature* of individual acts.”).

86. Interview with Frank S. Craig, III, Partner, Breazeale, Sachse & Wilson LLP, in Baton Rouge, La. (Sept. 12, 2007).

87. *Id.*

exploitation by co-owners occur unreported,⁸⁸ one jurisprudential example where a party attempted to use articles 800 and 806 out of context was *Hawthorne Land Co. v. Occidental Chemical Corp.*⁸⁹

In *Hawthorne*, a majority co-owner, desperate to destroy diversity jurisdiction, attempted to use articles 800 and 806 to join the minority co-owner as a defendant. After the co-owned property had been contaminated by a leaking pipeline, the majority co-owner sued the responsible parties, but the minority co-owner chose to settle with the defendants for its share of the damages.⁹⁰ Because the minority co-owner could not be joined as a plaintiff due to this settlement, the majority co-owner argued that the minority co-owner should be joined as a defendant pursuant to articles 800 and 806.⁹¹ Specifically, the majority co-owner urged that it would be entitled to contribution from the minority co-owner for damage-assessment costs, and as a result, the minority co-owner was indebted to the plaintiff. Additionally, the majority co-owner argued that if the minority's "share of the cost of remediating the alleged damages [exceeded] its settlement proceedings, [then the minority would] be required to make up the difference."⁹²

The flaw in the majority co-owner's argument was that no expenses to preserve the property had actually been incurred. Without an act incurring necessary expenses, reimbursement cannot be ordered, and hence articles 800 and 806 should have no application. Fortunately, the court acknowledged this weakness in the majority co-owner's argument and denied the joinder, reasoning that the anticipated failure of the minority to pay its share of necessary expenses could not stand as grounds for its joinder as a defendant.⁹³ Although the *Hawthorne* court refused to entertain the co-owner's misuse of articles 800 and 806, the case nevertheless demonstrates the vulnerability the legislation has to distortion by the co-owners themselves, thus defeating the policy of timely dispute resolution.

88. *Id.*

89. No. 01-0881 (E.D. La. May 24, 2002).

90. *Id.* slip op. at 1.

91. *Id.* slip op. at 2.

92. *Id.*

93. *Id.* Apparently the resolution of this issue was not to the majority co-owner's satisfaction, as it once again used the same argument involving articles 800 and 806 to try to force the joinder of the minority co-owner a year and a half later. *Hawthorne Land Co. v. Occidental Chem. Corp.*, No. 01-0881 (E.D. La. Dec. 8, 2003). The court, able to see through this transparent argument, stated that the majority co-owner had not demonstrated why the legal theory had not already been available. The joinder of the minority co-owner would once again be denied. *Id.* slip op. at 4.

C. Investment Obstacles Caused by Legal Ambiguities

The vague scope of authority granted to a co-owner to incur expenses unilaterally and later to command reimbursement from the others necessarily discourages investment in real property since these unplanned preservatory expenses cannot be accounted for at the conception of the investment. Encouraging property investment is a strong policy concern in any state. This is particularly so in Louisiana after the 2005 hurricane season and the resulting property challenges.⁹⁴ Although investments have gradually increased, as of 2006, Louisiana had little major private investment when compared to the Mississippi Gulf Coast.⁹⁵

While large corporations can afford to invest in property-related projects independently, individuals will usually only be able to invest in a small business or vacation property by obtaining ownership rights with others.⁹⁶ In addition, co-ownership in this sense is usually the product of a hand shake deal, subject to the default rules of the Code. These relationships are easy to create and result in lower initial transaction costs but expose the co-owners to the risk of increased future disputes when they find themselves trapped by the default regime.⁹⁷ Clear legislation will necessarily encourage property investment, by way of co-ownership, as the parties will know at the outset the instances in which they may be forced to contribute for necessary expenses.

V. SOLUTION: TWO-PRONGED TEST

In consideration of the preceding issues, a reworking of the language in article 800 is required in order to narrow the ability of a co-owner to unilaterally incur expenses and later command reimbursement from the other co-owners. The new standard for article 800 consists of a two-part, alternative test with different requirements depending on the circumstances:

In *imminent circumstances* of emergency or threat of loss, a co-owner may, *in good faith*, take necessary steps

94. See *Hurricanes Katrina & Rita: Outstanding Need, Slow Progress*, U.S. Senate Comm. on Homeland Security & Governmental Affairs (2007) (testimony of C. Ray Nagin, Mayor, City of New Orleans), available at http://hsgac.senate.gov/public_files/012907Nagin.pdf.

95. Jay Newton-Small, *Mississippi Outpaces New Orleans as Post-Katrina Tourism Draw*, BLOOMBERG, Aug. 23, 2006, <http://www.bloomberg.com/apps/news?pid=20670001&refer=news&sid=aauRE9IKq0sA>.

96. Gallagher, *supra* note 55.

97. *Id.* See also Lewis, *supra* note 9, at 389–90; Tracht, *supra* note 9, at 65.

for the preservation of the thing that is held in indivision without the concurrence of any other co-owner.

Absent imminent circumstances, a co-owner may take ordinary acts to preserve the thing held in indivision only after securing the consent of the other co-owners representing at least a *majority* of the ownership interest.

A. Imminent Circumstances and Good Faith

The first prong of the new standard includes two updated requirements for unilateral preservation of co-owned property: imminent circumstances and good faith. Exigency, a prerequisite that many jurisdictions incorporate in their respective provisions, provides justification for granting unilateral authority. The addition of this requirement to article 800 would align Louisiana's rule with that of foreign provisions and add consistency to its application. Furthermore, charging a co-owner with a duty of good faith while incurring the necessary expense would not alter the current standard of care imposed on ordinary co-owners but would provide additional protection from two angles. First, the non-acting co-owners would rest-assured that the expense was incurred in their best interest and with objective reasonableness, as well as subjective honesty. Second, if the acting co-owner was in good faith, he would not be forced to bear the entirety of the expense if it was later found to be "unnecessary." Ultimately, the imminent circumstances and good faith requirements would provide for a more easily applied rule.

1. Imminent Circumstances of Emergency or Threat of Loss

Logically, the only instance in which unilateral action by a co-owner is justified would be where imminent circumstances prevent the ability to obtain consent from the other co-owners. In this instance, the lapse of time needed to notify and receive approval from the non-acting co-owners would result in harm to or loss of the thing held in indivision. When a scenario arises that reasonably forces a single co-owner to make a prompt decision in order to defend the property from impending danger, the law should never require him to perform any additional task other than that necessary to protect his investment. Otherwise, if consent were required in this instance, the result would likely be counterproductive.

Justifying unilateral preservation of property in the face of urgent circumstances is a rationale familiar to Louisiana property

law. In Louisiana Civil Code article 2899, the borrower of a thing may, in certain instances, claim reimbursement from the lender for expenses sustained to preserve the thing lent.⁹⁸ Expenses will be “necessary” in this context if the expenses were extraordinary and so urgent “that the borrower could not give notice to the lender before incurring the expenses.”⁹⁹ Furthermore, the expenses contemplated under article 2899 do not include those that are *ordinary* for the preservation of the thing lent.¹⁰⁰ Interestingly, a cross reference to article 806 appears in the comment to article 2899, suggesting that the term “necessary expenses” in the co-ownership context should also be interpreted as including an imminent circumstances requirement.¹⁰¹

In addition, both foreign provisions¹⁰² and common law principles¹⁰³ acknowledge the value of including a circumstantial requirement of immediacy, promptness, or peril in order to rationalize unilateral action by a co-owner. The Greek provision, also the source for article 800,¹⁰⁴ is identical to the Louisiana rule in most respects, with the exception of the “imminent peril” requirement.¹⁰⁵ By omitting this situational requirement from the language of article 800, the Louisiana provision requires a lesser standard for a co-owner to act unilaterally,¹⁰⁶ thus facilitating a

98. Louisiana Civil Code article 2899 provides: “The borrower may not claim reimbursement from the lender for expenses incurred in the *use* of the thing. The borrower may claim reimbursement for expenses incurred for the *preservation* of the thing lent, if the expenses were *necessary and urgent*.” LA. CIV. CODE art. 2899 (2006) (emphasis added).

99. See LA. CIV. CODE art. 2899 cmt. b.

100. *Id.*

101. LA. CIV. CODE art. 2899 cmt. c.

102. AK § 788(b) (Greece) (requires “imminent peril” to justify unilateral action); ZGB art. 647 (Switz.) (requires “imminent or increasing damage” before unilateral acts to preserve may be performed).

103. The Restatement of Restitution provides that

[w]here two persons are tenants in common or joint tenants and one of them has taken reasonably necessary action for the preservation of the subject matter or of their common interests, he is entitled to indemnity or contribution, enforced by means of a lien upon the interest of the other (a) if he made a request to the other to join in such preservation, or (b) without such request if action was *immediately necessary* and the other was not available.

RESTATEMENT (FIRST) OF RESTITUTION § 105 (1937) (emphasis added).

104. LA. CIV. CODE art. 800 hist. n. (2006).

105. AK § 788(b).

106. Symeonides & Martin, *supra* note 32, at 114. See also Succession of Steckler, 712 So. 2d 1066 (La. App. 5th Cir. 1998) (although the ordering of reimbursement for lawn care expenses was probably necessary to maintain the appearance of the grass, it was likely not incurred to prevent impending harm); Knighten v. Knighten, 809 So. 2d 324, 329 (La. App. 1st Cir. 2001), *writ*

single co-owner's ability to incur expenses unilaterally and command reimbursement from the other co-owners.

Similar to the Greek provision, Switzerland's rule also requires "imminent or increasing damage" before a co-owner may act without the consent of the other parties.¹⁰⁷ Notably, while the Swiss provision was not the source for article 800, it was very influential in the drafting of Louisiana's co-ownership articles in general.¹⁰⁸

Not limited to Greece and Switzerland, this circumstantial restraint on unilateral acts of preservation has also been adopted in the common law tradition. At common law, while a co-owner is expected to request the participation of others before performing an act that would affect the co-owned thing, it makes an exception in instances of emergency, where consultation with the other parties would be impractical.¹⁰⁹ The Restatements also address the issue of reimbursement for unilaterally-incurred expenses, stating that the acting co-owner will be entitled to contribution for reasonably necessary expenses if he either made a request for the others to join in the act or it was *immediately* necessary and the other co-owners were unreachable.¹¹⁰ Ultimately, at common law, notice to other co-owners will not be required when *prompt* action is reasonably needed to protect the property.¹¹¹

An exigency requirement needs to be added to the current language of article 800 because some Louisiana courts are allowing reimbursement for expenses that were not truly necessary to preserve the property from imminent harm. Incorporating an imminent circumstances requirement into article 800 would ensure

denied, 805 So. 2d 207 (La. 2002) (awarding reimbursement for expenses relating to the replacement of an air conditioning unit, which was necessary for comfort, but not incurred in an emergency scenario).

107. ZGB art. 647(2).

108. See, e.g., LA. CIV. CODE art. 797 cmt. a (2006) (stating that there are "corresponding provisions in modern civil codes" and citing as examples the Greek, Swiss and Italian Codes).

109. Daniel Friedmann, *Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding*, 36 LOY. L.A. L. REV. 831, 856 (2003).

110. RESTATEMENT (FIRST) OF RESTITUTION § 105 (1937).

111. See *Lovrien v. Fitzgerald*, 66 N.W.2d 458, 463 (Iowa 1954) (holding that to require the acting co-owner to give notice or request participation of other parties would have been useless and futile under the particular circumstances); *Casso v. Fullerton*, No. 04-05-00905-CV, slip op. at 2 (Tex. App.—San Antonio Sept. 13, 2006) (finding that a co-owner should be reimbursed for mortgage payments made to prevent a foreclosure sale of the co-owned property).

a consistent analysis for determining when reimbursement should be ordered for a unilaterally-incurred expense.

An example of an erroneous order for the reimbursement of necessary, yet non-imminent, expenses may be found in *Succession of Steckler*.¹¹² There, the court affirmed the trial court's judgment with scant analysis, allowing reimbursement not only for insurance payments but also for lawn care expenses.¹¹³ Unlike insurance payments, which are absolutely needed to protect the property and presented a justifiable claim for reimbursement, trimming the lawn simply cannot be said to meet the same exigency requirement, as these expenses are not essential to the preservation of the property from impending damage or loss.¹¹⁴ Thus, an imminent circumstances requirement would not only narrow the unilateral authority of a co-owner to incur these expenses but would also provide a uniform criterion to aid a court's decision as to reimbursement.

2. Good Faith

Whereas the advantages of an imminent circumstances requirement are effortlessly explained, the utility of imposing a good faith duty on the acting co-owner may not be immediately apparent. The benefits of a good faith duty are largely obscured by its amorphous meaning; thus, providing a new definition of "good faith" in the co-ownership context is necessary to understand how it would be applied. Additionally, supplementing article 800 with a good faith duty would provide protection to the co-owners and, like the imminent circumstances requirement, would ensure uniformity in court analysis. Thus, it would not be superfluous in light of the prudent man standard already imposed on co-

112. 712 So. 2d 1066, 1071 (La. App. 5th Cir. 1998).

113. *Id.* It should be noted that the executor of a decedent's estate is charged with an affirmative duty to preserve, repair, maintain and protect the property of the succession. LA. CODE CIV. PROC. art. 3221 (2006). However, the claims for reimbursement regarding the lawn maintenance were considered necessary expenses "incurred by the succession as co-owner," and not in the actor's capacity as the executor of the estate. Therefore, no affirmative duty to preserve should have existed, such that the failure to perform such activities might have exposed the executor to liability.

114. While lawn care may have been desirable to prevent the grass from dying, this sort of expense is more likely related to the appearance of the residence. Even if incurred to preserve the integrity of the lawn, it cannot be said that they fall within the same category of mandatory expenses such as property taxes or insurance payments. Insurance payments, if not paid, can result in an inability to repair property that has already been damaged, and a failure to pay property taxes can cause a loss of ownership altogether.

owners.¹¹⁵ Finally, the case for good faith is bolstered by comparison with other regimes that employ a similar duty.

a. Definition in the Co-ownership Context

Like a chameleon, the term “good faith” has the ability to take on different characteristics depending on the framework in which it is applied.¹¹⁶ Even within property law, the meaning of good faith varies with its context. For instance, good faith in acquisitive prescription rests upon a reasonable *belief*, in light of *objective* considerations, that the party in possession believes that he is the owner.¹¹⁷ However, the definition of good faith is altered slightly for accession, where a possessor will only be in good faith if he has an act translatable of ownership *and* is unaware of any defect in his ownership.¹¹⁸ Despite differing meanings, the common thread in these definitions is that good faith in property law consists of both subjective and objective ingredients. Also, good faith in property law does not seem to be an active duty imposed on the possessor but rather a personal condition or state of mind.¹¹⁹

A definition of good faith in the co-ownership context should remain consistent with its use in other property provisions. Thus, a co-owner should be in good faith in preserving the property held in indivision when he not only subjectively believes that the act was needed but also that this belief was justified objectively in light of the circumstances.

However, the definition of good faith in co-ownership cannot cease at this point. Unlike other areas of property law, when one acts on property held in indivision, he is not only acting for his own ownership interest but is simultaneously acting on behalf of others as well. In this sense, co-ownership has been seen as a hybrid relationship, intermixing personal and proprietary rights.¹²⁰ Therefore, a general definition of good faith in contracts, in addition to that in property law, is helpful to an understanding of its application in a co-ownership setting. Generally, good faith in the contractual realm is said to encompass a certain honesty or loyalty to the *other party* involved, perhaps invoking an expectation of morality in the execution of the obligation.¹²¹

115. See LA. CIV. CODE art. 799 (2006).

116. Litvinoff, *supra* note 39, at 1649–51.

117. LA. CIV. CODE art. 3480.

118. LA. CIV. CODE art. 487.

119. Litvinoff, *supra* note 39, at 1649.

120. MAINE, *supra* note 30, at 257.

121. Litvinoff, *supra* note 39, at 1664.

While a melding of property and contract definitions of good faith is a novel concept under Louisiana law, it is required in this instance due to the unique characteristics of co-ownership that cause it to be neither purely proprietary nor personal. Ultimately, this new definition of good faith in co-ownership should unite certain features of the term as understood in both property and contract law. Hence, a co-owner should be in good faith under the revised standard if: (1) he had a *subjective* belief that the steps taken to preserve the property were in the *best interest of all parties* involved; and (2) the act taken was *objectively reasonable* in the face of imminent circumstances.¹²²

b. As Opposed to the Prudent Man Standard

At first glance, the addition of good faith in article 800 may seem superfluous considering the “prudent man” standard already imposed on co-owners under article 799.¹²³ However, article 799 merely charges each co-owner with an overarching standard of care to avoid acting in a manner that would cause harm to the property.¹²⁴ Unlike the duty of a prudent administrator, the prudent man standard does *not* impose liability for negligence or require a co-owner to act affirmatively to preserve the property held in indivision.¹²⁵ While article 799 refers to a duty to avoid causing harm to the property itself, it does not impose any obligation to prevent intangible “damage” to the other co-owners.¹²⁶ Therefore, the addition of good faith within article 800 would not be repetitive of the standard already imposed, as it contemplates a responsibility

122. The subjective and objective inquiries are drawn from the definition of good faith in property law, as seen under Louisiana Civil Code articles 487 and 3480. Asking whether the preservation is in the best interest of the other co-owners is an inquiry borrowed from contract law. See Litvinoff, *supra* note 39, at 1664.

123. See LA. CIV. CODE art. 799, which provides that “[a] co-owner will be liable to the other co-owners for any damage to the thing held in indivision caused by his fault.” Scholarly commentary has characterized this standard as that of a “prudent man.” Symeonides & Martin, *supra* note 32, at 104.

124. The prudent man standard in Louisiana Civil Code article 799 is comparable to the general duty to refrain from harming others, as found under Louisiana Civil Code article 2315. Katherine Shaw Spaht, *Matrimonial Regimes*, 51 LA. L. REV. 321, 331 (1990); Symeonides & Martin, *supra* note 32, at 103. See also LA. CIV. CODE art. 2315.

125. Symeonides & Martin, *supra* note 32, at 101–02. The addition of good faith in article 800 would *not* alter the standard imposed by article 799 or impose an affirmative duty to preserve, but would rather add an additional layer of protection to ensure that expenses are unilaterally incurred only in justifiable instances.

126. *Id.*

wider in scope than the mere avoidance of harm to the property. Good faith charges the acting co-owner with a duty to perform the unilateral steps of preservation in an objectively and subjectively honest manner while also keeping the interests of the other co-owners in mind.

Superimposing a good faith duty onto the prudent man standard would be beneficial to both the non-acting co-owners as well as the acting co-owner. From the viewpoint of the non-acting co-owners, they can be ensured that the expense was incurred only because the single co-owner had an honest belief that an impending threat would endanger the co-owned property. Thus, the addition of good faith would prevent an abuse of the right¹²⁷ granted in article 800 for a co-owner to act unilaterally to preserve the property.

Furthermore, because the law is reluctant to punish those acting in good faith,¹²⁸ the imposition of this duty would remedy a harm that the broad language of article 800 could presently have on the *acting* co-owner. Under the current standard, an acting co-owner may be denied reimbursement where he incurred an expense which he reasonably believed was "necessary" to preserve the property under articles 800 and 806 but that after-the-fact turned out not to be.¹²⁹ Hypothetically, this situation might occur where it appears that a hurricane is approaching the co-owned land, and in reliance on weather reports, a single co-owner takes steps to lessen the possible devastation. However, this effort later turns out to be in vain, as the hurricane takes a sudden sharp turn prior to landfall and the property escapes harm. Under current article 800, the acting co-owner may be held solely accountable for these expenses, as the steps taken turned out to be unnecessary. However, under the new standard, the other co-owners would be responsible for reimbursement, as it would be wrong to punish a co-owner who was acting in good faith to preserve the co-owned property. Therefore, the addition of this duty only furthers the "safety valve" function of article 800 for the acting co-owner and

127. Litvinoff, *supra* note 39, at 1660–61.

128. *Id.* at 1646–47.

129. This harm was recognized in *Miller v. Seven C's Properties, LLC*, 800 So. 2d 406, 411 (La. App. 3d Cir. 2001). In a typical setting, this issue of reimbursement is usually examined from the perspective of the co-owners that played no role in incurring the expense. However, because of the subjective nature of the term "necessary," the *Miller* court notes the possibility that a co-owner may proceed with the act, honestly believing it to be essential to protect the co-owned thing, only to later be denied reimbursement based upon a finding that the act was not that contemplated under the legislation.

provides protection beyond that contemplated under the prudent man standard.

Additionally, the inclusion of good faith would supply uniformity to court analysis that is not currently provided by the prudent man standard. For instance, while some Louisiana courts are applying a good faith standard to unilateral acts of preservation to determine whether reimbursement should be ordered, others do not consider this factor. In *Succession of Bell*, although the court's reasoning for denying reimbursement for the storage expenses was a lack of necessity,¹³⁰ it was highly likely that the co-owner was denied reimbursement because the expenses had not been incurred in a good faith effort to preserve the property.¹³¹ If a duty of good faith was included in article 800, the court in *Bell* could have denied reimbursement on that ground, rather than concealing its reasoning with the "lack of necessity" rationale.

Whereas some courts are considering the acting co-owner's state of mind or reasonableness of the expense for reimbursement claims,¹³² others do not embark on such an analysis.¹³³ Like the addition of an imminent circumstances requirement, including good faith as a prerequisite to reimbursement under articles 800 and 806 would guarantee that a uniform test is applied by courts.

Finally, including a good faith duty in article 800 would align Louisiana's generic co-ownership provisions with that of Louisiana's mineral law regime and the common law rule. For instance, a co-owner of a mineral lease in Louisiana may only operate independently when preventing waste, destruction, or termination, and in so acting he must do so in good faith.¹³⁴ Likewise at common law, a co-owner requesting reimbursement

130. *Succession of Bell*, 964 So. 2d 1067, 1074 (La. App. 1st Cir. 2007).

131. *Id.*

132. For example, see *Southwestern Gas & Electric v. Liles*, where a Louisiana court allowed reimbursement for necessary expenses to conserve an oil well held in indivision because the expenses were incurred "in an *honest effort* to preserve the property." 133 So. 835, 837 (La. App. 2d Cir. 1931) (emphasis added).

133. See generally *Ainsworth v. Ainsworth*, 860 So. 2d 104 (La. App. 4th Cir. 2003), writ denied, 862 So. 2d 995 (La.), cert. denied, 541 U.S. 992 (2004); *Mitchell v. Otis Elevator Co.*, No. 89-0976 (E.D. La. Apr. 12, 1991).

134. LA. REV. STAT. ANN. § 31:177 (2000) (providing that a co-owner of a mineral lease "may act to prevent waste, destruction, or termination of the lease and to protect the interest of all, but cannot impose upon his co-owner liability for any costs or expenses except out of production. In so acting *he must act in good faith* and must deal with the interest of the remaining owner or owners in the manner of a reasonably prudent lessee whose interest is not subject to co-ownership.") (emphasis added).

for preservatory expenses must have incurred these expenses in good faith.¹³⁵

Overall, the addition of good faith would not alter the present standard of care that applies to ordinary co-owners but would add currently unseen benefits. If a good faith duty was imposed on the execution of unilateral acts of preservation, the interests of both the acting and non-acting co-owners would be protected. Furthermore, the inclusion of good faith within article 800 should provide consistency in jurisprudential application of the rule. Finally, this addition would parallel the rules of other property regimes, which also require acts of preservation to be carried out in good faith.

c. Comparison with Similar Duties

Comparing good faith in co-ownership with other heightened duties reinforces the need for this requirement in article 800. Specifically, when examined in light of the fiduciary duty and the duty of a prudent administrator, the benefits of incorporating good faith into article 800 become apparent. Unlike these similar duties, good faith should not impose an *affirmative* responsibility on co-owners to preserve the property held in indivision; rather, it should merely add an additional layer of protection and assurance that the acting co-owner does not abuse the right granted to him in article 800.

i. Fiduciary Duty

As defined in the partnership context, a fiduciary duty requires that a partner not conduct activities contrary to the goals of his partners and of the partnership as a whole.¹³⁶ This heightened standard between fiduciaries is clearly justified in a partnership scenario, as a single partner has the ability to subject the entire partnership to an obligation, thus exposing his partners to personal

135. 86 C.J.S. *Tenancy in Common* § 90 (2007). This rule provides that “one tenant in common is entitled to charge the others with a proportion of the reasonable expenses incurred fairly and *in good faith* for the benefit of the common property.” (emphasis added). See also *Neeley v. Intercity Mgmt. Corp.*, 732 S.W. 2d 644, 648 (Tex. App.—Corpus Christi 1987); *Lovrien v. Fitzgerald*, 66 N.W. 2d 458, 465 (Iowa 1954). Common law courts will also deny reimbursement for “speculative efforts to preserve the common estate.” *Neeley*, 66 S.W. 2d at 465.

136. LA. CIV. CODE art. 2809 (2006). Article 2809 provides that [a] partner owes a fiduciary duty to the partnership and the partners. He may not conduct any activity, for himself or on behalf of a third person, that is contrary to his fiduciary duty and is prejudicial to the partnership. If he does so, he must account to the partnership and to his partners for the resulting profits.

liability.¹³⁷ However, the same cannot be said of co-ownership, as a single co-owner can only hold the others personally responsible for reimbursement of expenses already paid. Thus, the prevailing view in Louisiana is that co-owners are not fiduciaries merely by virtue of their relationship.¹³⁸

Good faith, on the other hand, has been described as “halfway between a fiduciary duty and the duty to refrain from active fraud.”¹³⁹ Good faith is a better fit for the instance of co-ownership, as a single co-owner has less power to bind his fellow co-owners to obligations than a partner does.¹⁴⁰ Consequently, while the inclusion of good faith within article 800 would not be an express adoption of a fiduciary duty, it would impose some sort of heightened duty involving honesty or fair dealing on the co-owner relationship.

ii. Duty of a Prudent Administrator

Examining good faith in light of a prudent administrator duty also exemplifies the benefits of requiring co-owners to preserve co-owned property in good faith. Recall that article 799 holds ordinary co-owners to a prudent man standard to avoid causing harm to the property held in indivision.¹⁴¹ In contrast, a prudent *administrator* duty holds the actor liable for his fault, neglect, or default, thus imposing an affirmative duty on the actor to preserve the property in order to avoid such liability. This duty of a prudent administrator is imposed on those acting to manage the affairs of another, as well as on ex-spouses in preserving former community property. While a good faith duty would not extend as far as

137. Symeonides & Martin, *supra* note 32, at 104.

138. *Id.* Interestingly, the common law imposes a fiduciary duty upon co-owners in certain situations. In *Cummings v. Anderson*, the Washington Supreme Court said that there are “[t]wo situations [that] give rise to most of the problems involving the existence and extent of fiduciary relations between tenants in common. These are: (1) the effort by one cotenant to buy in and later to assert a superior title to the detriment of his cotenants; and (2) the making of an agreement with the other cotenants, in which some advantage is gained by ‘overreaching’ the others.” 614 P.2d 1283, 1288 (Wash. 1980) (citing 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 605 (P. Rohan ed., 1979)). See also SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 366 (4th ed. Thomson West 2007) (1987) (stating that “[a]s fiduciaries, co-tenants cannot deal with the property in their own self-interest if the effect of such self-dealing would be to affect adversely the other co-tenant’s title”).

139. Litvinoff, *supra* note 39, at 1668.

140. Symeonides & Martin, *supra* note 32, at 104.

141. LA. CIV. CODE art. 799.

requiring an ordinary co-owner to preserve the co-owned property, it would secure good intentions and a clear conscience in executing the unilateral act of preservation.

The first instance in which the Louisiana Civil Code charges one to act as a prudent administrator is under the doctrine of *negotiorum gestio*, or management of the affairs of another. Under this doctrine, one acts to manage the affairs of another when he "acts without authority to protect the interests of another . . . in the reasonable belief that the owner would approve of the action if made aware of the circumstances." When a co-owner unilaterally preserves the co-owned thing, his actions bear a likeness to those that would occur under *negotiorum gestio*.¹⁴² Gestors¹⁴³ are obligated to affirmatively preserve the property that they manage, subject to liability for neglect.¹⁴⁴ Whereas most agree that *negotiorum gestio* does not apply to acts authorized under article 800,¹⁴⁵ it is not entirely clear why this is the case.¹⁴⁶

Like a fiduciary duty, the prudent administrator standard applied to gestors is inappropriate for co-ownership as it requires

142. LA. CIV. CODE art. 2292.

143. One acting under the doctrine of *negotiorum gestio* is often referred to as a "gestor."

144. Louisiana Civil Code article 2295 provides that "the manager [or gestor] must exercise the care of a prudent administrator and is answerable for any loss that results from his failure to do so." LA. CIV. CODE art. 2295.

145. LA. CIV. CODE art. 800 cmt. (stating that "[t]his is not unauthorized management of affairs of another under . . . Article 2295"). See also Spaht, *supra* note 124, at 331-32.

146. An exegetical analysis of the language of article 2292 suggests two reasons for which this doctrine does not apply to acts arising under article 800. First, when a co-owner acts unilaterally to preserve the co-owned thing, he is not only managing the affairs of another, but *also* of himself. Additionally, as a person holding an ownership interest in the property, the co-owner has the *authority* to preserve the thing, and therefore it would not be *unauthorized* management. Cheryl L. Martin, Comment, *Louisiana State Law Institute Proposes Revision of Negotiorum Gestio and Codification of Unjust Enrichment*, 69 TUL. L. REV. 181, 189 (1994). This is not to say that this doctrine will *never* apply in the instance of co-ownership. Both jurisprudence and scholarly commentary reveal that if a co-owner performs an act unilaterally that reaches beyond those contemplated in article 800, then *negotiorum gestio* would attach and the prudent administrator duty would apply. Symeonides & Martin, *supra* note 32, at 116. See also Granger v. Granger, 967 So. 2d 540, 543-44 (La. App. 3d Cir. 2007); Gibson v. Gibson, 692 So. 2d 708, 709 (La. App. 3d Cir. 1997). Although unclear, this might occur when a co-owner undertakes administrative acts beyond mere preservation without the concurrence of the other co-owners. Because acts of administration or management usually require unanimous consent of the co-owners, it makes sense that a heightened duty would apply when a co-owner undertakes an act of a more substantial nature without the concurrence of the others.

affirmative preservation of the property, threatening liability for neglect. Therefore, imposing a prudent administrator duty to acts arising under article 800 would alter the pre-existing prudent man standard, which does not impose an affirmative duty to preserve the co-owned thing. Instead, a co-owner should be subject to the standard of good faith when acting unilaterally, so as to ensure that he acts for the benefit of all parties when exercising the right bestowed by article 800.

A second instance in which the prudent administrator duty applies is where an ex-spouse has former community property under his control.¹⁴⁷ The rationale for this increased duty is that former spouses are peculiar co-owners in that they are “less likely to remain on friendly terms or to continue to share a common purpose.”¹⁴⁸ Again, a prudent administrator duty is inappropriate for ordinary co-owners; however, a comparison of co-owners with former spouses strengthens the case for some sort of heightened duty when a co-owner acts without concurrence under article 800.

Due to the plethora of property disputes between co-owners that are either family members or cohabitating couples, the logic behind the increased standard in the former community property context suggests a need for an increased standard for acts under article 800.¹⁴⁹ Because of the “human element” in property disputes between these common classes of co-owners, it would

147. LA. CIV. CODE art. 2369.3. Article 2369.3 provides, in pertinent part, that

[a] spouse has a duty to preserve and to *manage prudently* former community property under his control, including a former community enterprise, in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. *He is answerable for any damage cause by his fault, default, or neglect.*

Id. (emphasis added).

148. Katherine Shaw Spaht, *Co-ownership of Former Community Property: A Primer on the New Law*, 56 LA. L. REV. 677, 679 (1996). See also Granger, 967 So. 2d at 544–45 (stating that the rationale for the heightened standard for former spouses is that “the law no longer assumes that a spouse who has former community property under his control will act in the best interest of both spouses in managing it”).

149. Examples of family property cases include *Giardina v. Giardina*, 158 So. 615 (La. 1935); *Succession of Bell*, 964 So. 2d 1067 (La. App. 1st Cir. 2007); *Ainsworth v. Ainsworth*, 860 So. 2d 104 (La. App. 4th Cir. 2003); *Succession of Riehlman*, 4 Teiss. 400 (La. Ct. App. 1907). Examples of cohabitating couple disputes include *Johnson v. Antoine*, 735 So. 2d 856 (La. App. 5th Cir. 1999); *Glover v. Sowada* 457 So. 2d 101 (La. App. 5th Cir. 1984); *Jackson v. Hampton* 153 So. 2d 187 (La. App. 2d Cir. 1963); *Chambers v. Crawford*, 150 So. 2d 61 (La. App. 2d Cir. 1963). See also *Lewis*, *supra* note 9, at 401; *Tracht*, *supra* note 9, at 67.

make sense to apply a higher standard of care for unilateral acts of preservation.

However, the prudent administrator standard imposed on former spouses is once again inappropriate for co-ownership, as it includes an affirmative duty to preserve. Additionally, the prudent administrator standard is too stringent for generic co-ownership because family members and cohabitating couples are not likely as vindictive as former spouses. The addition of a duty of good faith in article 800, on the other hand, would prevent emotions from affecting the co-owned property and ensure that acts of preservation are performed rationally.

B. Majority Consent Absent Imminent Circumstances

Under the new standard in article 800, imminent circumstances and good faith are required for a co-owner to act unilaterally on a co-owned thing. These requirements not only serve to protect the non-acting co-owners from unforeseen expenses but also to ensure that the acting co-owner receives reimbursement for a bona fide act of preservation. Absent an emergency, however, a co-owner wishing to incur expenses to protect the property from *gradual* deterioration should be required to consult others having an interest in the property before performing the act.¹⁵⁰ The second prong of proposed article mandates just that. Gaining the consent of co-owners representing a majority interest¹⁵¹ in the co-owned

150. To distinguish these acts of preservation from those occurring under imminent circumstances, these acts will be referred to as "ordinary" steps to preserve the co-owned property.

151. Unfortunately, a pragmatic exception to the rule of majority consent occurs in the instance where two co-owners have an equal, undivided interest in a thing. In this scenario, a majority cannot technically be achieved without unanimous consent, as each party owns exactly 50% of the interest. However, this proves to be no obstacle to the proposed majority consent rule for many reasons. First, in almost every instance of gaining consent, there will be some surplus percentage of agreement. For example, in the instance of four co-owners, each owning an equal interest, three of the co-owners (or 75%) must agree to the act of ordinary preservation, thus resulting in 24% excess consent. The instance of two co-owners is no different—there is merely a higher level of surplus consent. Secondly, the task of obtaining the consent will be less onerous in the instance of only two co-owners, as the acting co-owner must only convince one other party to agree that the act is necessary. Finally, if a co-owner having a 50% interest in the thing were able to act unilaterally in all instances of preservation, imminent or otherwise, then the purposes of requiring consent in the first place would be unfulfilled. Not only would a check on the acting co-owner's judgment be absent, but the other co-owner would be without notice that the act occurred, would never have had an opportunity to object, and would be more likely to protest when asked for reimbursement post-performance.

thing prior to incurring the necessary expense would fulfill a variety of beneficial purposes.

First, requiring majority consent would provide *notice* to the other parties that an act is about to be performed on property with which they have an interest. Along the same lines, it would cause the other co-owners to be aware that they should expect an extra expense in the near future. Being able to plan for future expenses, through increased communication among co-owners, would do away with many of the bitter disputes that can arise between co-owners.

Second, a majority consent requirement would dispense with many *reimbursement issues* at the outset, thus avoiding later conflicts and litigation. If a majority of co-owners were consulted before the expense was incurred, then they should be estopped from complaining about reimbursement at a later date. In *Miller v. Seven C's*, the court suggested that a preliminary verification of the necessity of the expense, by either the parties or the court, would be helpful in maintaining a harmonious relationship when reimbursement is requested.¹⁵² Furthermore, a declaration by the parties at an early stage that the expense is necessary would also protect the acting co-owner by “prevent[ing] the possibility of one co-owner proceeding with the repairs, only to be denied reimbursement based upon a later finding that the repairs were not those contemplated under [a]rticle 806, while the other co-owners reaped the benefits of the improvements.”¹⁵³

Third, requiring that the acting co-owner consult others having a majority interest in the property will serve to *check* his judgment, certifying that the act is absolutely necessary to maintaining the condition of the property. Because exigency is not a factor in instances where majority consent is required, it will be less likely that an expense in this instance is actually “necessary” to protect the property.¹⁵⁴ For instance, it could be argued that re-painting a co-owned house is an act to preserve the exterior from gradual corrosion or decay.¹⁵⁵ This act, however, would also likely enhance the value of the co-owned property, thus resulting in a useful, rather than necessary, expense.¹⁵⁶ Therefore, requiring the acting

152. 800 So. 2d 406, 411 (La. App. 3d Cir. 2001).

153. *Id.*

154. Recall that expenses are divided into three categories—necessary, useful and luxurious. YIANNPOLOUS, *supra* note 13, at 551–53.

155. National Association of Corrosion Engineers, Household Corrosion: Consumer Tips, <http://events.nace.org/library/community/household/tips.asp> (last visited Aug. 10, 2008).

156. Recall that useful expenses are those that result in the enhancement of the value of the property. YIANNPOLOUS, *supra* note 13, at 551. The

co-owner to consult other co-owners prior to incurring the expense will confirm the necessity of it. If the others disagree as to the necessity of the expense, this process would also provide the other co-owners with an opportunity to object if they believe the expense to be excessive.

Not only would this requirement be functional, but consent requirements are usually a prerequisite to ordinary acts of preservation. In fact, both the common law and the Swiss Civil Code embrace similar rules. At common law, a co-owner desiring indemnity or contribution for acts to preserve the thing should "inform the other [co-owners] and request [them] to participate or to pay [their] proportionate share."¹⁵⁷ Furthermore, the Swiss Code requires unanimous consent for acts of preservation that are "essential," yet not immediately necessary under the circumstances.¹⁵⁸

Notably, the newly suggested language of article 800 only requires the consent of co-owners representing a majority interest, rather than the higher standard of unanimity imposed by other jurisdictions. The majority rule is a superior one because it eliminates the circumstance where a single co-owner could "hold out" and prevent the protection of the property.¹⁵⁹ However, the majority consent requirement still provides the benefits of notice, disposal of conflict, and verification of the act's necessity.

Additionally, majority consent requirements are frequently utilized elsewhere in Louisiana property law. Therefore, including a majority consent rule in article 800 would align the generic co-ownership provisions with other Louisiana property regimes. Under the Louisiana condominium regime, a contract for maintenance, management, or operation of the property may be cancelled by a majority vote of individual unit owners.¹⁶⁰

significance of classifying an expense as one that is useful versus one that is necessary is that if merely useful, the acting co-owner may not be guaranteed reimbursement under article 806. LA. CIV. CODE art. 806 (2006) (the only expenses that can be reimbursed under article 806 are "necessary expenses, expenses for ordinary maintenance and repairs or necessary management expenses paid to a third person").

157. RESTATEMENT (FIRST) OF RESTITUTION, § 105 cmt. c (1937).

158. ZGB art. 647c (Switz.) (providing that "[w]ith the consent of all co-owners maintenance work, repairs and renovations which are essential for the preservation of the value and the serviceableness of the object can be executed provided these acts are not usual acts of management to which each co-owner is entitled singly").

159. Symeonides & Martin, *supra* note 32, at 123.

160. LA. REV. STAT. ANN. § 9:1123.105 (2008) (providing, in pertinent part, that "[a] contract for the maintenance, management, or operation of the

Additionally, a super-majority requirement¹⁶¹ is imposed by both the timber and mineral regimes. For example, when a buyer purchases timber from a co-owner, he may not remove the timber without receiving approval from most of the other co-owners.¹⁶² Finally, in mineral servitudes, a co-owner is forbidden to conduct operations on the property without the consent of co-owners representing an eighty percent interest.¹⁶³

In sum, imminent circumstances justify unilateral action by a co-owner to preserve the co-owned property; however, absent an emergency, a co-owner wishing to act upon co-owned property to prevent gradual, ordinary damage should be required to consult the other co-owners first. Obtaining the consent of co-owners representing a majority interest in the property, a less onerous standard than unanimity, would provide notice to the other co-owners, dispense with reimbursement issues at the outset, and check the judgment of the acting co-owner. Because other regimes employ consent requirements, this rule would unify Louisiana's default co-ownership rules with those of other Louisiana property regimes, the common law, and the Swiss Civil Code.

VI. CONCLUSION

While the 1990 enactment of co-ownership provisions was a significant stride to filling the legislative gap perpetuated by the Roman-French disapproval of this arrangement, the broad rule that

condominium property or any lease of recreational or parking facilities entered into by the association while the association is controlled by the developer of the condominium shall be subject to cancellation by the association by vote of not less than a majority of the individual unit owners").

161. Under a super-majority rule, an act cannot be done without obtaining the consent of co-owners representing at least *eighty* percent interest.

162. LA. REV. STAT. ANN. § 3:4278.2(B) (2003) (providing, in pertinent part, that "[a] buyer who purchases the timber from a co-owner or co-heir of land may not remove the timber without the consent of the co-owners or co-heirs representing at least eighty percent of the ownership interest in the land, provided that he has made reasonable effort to contact the co-owners or co-heirs who have not consented and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with the other co-owners or co-heirs").

163. LA. REV. STAT. ANN. § 31:175 (2000) (providing, in pertinent part, that "[a] co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of co-owners owning at least an undivided eighty percent interest in the servitude, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner").

currently grants unilateral authority to incur, and to be reimbursed for, necessary expenses is inadequate to protect co-owners from unforeseen expenses, thus resulting in excessive conflict. This problem can be solved by amending article 800 to include a two-pronged test, requiring imminent circumstances and good faith for unilateral acts and a majority consent requirement for acts of ordinary preservation.

The need for immediate action justifies unilateral acts of preservation as a lapse of time needed to gain consent would only further endanger the property. A good faith duty that includes aspects of both property and contract law would ensure that these acts are carried out with subjective honesty and objective reasonableness as well as with the best interest of the others in mind.

In contrast, a co-owner wishing to remedy more gradual harm to the co-owned property should first be required to gain the consent of those representing a majority interest. This prerequisite would fulfill many purposes, such as providing notice, checking the actor's judgment, and dispensing with reimbursement issues at the outset.

This revised standard, which narrows the unilateral power of a co-owner, is a more sensible approach when compared to the present rule. Adopting this new test would facilitate the practical application of article 800 and help to preserve co-ownership arrangements in Louisiana.

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