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**TWENTY-EIGHT YEARS LATER: *DELANEY v. MCCOY*
AND SUPPLEMENTAL PARTITIONS OF COMMUNITY
PROPERTY IN LOUISIANA**

Claire Murray*

Twenty-eight years after Mack McCoy's divorce, his ex-wife, Claudine McCoy Delaney, filed a supplemental petition for partition of community property.¹ Ms. Delaney sought a pro rata share of Mr. McCoy's retirement benefits. The Second Circuit Court of Appeal held that Ms. Delaney's supplemental partition was not barred by *res judicata* because when an asset is omitted from a community property settlement by mutual oversight, the matter has not yet been adjudicated and is properly subject to modification.

I. BACKGROUND

Mack Allen McCoy and Claudine Mason McCoy Delaney married on November 16, 1973. On June 27, 1979, Mr. McCoy filed a petition for separation. After termination of the community property regime, Ms. Delaney filed a petition for settlement of the parties' community property. Ms. Delaney propounded interrogatories to Mr. McCoy regarding the existence of a retirement plan related to his employment at the Shreveport Fire Department. He answered, "The parties have no vested interest in any retirement plan."²

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1. *Delaney v. McCoy*, 47,240 (La. App. 2 Cir. 6/20/12), 93 So. 3d 845. The Second Circuit Court of Appeal heard this dispute twice. The 2012 opinion, *Delaney v. McCoy*, 93 So. 3d 845, is the subject of this case note.

2. *Delaney*, 93 So. 3d at 847.

Following a trial, the court entered a judgment partitioning the community property. The judgment set forth which items of the former community were to be partitioned in kind and which were to be partitioned by licitation, yet the judgment made no mention of retirement benefits.

Twenty-seven years later, Mr. McCoy retired from the fire department. The following year, Ms. Delaney filed a supplemental petition for partition of community property, alleging that the retirement benefits that had accrued during the marriage had been omitted from the prior community property partition. Mr. McCoy filed exceptions of *res judicata* and no right and no cause of action. The trial court denied the exceptions. Mr. McCoy then filed a petition for rehearing. Upon rehearing, the court granted Mr. McCoy's exception of *res judicata*, reasoning that the existence of a settlement agreement itself indicated intent to settle all claims that either party had or may have against the former community of acquets and gains.³

Ms. Delaney appealed the trial court decision granting Mr. McCoy's exception of *res judicata*. Because Mr. McCoy failed to introduce critical documents into evidence, the Second Circuit Court of Appeal found he had not met his burden of proof. The court remanded for further proceedings.

On remand, the trial court held a hearing in June 2011. With all the required documentation admitted into evidence, the trial court again granted Mr. McCoy's exception of *res judicata*. Ms. Delaney again appealed.

II. DECISION OF THE COURT

The Second Circuit Court of Appeal held that Ms. Delaney's action was not barred by *res judicata*. Because the retirement benefits were never specifically mentioned in the community

3. See *Delaney v. McCoy*, 63 So. 3d 327 (La. App. 2 Cir. 2011) (the Second Circuit Court of Appeal's first opinion in this matter).

property settlement, the partitioning of the asset had not been formerly adjudicated. Accordingly, the issue was not barred by *res judicata*. Ms. Delaney was entitled to file a supplementary petition for partition of community property.

III. COMMENTARY

Under Louisiana's community property regime, each spouse owns a present, undivided one-half interest in the community during its existence.⁴ If a property right results from a spouse's employment during the existence of the community, then it is a community asset and is subject to division upon dissolution of the marriage.⁵ When the community terminates, the employee's spouse is the owner of one-half of the amount attributable to the pension or retirement benefit earned during the existence of the community.⁶

Upon termination of the community property regime, the spouses, as co-owners, may extra-judicially partition the community property,⁷ or may seek judicial partition under the aggregate theory.⁸ Under this theory, the court allocates the community assets and liabilities so that each spouse receives property of equal net value.⁹ If the allocation results in an unequal net distribution, the court will order payment of an equalizing sum of money.¹⁰ The *Delaney* parties partitioned their community property voluntarily.

The question presented in *Delaney* concerns how to appropriately treat a community property settlement agreement that fails to mention retirement benefits correspondent to a portion of time during the existence of the community property regime.

4. LA. CIV. CODE ANN. art. 2336 (2012).

5. See LA. CIV. CODE ANN. art. 2338 (2012).

6. Day v. Day, 858 So. 2d 483, 491 (La. App. 1 Cir. 2003).

7. 16 KATHERINE S. SPAHT & RICHARD D. MORENO, LOUISIANA CIVIL LAW TREATISE: MATRIMONIAL REGIMES 661 (3d ed., West 2007).

8. *Id.* at 688.

9. LA. REV. STAT. ANN. 9:2801(A)(4)(b) (2012).

10. LA. REV. STAT. ANN. 9:2801(A)(4)(d) (2012).

Louisiana jurisprudence provides that, when an agreement does not expressly address the employee spouse's pension, the issue of whether the agreement divests the other spouse of any community property right to the pension depends on the intent of the parties.¹¹ In order to determine the intent of the parties, the court will examine the agreement and other evidence to see whether the non-employee spouse appears to have intended to abandon any future claims to the former community property.¹² The resolution of the intent question determines the applicability of *res judicata*; if a non-employee spouse did not intend to divest him or herself of a right to the benefit, then the matter has not yet been adjudicated and *res judicata* does not apply.

To ascertain the intent of the parties, the court will look for an indication that the parties discussed the asset during the events leading up to the drafting of the agreement. A lack of discussion regarding the asset tends to indicate that the non-employee spouse did not waive his or her right in the asset. In *Robinson v. Robinson*, the Louisiana Supreme Court recognized that supplementary partitions like Ms. Delaney's have been allowed where the spouses had not discussed the pension or retirement benefits before confecting their community property settlements.¹³ In *Robinson*, the parties' partition settlement did not address the division of the former husband's pension plan. Moreover, both parties testified that they did not discuss the benefits in the context of their settlement.¹⁴ The court found that, since the benefits were never discussed, the former wife could not have intended to transfer her right in the pension plan.¹⁵

In *Adams v. Adams*, the Second Circuit Court of Appeal held that a community property settlement could not be declared null

11. *Jennings v. Turner*, 803 So. 2d 963, 965 (La. 2001); see LA. CIV. CODE ANN. art. 2045 (2012).

12. See *Robinson v. Robinson*, 778 So. 2d 1105, 1120 (La. 2001).

13. *Id.* at 1119-21.

14. *Id.* at 1120.

15. *Id.*

based on the erroneous omission of an asset neither party knew they owned.¹⁶ In that case, the parties were unaware that a parcel of land was part of their community property. Accordingly, the parties made no mention of the parcel in their community property settlement. When the former wife tried to nullify the agreement on the basis of error, the court found that the agreement reflected only an intent to change their ownership interests as to the assets listed.¹⁷

The original trial court in *Delaney* found that the settlement indicated an intent of the parties to settle all claims the parties may have had or will have in the future relating to the former community of acquets and gains.¹⁸ The Second Circuit, in its second *Delaney* opinion, adhered more strictly to the jurisprudential rule: even when an original partition expressly purports to be a full and final property settlement between the spouses, courts have allowed supplemental partitions of omitted assets when the facts and the intent of the parties warrant it.¹⁹ The court examined the record and found no evidence of a discussion beyond Mr. McCoy's answer that there was no "vested interest" in retirement benefits.²⁰ The court explained that, when neither party mentions retirement pay during negotiations and settlement, the failure to include the retirement pay in the settlement is a "mere omission" which can be amended by supplemental petition.²¹

The law of *res judicata* has changed since the *Delaney* parties entered into their settlement. The changes were substantive and the court was required to apply the previous law. Under former Louisiana Civil Code article 2286:

The authority of the thing adjudged takes place only with respect to what was the object of the judgment. *The thing*

16. *Adams v. Adams*, 503 So. 2d 1052, 1056 (La. Ct. App., 1987).

17. *Adams*, 503 So. 2d at 1056.

18. *Delaney*, 93 So. 3d at 848.

19. *Id.* at 850.

20. *Id.*

21. *Id.*

demand must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.²²

Because Mr. McCoy was the party urging the exception, he had the burden of proving each essential element by a preponderance of the evidence. The Second Circuit held that the “thing demanded” was not the same.²³ Because the parties did not discuss the benefits and Ms. Delaney did not expressly waive her right to them, the court found there was no adjudication of the particular asset at all. If any retirement benefits accrued during the marriage of the parties, Ms. Delaney has remained a co-owner and is entitled to a partition of the property.

Though Ms. Delaney did not move to supplement the agreement until twenty-eight years after settlement, her right has not prescribed. Under Louisiana law, items omitted from judicial and extra-judicial partitions are always subject to supplementary partition; the right *never* prescribes.²⁴ Under the successions section of the Civil Code, the mere omission of a thing belonging to the succession is not ground for rescission, but only for supplementary partition.²⁵ By analogy, Louisiana courts have incorporated the successions rule into the matrimonial regimes context; when a plaintiff moves to file a supplementary petition of a community asset omitted from the original community property settlement through “mutual oversight,”²⁶ he or she is entitled to do so and the right does not prescribe.

Though the Second Circuit’s decision is legally sound, whether the decision is the right one is a more difficult determination. *Delaney* illustrates a clash between two important societal

22. *Id.* at 849 (emphasis added).

23. *Delaney*, 93 So. 3d at 851.

24. *Succession of Tucker*, 445 So. 2d 510 (La. Ct. App. 1984).

25. LA. CIV. CODE ANN. art. 1401 (2012).

26. *Succession of Tucker*, 445 So. 2d at 513.

interests: the doctrine of *res judicata* and Louisiana's commitment to the community property regime.

The doctrine of *res judicata* prohibits the re-litigation of claims that have been processed to final judgment in an action between the parties.²⁷ In part, the doctrine exists to ensure judicial economy;²⁸ courts simply do not have the time or resources to hear cases multiple times. Perhaps more importantly, *res judicata* guarantees the finality of judgment.²⁹ In the *Delaney* case, it may seem unfair that Ms. Delaney sought a share of Mr. McCoy's retirement benefits twenty-eight years after their separation, as *res judicata* is meant to impart a sense of certainty after the resolution of a legal dispute. But *res judicata* is not implicated when the judgment is not indeed final, even when the parties believe it to be.

The facts in *Delaney* are unusual. Twenty-eight years had passed before Ms. Delaney brought this action seeking her share of Mr. McCoy's retirement benefits. At first blush, the court's decision would seem to defy the policy goals underlying *res judicata*: neither judicial economy nor fairness to Mr. McCoy would be served by allowing Ms. Delaney's action to proceed. But the law is clear: a community property settlement, from which an asset was inadvertently omitted, is subject to supplemental partition at any time. On the facts of *Delaney*, however, the result appears to be absurd.

Suppose a couple divorced after thirty years of marriage. Upon divorce, the couple voluntarily partitioned their community property. Due to a mutual oversight, the couple neglected to account for a particular community asset. If one of the former spouses realized his or her mistake just a year later, few would argue that the holdings of *Delaney* and its progeny would produce

27. FRANK L. MARAIST, 1A LOUISIANA CIVIL LAW TREATISE: CIVIL PROCEDURE – SPECIAL PROCEDURES 52 (West 2005).

28. *Id.* at n.8.

29. *Id.*

an unfair result by allowing the spouse to supplement the agreement.

Suppose the neglected asset were exceptionally valuable. Even if the disadvantaged spouse did not realize the error until ten years later, most would find that fairness would be better served if he or she were allowed to supplement the agreement.

Consider a couple married for just two years prior to divorce. If their community property settlement neglected to include an asset of even nominal value, few would argue that the disadvantaged spouse should not be able to supplement the agreement.

The facts in *Delaney* distract from how fair the law actually is. Mr. McCoy and Ms. Delaney were married for less than six years, she initiated her action twenty-eight years after they settled their community property agreement, and the amount in question is likely minimal. Though the law applied in this case produced an unusual result, it is not difficult to imagine situations in which the law would be applied so as to adequately protect Louisiana's community property regime.