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# Classification of Incorporeal Movables

Amanda Palmer

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## CLASSIFICATION OF INCORPOREAL MOVABLES

The classification of property belonging to married persons as either community or separate<sup>1</sup> is basic to a determination of a number of issues<sup>2</sup> which are important not only to the spouses,<sup>3</sup> but also to their heirs,<sup>4</sup> their creditors,<sup>5</sup> and other third parties who deal with the spouses. One category of assets, incorporeal movables,<sup>6</sup> historically has been particularly difficult to classify. The new matrimonial regimes legislation,<sup>7</sup> while making some changes in the classification articles, does little to alleviate that difficulty. At the same time, a number of new questions have arisen concerning the classification of incorporeal movables because the new articles are subject to varying interpretations.

### *History and Background*

Louisiana and other community property jurisdictions have traditionally<sup>8</sup> classified property as community or separate, using two factors: time<sup>9</sup> and manner<sup>10</sup> of acquisition. The former Code articles on classifying property expressly covered most of the ways in which property could be acquired: through labor and industry,<sup>11</sup>

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1. LA. CIV. CODE art. 2335.

2. For example, the classification determines, in part, who will receive the property upon termination of the community or marriage. See LA. CIV. CODE art. 2356.

3. See LA. CIV. CODE arts. 2346-2355. For a particularly insightful discussion, see Note, *Termination of the Community*, 42 LA. L. REV. 789 (1982).

4. See, e.g., LA. CIV. CODE arts. 915, 916 & 916.1.

5. See LA. CIV. CODE arts. 2359, 2360, 2363 & 3183.

6. See LA. CIV. CODE art. 473 (definition of incorporeal movable).

7. 1979 La. Acts., No. 709 (effective January 1, 1980).

8. The precise origins of the concepts of community property are not known. W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 7 (2d ed. 1971). Louisiana's community property principles, however, clearly were derived from Spanish law. Comment, *Origin and Historical Development of the Community Property System*, 25 LA. L. REV. 78, 91-93 (1964).

9. G. MCKAY, *A TREATISE ON THE LAW OF COMMUNITY PROPERTY* § 198 (2d ed. 1925).

10. The manner of acquisition under Spanish law might be onerous (giving money or labor for property) or lucrative (receiving a gift or inheritance). If acquired during a marriage, an onerous acquisition was generally classified as community property. A lucrative donation made during marriage was separate property, unless the donor intended it to be a gift to both spouses. 1 W. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* § 62 (1943). This distinction is incorporated into Civil Code article 2343.1, added by 1981 La. Acts, No. 921, § 1.

11. LA. CIV. CODE arts. 2334 & 2402 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 1). Cf. LA. CIV. CODE art. 2338.

through purchases,<sup>12</sup> through donations and inheritances,<sup>13</sup> through accession,<sup>14</sup> and through tort suits.<sup>15</sup> But those articles did not expressly define the *time* of acquisition. Generally, the reference to time was simply noted as "during the marriage," "upon dissolution of the marriage," or when "brought into the marriage."<sup>16</sup>

Because the Code articles did not define the time of acquisition,<sup>17</sup> the courts have adopted three theories which aid in classifying incorporeal movables by determining the time of acquisition: inception of title, vesting, and pro rata.<sup>18</sup> Inception of title "focuses on the initiation of the transaction."<sup>19</sup> If, for example, the court used the inception of title theory to classify a pension plan, the time of acquisition would be the date on which the employee joined the pension plan. If the employee was single when he joined the plan, the pension rights would be separate property and remain separate property even if he later married. If he were married when he joined the plan, the pension rights would be community property even if he later divorced. With the vesting approach, "the focus is on the closing of the transaction."<sup>20</sup> Using the example above, the time of acquisition would be the date on which the employee is granted the right to receive a pension benefit. Thus, if the plan vested while the employee were single, his rights in the plan would be separate property; if it vested while he were married, the rights in the pension plan would be community property. The pro rata approach focuses "on the overall percent of consideration paid over time by the community and by a spouse separately," and it provides for "concurrent owner-

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12. LA. CIV. CODE arts. 2334 & 2402 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 1). Cf. LA. CIV. CODE arts. 2338 & 2341 (amended by 1981 La. Acts, No. 921, § 1).

13. LA. CIV. CODE arts. 2334 & 2402 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 1). Cf. LA. CIV. CODE arts. 2338 & 2341 (amended by 1981 La. Acts, No. 921, § 1).

14. LA. CIV. CODE arts. 2386 & 2402 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 1). Cf. LA. CIV. CODE art. 2339.

15. LA. CIV. CODE arts. 2334 & 2402 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 1). Cf. LA. CIV. CODE art. 2344.

16. LA. CIV. CODE arts. 2334, 2402 & 2406 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 1). Cf. LA. CIV. CODE arts. 2338 & 2341 (amended by 1981 La. Acts, No. 921, § 1).

17. The absence of such a definition is troublesome where annuities, pensions, insurance, payment of damages, and similar property rights are acquired over a period of time. During that period, a person might begin unmarried, marry, dissolve the marriage, and remarry.

18. W. REPPY & W. DEFUNIAK, *COMMUNITY PROPERTY IN THE UNITED STATES* 220-21 (1975).

19. *Id.* at 220.

20. *Id.* at 220-21.

ship by community and separate estates."<sup>21</sup> In the pension plan example, the time of acquisition would continue over a period of time beginning with the initial joining of the plan and ending when employment stopped. If the employee were to join the plan as a single person, continue participating during marriage, and dissolve the marriage while continuing to participate in the plan, the rights to pension benefits would be prorated between his separate estate and the community. Thus, depending on which theory was used to determine the time of acquisition, an incorporeal movable might be classified as totally separate property, totally community property, or partially separate and partially community property.<sup>22</sup>

#### *Manner of Acquisition Under the New Code Articles*

In some cases the manner of acquisition is often a more important factor than the time of acquisition. For example, inheritances, donations, and damages awarded in certain suits are classified according to the manner in which they are acquired. When property is received "by inheritance or donation to him individually," article 2341 requires that it be classified as the separate property of the heir,<sup>23</sup> regardless of the marital status of the heir when the inheritance is received.

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21. *Id.* at 221. See, e.g., *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834 (La. 1976).

22. In *Curtis v. Curtis*, 403 So. 2d 56 (La. 1981), the court stated that "[w]hile other community property states may categorize property paid for in part with separate funds and in part with community funds as mixed, Louisiana does not do so. Under our law property is characterized as either community or separate." *Id.* at 57. This statement is misleading. Technically, it is correct to say that neither the legislation nor the courts use the label "mixed" to describe a property classification (although one court has described its disposition in a partition case as a division of "mixed" property. *Lane v. Lane*, 375 So. 2d 660 (La. App. 4th Cir. 1978), *writ denied*, 381 So. 2d 1222 (La. 1980)). The court's statement in *Curtis* implies, however, that a pro rata classification never is allowed under Louisiana law, an implication which plainly is erroneous; the legislation has not prohibited the use of a pro rata scheme. Indeed, the Louisiana Supreme Court itself applied the pro rata method in a number of cases. See, e.g., *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *Due v. Due*, 342 So. 2d 161 (La. 1977); *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834 (La. 1976); *West v. Ortego*, 325 So. 2d 242 (La. 1975). The court also has prorated funds deposited in bank accounts. *Succession of Land*, 212 La. 103, 31 So. 2d 609 (1947). See also *Stoutz v. United States*, 324 F. Supp. 197, 203 (E.D. La. 1970), *aff'd*, 439 F.2d 1197 (5th Cir. 1971) (separate funds deposited in an account with community funds retained their separate character); *Abraham v. Abraham*, 230 La. 78, 87 So. 2d 735 (1956) (dicta); *Gregory v. Gregory*, 233 So. 2d 238 (La. App. 3d Cir. 1969) (dicta); *Succession of Sonnier*, 208 So. 2d 562 (La. App. 3d Cir. 1968) (dicta). In these cases, the courts' reasoning leads to the conclusion that things paid for out of both community and separate funds could be prorated.

23. "The separate property of a spouse is his exclusively. It comprises: . . . property acquired by a spouse by inheritance." LA. CIV. CODE art. 2341, *as amended by* 1981 La. Acts, No. 921, § 1.

*Classifying Donations*

Donations generally are classified by examining the donor's intent. Donations made in authentic acts usually name the donee or donees. If only one spouse is named, the property given will be classified as the separate property of that spouse.<sup>24</sup> If both spouses are named, the donation will be classified as community property.<sup>25</sup> But in donations made by manual delivery, the donor's intent to make the gift separate or community must be established before the property can be classified.<sup>26</sup> If the donor's intent cannot be determined, the gift will be presumed to be community property under article 2340.<sup>27</sup> If the gift is a remunerative donation,<sup>28</sup> however, it will not be classified according to these rules. Instead, the property will be classified as property acquired through effort, skill or industry under article 2338.<sup>29</sup> Likewise, if the gift is an onerous donation,<sup>30</sup> it will be classified under articles 2338 and 2341.<sup>31</sup>

Special rules apply to donations by one spouse to the other spouse.<sup>32</sup> Article 2343 provides that when one spouse gives his in-

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24. See LA. CIV. CODE 2341, as amended by 1981 La. Acts, No. 921, § 1: "The separate property of a spouse . . . comprises . . . property acquired by a spouse by . . . donation to him individually."

25. See LA. CIV. CODE art. 2338. "The community property comprises . . . property donated to the spouse jointly."

26. See LA. CIV. CODE arts. 2338 & 2341 as amended by 1981 La. Acts, No. 921, § 1).

27. LA. CIV. CODE art. 2340 states: "Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community. . . ." See *Hamilton v. Hamilton*, 381 So. 2d 517 (La. App. 1st Cir. 1979) (wedding shower gifts are presumed to be gifts to both the husband and the wife in the absence of proof that they were given to only one spouse).

28. LA. CIV. CODE arts. 1523, 1525, & 1526.

29. See LA. CIV. CODE art. 2338, which states: "The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse. . . ." W. DEFUNIAK, *supra* note 10, at § 69.

30. LA. CIV. CODE arts. 1523, 1524, & 1526.

31. See LA. CIV. CODE arts. 2338 & 2341 as amended by 1981 La. Acts, No. 921, § 1). See also notes 24 & 25, *supra*, and text at notes 100-102, *infra*.

32. See LA. CIV. CODE art. 2343, as amended by 1981 La. Acts, No. 921, § 1, which states:

The donation by a spouse to the other spouse of his undivided interest in a thing forming part of the community transforms that interest into separate property of the donee. Unless otherwise provided in the act of donation, an equal interest of the donee is also transformed into separate property and the natural and civil fruits of the thing, and minerals produced from or attributable to the property given as well as bonuses, delay rentals, royalties and shut-in payments arising from mineral leases, form part of the donee's separate property.

See also LA. CIV. CODE art. 2343.1, added by 1981 La. Acts, No. 921, § 1, which states:

The transfer by a spouse to the other spouse of a thing forming part of his

terest in community property to the other, that interest becomes the separate property of the donee. Furthermore, the donee's interest in the community property also becomes separate property, unless the act of donation states otherwise.<sup>33</sup> For example, if a community includes 1000 shares of stock, and the husband gives his interest in the stock to his wife, she becomes the sole owner of the entire 1000 shares of stock.

The act of donation, however, could provide that the donee's interest in the community property remain as community property. In that case, the wife would be the sole owner of a one-half undivided interest in the stock, and the other one-half undivided interest would be community property. A question arises as to how the one-half undivided community interest is to be treated in a voluntary or judicial partition. Article 2336 states that "[e]ach spouse owns a present undivided one-half interest in the community property."<sup>34</sup> Two possible interpretations result from a reading of articles 2343 and 2336. First, if the husband gives his interest to the wife, then the one-half interest that remains in the community must be the wife's one-half undivided interest in the community. This result is analogous to situations in which the donor and the donee are not spouses but own property as co-owners.<sup>35</sup> Under this interpretation, when the property is partitioned, the wife alone would have a claim to that one-half undivided community interest. She would get 500 shares of community-owned stock and 500 shares of separate stock. The second possible interpretation is that whatever remains in the community is subject to claims of ownership by both spouses, even though one spouse has given his undivided interest to the other spouse. Thus, the husband would still have an undivided interest in the shares of stock that remained community property after he made his gift. Upon partition, the husband and wife would each get 250 shares of community stock, and the wife would also keep her 500 shares of stock received as a gift from her husband. The first interpretation seems to be the better view because it is more consistent with principles of property owned in indivision.

Where one spouse donates community property to the other, a

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separate property, with the stipulation that it shall be part of the community, transforms the thing into community property. As to both movables and immovables, a transfer by onerous title must be made in writing and a transfer by gratuitous title must be made by authentic act.

33. LA. CIV. CODE art. 2343, *as amended by* 1981 La. Acts, No. 921, § 1. This article may not require an authentic act, whereas Civil Code article 2343.1 does require an authentic act.

34. LA. CIV. CODE art. 2336, *as amended by* 1981 La. Acts, No. 921, § 1.

35. *See* LA. CIV. CODE arts. 477 & 480.

question arises as to how to classify the fruits of that property. The general rule of article 2339 is that the fruits of separate or community property are considered community property unless a declaration is filed for registry declaring them to be separate.<sup>36</sup> But when community property is donated by one spouse to the other, the opposite classification is assigned.<sup>37</sup> Under article 2343, the fruits will be classified as separate unless the donor spouse stipulates in the act of donation that they will continue to be community property.<sup>38</sup> In the stock gift example, the dividends received after the donation would be the separate property of the wife, unless the husband had stipulated otherwise. Had he stipulated that the dividends were to be community property, upon partition the husband would be entitled to one-half of the dividends received. Another possible disposition would be that the husband could give his one-half undivided interest in the stock to his wife, stipulate that her interest remain community property, and make no provisions in the act concerning the dividends. Upon partition, he would have a claim to one-half of the dividends on the community-owned stock, and the wife would have a claim to one-half the dividends on the community stock plus all of the dividends on her separate stock.

Different provisions apply to donations of separate property. Under article 2343.1, added in 1981, when a spouse transfers by onerous or gratuitous title his separate property to the other spouse and stipulates that the property is to be part of the community, the

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36. LA. CIV. CODE art. 2339 states:

The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged [by the spouse].

37. See LA. CIV. CODE art. 2343, comment (b), as amended by 1981 La. Acts, No. 921, § 1. The reason for departing from the provisions of article 2339, as suggested by one writer, was to allow more favorable treatment of donations in computing federal estate taxes. Riley, *Analysis of the 1980 Revision of the Matrimonial Regimes Law of Louisiana*, 27 LOY. L. REV. 453, 483 (1980).

38. LA. CIV. CODE art. 2343, as amended by 1981 La. Acts, No. 921, § 1. A literal reading of the article indicates that the donor could stipulate any disposition he chose for his share of the fruits. Thus, he might not be confined to stipulating that his interest in the fruits were for the community, but might stipulate that the fruits were to inure to a third person's benefit. This reasoning is inconsistent with the pervasive preference for the community shown throughout the Code articles governing matrimonial regimes. See, e.g., LA. CIV. CODE art. 2340. A more reasonable interpretation is that the donor spouse's only alternative to donating the fruits to the other spouse's separate estate is to reserve them for the community.

property will be community property.<sup>39</sup> Thus, if a husband donates his separately owned stock to the community, the stock is owned in indivision by both the husband and the wife. If, however, the gift of separate property is made to the other spouse without the stipulation that it will belong to the community, the legislation implies that the property will be classified as the separate property of the donee spouse.<sup>40</sup> This result would be consistent with the general rule in article 2341 that a donation made to a spouse individually is separate property,<sup>41</sup> and by analogy, consistent with the general rule in article 2343 that a spouse's gift of community property also becomes the separate property of the recipient spouse.<sup>42</sup>

Because article 2343.1 does not explain how the fruits of separate property donated to a community are to be treated, two interpretations are possible. First, a reading of the article in *pari materia* with article 2343 suggests that the fruits would be classified as the property itself is classified. Thus, if the property is donated to the community, the fruits will fall into the community, and if the property is considered donated to the other spouse's separate estate (because no stipulation in favor of the community was made), the fruits will fall into the spouse's separate estate.<sup>43</sup> The second interpretation is that the legislature, in failing to specify how to classify the fruits, may have intended that article 2343.1 was not to be read with article 2343, but instead with articles 2338 and 2339. Under this analysis, by applying article 2338<sup>44</sup> the fruits of property donated to the community would be community property. And under article 2339, even fruits produced from property donated to the other spouse's estate would be community unless a declaration reserving the fruits as separate property had been filed.<sup>45</sup> Thus, under both analyses, fruits of property donated to the community will be community. But fruits of separate property donated to the other spouse's separate estate might be community or separate, depending on which articles the legislature intended to apply in interpreting article 2343.1. One indication that the legislature intended that articles 2338 and 2339 should control the classification of fruits under article 2343.1 is that the article covers not only donated property but also

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39. LA. CIV. CODE art. 2343.1, *added by* 1981 La. Acts, No. 921, § 1. See note 28, *supra*.

40. LA. CIV. CODE art. 2343.1, *added by* 1981 La. Acts, No. 921, § 1.

41. LA. CIV. CODE art. 2341, *as amended by* 1981 La. Acts, No. 921, § 1.

42. LA. CIV. CODE art. 2343, *as amended by* 1981 La. Acts, No. 921, § 1.

43. LA. CIV. CODE art. 2343, *as amended by* 1981 La. Acts, No. 921, § 1.

44. LA. CIV. CODE art. 2338.

45. LA. CIV. CODE art. 2339.



property transferred by onerous title.<sup>46</sup> Article 2343 contemplates only donated property,<sup>47</sup> whereas article 2338 and 2339 encompass all manners of acquisition of property.<sup>48</sup> To extend article 2343's provisions to property given under onerous title could be going beyond the bounds set by the legislature.

Another problem arises in classifying fruits under article 2343.1 when the spouse reserved the fruits of the separate property<sup>49</sup> prior to making the gift or transferring the property under onerous title. The legislature probably intended that when separate property is conveyed to the community or to the other spouse's estate, any declaration of reservation of fruits automatically would become null. Article 2339 allows the reservation of fruits for a spouse's estate only when the fruits are derived from that spouse's separate property.<sup>50</sup> Article 2338 does not allow fruits to be reserved when they are derived from community property.<sup>51</sup> Therefore, when the separate property of the donor becomes either the separate property of the donee or community property, the declaration should cease to have any effect.

The legislature should re-examine the Code articles on donations from one spouse to another and give special attention to these issues: (1) whether a donor spouse under article 2343<sup>52</sup> should be permitted to stipulate in the act of donation that the donee's interest shall remain community property, (2) what the proper treatment of such an undivided community interest would be in a partition, and (3) whether article 2343.1 should be amended to provide for the filing of a declaration of reservation of fruits.<sup>53</sup>

#### *Classifying Damages Under Article 2341*

Like donations, certain damages are classified on the basis of the manner of acquisition. Article 2341 characterizes *damages* awarded to one spouse as separate property when the action is against the other spouse for breach of contract or for "fraud or bad faith" in managing the community property.<sup>54</sup> By implication, that article

46. LA. CIV. CODE art. 2343.1, *added by* 1981 La. Acts, No. 921, § 1.

47. LA. CIV. CODE art. 2343, *as amended by* 1981 La. Acts, No. 921, § 1.

48. LA. CIV. CODE arts. 2338 & 2339.

49. *See* LA. CIV. CODE art. 2339.

50. *See* LA. CIV. CODE art. 2339.

51. *See* LA. CIV. CODE art. 2338.

52. LA. CIV. CODE art. 2343, *as amended by* 1981 La. Acts, No. 921, § 1.

53. *Compare* LA. CIV. CODE art. 2343.1, *added by* 1981 La. Acts, No. 921, § 1, *with* LA. CIV. CODE art. 2343, *as amended by* 1981 La. Acts, No. 921 § 1.

54. LA. CIV. CODE art. 2341, *as amended by* 1981 La. Acts, No. 921, § 1 states that separate property includes "damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse . . . ."

would also require *causes of action* for breach of contract or fraud or bad faith in community property management by one spouse to be the separate property of the injured spouse.<sup>55</sup> For example, a wife, extremely angry with her husband, seeks to make him more irate by investing a large sum of community funds in her brother's failing business. She knows that the invested funds will be lost and that her husband would not want the funds invested in a losing venture. The husband may have a separate cause of action against the wife for bad faith in managing the community assets. Any damages awarded in the suit against her will become his separate property. Likewise, where a husband agrees to give up smoking in exchange for his wife's promise to paint a portrait of his mother, and he breaches his promise while she keeps hers, she might have a separate cause of action against him for breach of contract. Damages awarded to her for the breach would be her separate property.

Actions and damages for tort suits other than those for fraud or bad faith in managing community assets are treated differently. First, neither article 2344, 2338, nor 2341 mentions the possibility of other tort actions between spouses.<sup>56</sup> The implication is that the general interspousal immunity from tort suits is continued.<sup>57</sup> In suits against third parties for damage to property, the damages received become separate property if the injured or lost property was separately owned;<sup>58</sup> if the injured or lost property was a community thing, the damages become community assets.<sup>59</sup> The implication is that the causes of action will be classified in the same fashion as the damages.<sup>60</sup>

### *Classifying Property Received in a Partition*

The final type of property that is classified chiefly by looking at the *manner* in which it is acquired is property received by a spouse

55. See LA. CIV. CODE art. 2341, as amended by 1981 La. Acts, No. 921, § 1. The Louisiana Supreme Court has found that one spouse may have an interest in damages awarded in a cause of action which could only be brought by the other spouse. See *Chambers v. Chambers*, 219 So. 2d 896 (La. 1971), *overruled on other grounds*, *West v. Ortego*, 325 So. 2d 242 (La. 1975). See also text at pages 65-81, *infra*; Note, *Management of Community Assets*, 42 LA. L. REV. 770 (1982).

56. See LA. CIV. CODE arts. 2338, 2341 (amended by 1981 La. Acts, No. 921, § 1) & 2344.

57. See LA. R.S. 9:291 (Supp. 1960 & 1979). *But see* LA. R.S. 22:655 (1950 & Supp. 1958 & 1962) (permitting a direct action by a spouse against the other spouse's insurer).

58. LA. CIV. CODE art. 2341, as amended by 1981 La. Acts, No. 921, § 1: Separate property includes "damages or other indemnity awarded to a spouse in connection with the management of his separate property."

59. LA. CIV. CODE art. 2338. Community property includes "damages awarded for loss or injury to a thing belonging to the community."

60. See LA. CIV. CODE arts. 2338 & 2341 (amended by 1981 La. Acts, No. 921, § 1).

in a voluntary partition of the community. Article 2336 was amended in 1981 to permit voluntary partial or whole partitions of the community during marriage without court approval.<sup>61</sup> At the same time, article 2341 was amended to classify the property partitioned as the separate property of the spouse who acquired it under the partition agreement.<sup>62</sup> The fruits accruing on partitioned property after the date of partition should become community property unless declared to be the separate property of the acquiring spouse in a declaration filed for registry.<sup>63</sup> Thus, where a community interest in oil production is partitioned, each spouse would receive a one-half interest as sole owner; but absent a declaration, the royalties received from each interest would fall into the community.

#### *Time of Acquisition Under the New Code Articles*

Classifications based on the time of acquisition are characterized by the language "property acquired during" the existence of the regime or "property acquired . . . prior to marriage."<sup>64</sup> The determination of what event constitutes an acquisition is problematic. The legislation may require that one particular theory be applied to determine the time of acquisition of property in specific situations; in other situations, the legislation may permit the court to apply its choice of theories to determine the time of acquisition. The question arises in several Code articles.

#### *Classifying Damages Under Article 2344*

The first is article 2344 which classifies damages for personal injuries "sustained during the existence of the marriage."<sup>65</sup> Such

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61. LA. CIV. CODE art. 2336, *as amended by* 1981 La. Acts, No. 921, § 1, now states in part: "During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property."

62. Civil Code article 2341, *as amended by* 1981 La. Acts, No. 921, § 1, now classifies as separate property "things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime."

63. *See* LA. CIV. CODE arts. 2339 & 2336, comment (a) (amended by 1981 La. Acts, No. 921, § 1).

64. *See, e.g.,* LA. CIV. CODE arts. 2338, 2341 (amended by 1981 La. Acts, No. 921, § 1) & 2344.

65. *See* LA. CIV. CODE art. 2344:

Damages due to personal injuries sustained during the existence of the community by a spouse are separate property.

Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse.

damages are separate property, with the exception of two items which are community property: damages awarded for "expenses incurred by the community as a result of the injury" and in "compensation of the loss of community earnings."<sup>66</sup> When the injury occurs during the marriage and the marriage is later dissolved, article 2344 mandates that damages for lost earnings of the injured spouse be prorated<sup>67</sup> between the community and his separate estate.<sup>68</sup> Thus, in every award of damages for personal injuries suffered during a community property regime, the injured spouse's separate estate will receive the total amount of the damages less community expenses and community lost earnings. Protection of widows and widowers is granted through the article's exemption from proration when the injured spouse dies.<sup>69</sup> In this situation, comment (b) to article 2344 states that the entire amount of lost earnings would fall into the community.<sup>70</sup>

While article 2344 specifically provides for classifying damages that result from personal injuries sustained *during* marriage, it does not specify the classification of damages when the injury is sustained *prior* to marriage. Presumably, the damages would be classified as separate property acquired prior to marriage under article 2341.<sup>71</sup> But if no marriage takes place until after the damages are awarded, a question arises as to whether community expenses or loss of earnings as a result of the injury would compel the reclassification of a portion of the damages as community property. Article 2344 seems to contemplate that the expenses must be incurred by a community prior to the awarding of damages. The article's language, "the portion of the damages attributable to expenses incurred by the community

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66. LA. CIV. CODE art. 2344.

67. See LA. CIV. CODE art. 2344.

68. Thus, the court's reasoning in *West v. Ortego* has been legislatively approved. See *West v. Ortego*, 325 So. 2d 242 (La. 1975). In *West*, the husband's injury occurred during the marriage. He began receiving worker's compensation benefits shortly after the wife filed for judicial separation. The court rejected her claim that all of the benefits he received would be community property because the cause of action arose during the community regime. Instead, the court found that the situation presented by these facts was one not contemplated in the Code. The court then resorted to its power under Civil Code article 21 to craft an equitable solution. That solution was to award the wife one-half of the benefits accruing to the community between the time of injury and the date of filing for judicial separation. The remainder of the benefits fell into the husband's separate estate. *Id.* at 248-49. According to Professor Spaht, Civil Code article 2344 is "modeled after the pro rata rule in *West v. Ortego*." Spaht, *Interim Study Year*, 39 LA. L. REV. 551, 553 n.5 (1979). The legislative approval of the reasoning, however, may not necessarily extend to the holding in *West*. See note 80, *infra*, and accompanying text.

69. Samuel, *The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality*, 39 LA. L. REV. 347, 394 n.201 (1979).

70. See LA. CIV. CODE art. 2344, comment (b).

71. See LA. CIV. CODE art. 2341.

as a result of the injury, or in compensation of the loss of community earnings, is community property,"<sup>72</sup> suggests that the property is to be classified at the time the damages are awarded. In other words, the inception of title approach would be applied to classify damages for injuries sustained prior to marriage. Under this analysis, a future community would not be entitled to claim any part of the damages that are awarded as a result of injuries that occur prior to marriage. However, the legislature may not have intended such a distinction when it drafted the article. "[T]he portion of damages attributable to expenses incurred by the community as a result of the injury, or [compensation for lost earnings]" may be read independently of the article's first sentence reference to "during the existence of the regime."<sup>73</sup> Under the pro rata theory, a future community might be apportioned a part of the damages awarded to an unmarried person. The better interpretation is that the legislature intended that the inception of title theory be applied whenever the damages are awarded for an injury sustained prior to marriage.<sup>74</sup>

Presumably, the courts will use formulas similar to those it has used in cases decided under the old law when applying the pro rata theory.<sup>75</sup> Nevertheless, two problems will persist. First is the problem of how to account for the fact that wages normally increase with age. The second is how to account for inflationary increases.<sup>76</sup>

These provisions of article 2344 regarding damages raise the question of how to classify causes of action in which those damages are sought. Article 2344 does not classify specifically the causes of action that might arise as a result of personal injuries that occur during the marriage, but the implication is that a cause of action will be classified in the same manner as the damages that are sought.<sup>77</sup> Thus, if a husband is injured during the marriage, he has a

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72. LA. CIV. CODE art. 2344.

73. See LA. CIV. CODE art. 2344.

74. This interpretation is supported by the fact that the cases decided under the old legislation classified damages for injuries sustained prior to marriage as separate property. See, e.g., *Broussard v. Broussard*, 390 So. 2d 1309 (La. 1976). The legislature could have overruled this case law by expressly providing for proration of damages when the injury occurred prior to marriage. Its failure to specifically address this problem in article 2344 suggests that such damages are to be separate property under article 2341.

75. See, e.g., *Hall v. Hall*, 349 So. 2d 1349, 1350 (La. App. 4th Cir. 1977) (trial court's formula used to account for life expectancy of the injured spouse might be applied to lost earnings).

76. See *Curtis v. Curtis*, 388 So. 2d 816, 817 (La. App. 4th Cir. 1980), *rev'd on other grounds*, 403 So. 2d 56 (La. 1981) (prorating the appreciated value of a house between the community and the wife's separate estate).

77. See LA. CIV. CODE art. 2344.

separate cause of action for pain and suffering, because any damages that might be awarded for pain and suffering would be his separate property. He or his wife would have a community cause of action for damages in compensation for lost community earnings because such damages would fall into the community. But the wife could not bring suit for the pain and suffering of the husband.<sup>78</sup>

If article 2344 does govern the classification of causes of action for personal injuries, one issue is whether it includes all causes of action and claims that may arise from a personal injury. For example, comment (a) to article 2344 states that this article will apply to worker's compensation.<sup>79</sup> The article is based on the reasoning of the court in *West v. Ortego*,<sup>80</sup> where worker's compensation benefits were at issue. This adoption of the *West* reasoning in article 2344 would support a conclusion that worker's compensation benefits should be classified under article 2344. Nevertheless, the article itself does not expressly include worker's compensation, which may be taken as indicative of the legislature's intent that worker's compensation not be included within the provisions of article 2344. If worker's compensation benefits are included, there is a strong argument that disability payments from private insurers should also be subject to the pro rata requirements of article 2344, instead of being classified under the vesting theory.<sup>81</sup> The only distinction between

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78. See LA. CIV. CODE art. 2344. But see LA. CIV. CODE art. 2315.

79. LA. CIV. CODE art. 2344, comment (a).

80. See note 68, *supra*.

81. See *Lacaze v. Tennessee Life Ins. Co.*, 346 So. 2d 1280 (La. App. 3d Cir.), writ denied, 349 So. 2d 1267 (La. 1977). In *Lacaze*, the court used a vesting theory to find that a husband's right to receive disability payments from his employer-sponsored insurance policy had arisen at the time that he was no longer able to work. In a concurring opinion Judge Watson (now Justice Watson) stated: "[T]he decisive factor is not the time when the premiums were paid but the date rights vested under the policy. . . . [H]is rights . . . vested . . . when he was unable to continue working." *Id.* at 1282 (emphasis added). Because the wife filed for separation before the husband stopped working, the court found that the benefits were his separate property. Here, the husband had joined the employer plan during the marriage, his illness has originated during the marriage, and premiums paid by the husband presumably were from community funds. The court distinguished these facts from other cases in which employer compensation had been classified on a pro rata basis, e.g., *Swope v. Mitchell*, 324 So. 2d 461 (La. App. 3d Cir. 1975), because it found the analogy to insurance cases more appropriate. Judge Watson stated: "[T]hese payments are made to Lacaze only because of his current inability to work and do not represent any compensation for disability during the period of his marriage." *Id.* at 1282. Under the court's vesting approach, had the husband in *Lacaze* been unable to continue working prior to the dissolution of the marriage, all of the benefits would have fallen into the community. See *Hall v. Hall*, 349 So. 2d 1349 (La. App. 4th Cir. 1977). The court probably chose not to use the inception of title approach, as it generally does in insurance cases, because that would have resulted in classifying the benefits as community property in their entirety. See *Hall v. Hall*, 349 So. 2d 1349 (La. App. 4th Cir. 1977), in which the fourth circuit held that

worker's compensation and private insurance disability payments is the source of the payments. On one hand, the employer or his insurer pays; on the other hand, the employee through his insurer pays. The manner of acquisition is essentially the same; therefore, the theory used to classify the acquisition should be the same.

### *Classifying Commingled Property*

The question of which theory to use also arises in situations covered by articles 2338 and 2341 where separate and community things are commingled in an acquisition of property.<sup>82</sup> When the funds or things that are commingled cannot be satisfactorily traced to their original nature as separate or community, obviously no comparison of their values can be made. Since no comparison of values can be made, the property acquired with those things cannot be classified under article 2341.<sup>83</sup> The property acquired, then, must be classified under article 2338; the entire property will be community property.<sup>84</sup>

When both community and separate things are given in payment and their character and values can be established, article 2341 is the first step in determining the character of the property received in the exchange. Article 2341 states that separate property includes "property acquired by a spouse with . . . separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used."<sup>85</sup> When applied

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former article 2334 did not permit a pro rata classification "where both the cause of action and the recovery of damages occurred during the existence of the community." *Id.* at 1352. Perhaps the legislature intended in new article 2344 merely to correct an inequity which was produced in the *Hall* case. If so, the legislature may have intended that the new article cover only causes of action for damages and that it exclude other causes of action, such as worker's compensation and other recoveries, such as disability insurance.

82. LA. CIV. CODE arts. 2338 & 2341.

83. LA. CIV. CODE art. 2341.

84. LA. CIV. CODE art. 2338 states that "[C]ommunity property comprises . . . property acquired with . . . community and separate things, *unless classified as separate property under article 2341.*" (Emphasis added). The italicized clause creates a residual class in that whatever cannot be classified under article 2341's commingling clause falls under the commingling clause of article 2338 quoted above.

85. LA. CIV. CODE art. 2341. The language requiring a comparison apparently is taken from a line of cases on commingling of funds in bank accounts.

When separate funds are mixed or co-mingled with community funds to the extent that the separate funds are no longer capable of identification, and it is impossible to establish what part of the funds belongs either to the separate estate or to the community, then all of said funds are regarded as belonging to the community. If only a relatively small amount of community funds are co-mingled with separate funds, then the mixing of such funds will be considered as *inconsequen-*

to the cash purchase of an incorporeal movable such as a bond, the literal language of the article suggests that only the inception of title theory may be applied. Thus, if a husband took \$800 of his separate funds and \$10 of community funds and paid the \$810 as the full purchase price of the bond on January 1, the time of acquisition would be that day, January 1. Using an inception of title approach, the bond would be classified as his separate property because the \$10 of community funds used are inconsequential in comparison with the \$800 of separate funds used.

Comment (b) to article 2341 suggests that the comparison of values may not be necessary in all cases of commingling, but may instead be required only "at the time of acquisition."<sup>86</sup> If the "time of acquisition" is read to mean the moment when all obligations are completely performed, then the comparison of values may be required only for cash purchases or exchanges in which no suspensive conditions or conjunctive obligations remain to be performed. This interpretation thus leaves the courts with latitude to apply the pro rata approach to acquisitions acquired over a period of time. If, however, the "time of acquisition" referred to in comment (b) does not limit the application of this clause to the time when the transaction is completed (i.e., no suspensive conditions or conjunctive obligations remain to be performed), then the comparison of values must also be made when property is acquired over a period of time.

If the article is interpreted to include transactions in which payments are made over a period of time, the theory used to determine the time of acquisition becomes very important. Article 2341 seems to be open to two interpretations. On one hand, the article seems to require a one-time shift in classification and to forbid the use of vesting or pro rata. The literal language of the article indicates that the key time is when the comparison of values is made. Since the property is classified wholly as separate or wholly as community, it cannot be prorated.<sup>87</sup> When the meaning of an article is clear and unambiguous, a resort to legislative intent is not appropriate;<sup>88</sup> but even if it were appropriate, the legislature's intent

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tial, not sufficient to constitute a co-mingling, and it will not warrant the designation of all such funds as community property.

Gregory v. Gregory, 223 So. 2d 238, 244 (La. App. 3d Cir. 1969) (emphasis added). In *Succession of Land*, 212 La. 103, 31 So. 2d 609 (1947), the court found that deposits of community funds consisting of some community earnings were inconsequential in comparison with deposits made by the wife of her separate funds.

86. LA. CIV. CODE art. 2341, comment (b) states: "The value of the community things at the time of acquisition should be used for determining whether it is 'inconsequential' in comparison with the value of the separate things used." (Emphasis added).

87. LA. CIV. CODE art. 2341.

88. LA. CIV. CODE art. 13.



might be supportive of this interpretation. Since the legislature specifically required the application of pro rata in article 2344<sup>89</sup> but omitted any mention of it in article 2341, perhaps the legislature disapproved of pro rata in commingling situations covered by article 2341. Furthermore, a strong preference in favor of the community exists throughout the Code articles on matrimonial regimes.<sup>90</sup> Article 2341's shifting classification is consistent with other Code articles because it favors the community.<sup>91</sup>

A different analysis of the legislature's intent is also possible. Because the use of vesting and pro rata theories in article 2341 is not expressly forbidden, by implication their use could continue. The legislature specifically approved of pro rata in article 2344,<sup>92</sup> so the legislature does not necessarily disapprove its application in other areas. Finally, the legislature may have assumed that the courts would understand that pro rata was to be allowed in classifying property under article 2341. Pro rata was a jurisprudential creation used to avoid inequitable dispositions<sup>93</sup> that resulted from other theories. Surely the legislature did not intend to return to unjust dispositions. The legislature probably intended to permit the courts to continue using theories that would result in an equitable classification of property. If so, then article 2341 would require an inception of title approach where the acquisition is begun and completed in virtually the same transaction, while still allowing for the application of other theories where the acquisition takes place over a period of time.<sup>94</sup>

Regardless of which theory is applied, however, article 2341 presents another question. It requires a comparison of values of property used to acquire new property in order to determine if the value of the community things used is inconsequential.<sup>95</sup> Inherent in this determination is the problem of assessing those values. In the purchase of incorporeal movables, a difference in the contract price and the market price frequently exists. For example, in speculative stocks and in the commodities markets, prices may fluctuate con-

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89. See LA. CIV. CODE art. 2344.

90. See, e.g., LA. CIV. CODE arts. 2337-2342. Civil Code article 2340 particularly is relevant.

91. See LA. CIV. CODE art. 2341.

92. See LA. CIV. CODE art. 2344.

93. See, e.g., *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834 (La. 1976); *West v. Ortego*, 325 So. 2d 242 (La. 1975). *Contra*, *Hall v. Hall*, 349 So. 2d 1349, 1352 (La. App. 4th Cir. 1977) (Samuel, J., concurring).

94. This analysis also may be applicable to article 2341's companion clause on commingling in article 2338. The effect of the companion clause seems to be an automatic classification of property as community property when the value of the community things given is consequential.

95. LA. CIV. CODE art. 2341.

siderably during the course of one day. Use of the contract price would be more practical in valuing the things given, but the contract may not always specify the individual values of the community and separate things used. Where it does not, the market price may be the only alternative. Where both the community and the separate things used are not susceptible of precise valuation, the court will have to use its own discretion.

Once the values of the things given have been fixed, determining what is "inconsequential" often presents a problem.<sup>96</sup> The courts probably will not fix a percentage of the total value as the definition of inconsequential, although they probably will consider percentages in arriving at their decisions. The courts probably will handle this question on a case by case basis, as they apparently have been doing in other commingling cases.

*Classifying Property Acquired Through Effort, Skill, or Industry*

The question of which theory to use arises yet another time in article 2338.<sup>97</sup> Article 2338 classifies as community property that "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse."<sup>98</sup> Apparently the legislature intended to permit the courts to use any of the three theories to determine the time of acquisition of property classified under this clause of article 2338. The reference to the time of acquisition is phrased broadly: "acquired during the existence of the legal regime . . ."<sup>99</sup> Nothing in the article's language or comments suggests that any one particular theory is either mandated or prohibited. If the legislature had intended to prescribe the use of one theory, it could have expressed that intention as it did in article 2344 where it mandated the use of pro rata.<sup>100</sup> Thus, the courts arguably will continue to have latitude to apply pro rata to pensions, for example, and to apply whichever theory is most appropriate to the facts surrounding the acquisition in other cases.<sup>101</sup>

In construing the Code articles, the courts will have the freedom to apply their choice of theories in most cases. Article 2344 requires

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96. LA. CIV. CODE art. 2341.

97. See note 84, *supra*.

98. LA. CIV. CODE art. 2338.

99. LA. CIV. CODE art. 2338.

100. LA. CIV. CODE art. 2344.

101. This analysis also applies to the clause of article 2341 classifying as separate property things that are acquired "prior to the establishment of a community property regime." Thus, any of the three theories could be applied to classify property acquired prior to marriage.

the use of the pro rata theory in classifying damages received for personal injuries;<sup>102</sup> if the damages are awarded prior to marriage, the entire amount should be classified as the separate property of the injured spouse, using an inception of title approach.<sup>103</sup> The comingling clauses of articles 2341 and 2338 should be construed to require application of the inception of title theory only where the acquisition is begun and completed in virtually the same transaction and to permit the courts to apply other theories where the acquisition is made over a period of time.<sup>104</sup>

#### *Amendments to 1979 Legislation*

A number of amendments were added to the 1979 legislation to clarify the question of how mineral interests and revenues from mineral interests were to be classified. These amendments do not affect the classification of the property from which the minerals are extracted; that property will still be classified as separate or community under articles 2338, 2341, 2343, or 2343.1.<sup>105</sup> Article 2339 was amended in 1980<sup>106</sup> to provide that "minerals produced from or attributable to a separate asset, and . . . royalties . . . are community property."<sup>107</sup> Thus, article 2339 now treats both minerals and royalties in the same fashion as fruits.<sup>108</sup> This amendment not only permits a spouse to reserve the "minerals produced from or attributable to a separate asset" but also the royalties therefrom as his separate property.<sup>109</sup>

In 1981, article 2343 was amended<sup>110</sup> to provide that minerals

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102. See LA. CIV. CODE art. 2344.

103. See LA. CIV. CODE art. 2341.

104. See LA. CIV. CODE arts. 2338 & 2341.

105. LA. CIV. CODE arts. 2338, 2341, 2343 & 2343.1.

106. 1980 La. Acts, No. 565, § 2.

107. LA. CIV. CODE art. 2339.

108. This amendment appears to have been added to clarify the legislature's intent that royalties, like fruits, will be community property, unless reserved. The amendment also expresses an approval of the Louisiana Supreme Court's holding in *Milling v. Collector of Revenue*, 220 La. 773, 57 So. 2d 679 (1952). The court reasoned that royalties "are a portion of the product of the land;" 220 La. at 780, 57 So. 2d at 682, thus they could not be fruits under Civil Code article 551 nor under prior article 2402. The court analogized royalties to rents and found that the royalties from a husband's separately owned property were community property. 220 La. at 781-82, 57 So. 2d at 682-83. The 1979 legislation did not mention royalties *per se*. 1979 La. Acts, No. 709. Writers questioned how royalties were to be treated under the new Code article 2339 which specifically did mention bonuses, delay rentals, and shut-in payments. See, e.g., Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 111-13 (1979).

109. LA. CIV. CODE art. 2339.

110. 1981 La. Acts, No. 921, § 1.

and royalties from community property donated to a spouse are to be treated, like fruits, as the separate property of the donee, unless the act of donation provides otherwise.<sup>111</sup> In the same bill passed by the legislature, article 2343.1 was added.<sup>112</sup> However, the legislature failed to provide expressly for the classification of fruits of the separate property that is donated. Perhaps the legislature saw the provisions of article 2343 as exceptions to the general rule in article 2339 that minerals, bonuses, delay rentals, royalties, and shut-in payments arising from separate property are to be classified as community property if no reservation is filed.<sup>113</sup> The legislature may have intended that the general rule of article 2339 would apply to separate property that is donated to the community. If so, then those revenues would be classified as community property, unless declared separate under the provisions of article 2339.<sup>114</sup> Because donated separate property becomes classified as community, a logical conclusion is that the revenues must also be classified as community assets.<sup>115</sup> Perhaps the legislature should add to article 2343.1 a requirement of filing a declaration similar to that in article 2339.

#### *Classification of Particular Incorporeal Movables*

The classification of particular items of property involves a three step process. The first step is to determine whether the item is "property" within the meaning of the Code articles on matrimonial regimes. If the thing is "property," the second step is to determine the *manner* of acquisition. The third step is to determine which theory should be used to fix the *time* of acquisition. This third step involves ascertaining whether the pertinent Code article requires application of a particular theory and if not, which theory will result in a disposition that is most consistent with the Code principles, the jurisprudence, and concepts of equity.

#### *Definition of Property*

The definition of property is not given in the Code articles on matrimonial regimes nor in those on things in Book II of the Civil Code. The jurisprudential definition, apparently, is that of "patrimony" adopted in *Due v. Due*: "Property, in its broad sense, denotes all patrimonial rights. . . . The civil law concept of patrimony includes the total mass of existing or potential rights and

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111. See LA. CIV. CODE art. 2343.

112. Compare LA. CIV. CODE art. 2343 with LA. CIV. CODE art. 2343.1.

113. LA. CIV. CODE art. 2339.

114. LA. CIV. CODE art. 2339.

115. LA. CIV. CODE art. 2338. See notes 24-31, *supra*, and accompanying text.

liabilities attached to a person for the satisfaction of his economic needs.'"<sup>116</sup>

One issue that the Louisiana courts have not yet been called upon to decide is whether the goodwill of a professional practice is property, and, if so, whether it is community property if acquired during the existence of a marriage. Other community property states have split on the issue of whether the goodwill of a professional practice is property. California and Washington courts have held that goodwill of a professional practice is property and that such property is prorated upon dissolution of a marriage.<sup>117</sup> Texas has ruled that professional goodwill is not property.<sup>118</sup> If faced squarely with the issue of whether professional goodwill is property, the Louisiana courts could find that goodwill is an "existing or potential right . . . attached to a person for the satisfaction of his needs," thus meeting the civilian definition of property.<sup>119</sup> On the other hand, the courts might find that professional goodwill is not an existing or potential right. Or, the courts might analyze the issue by first determining that goodwill is a product of the "effort, skill, or industry"<sup>120</sup> of a spouse and, as such, property. This analysis actually begs the question for the language of article 2338 states that "property acquired . . . through the effort, skill, or industry of either spouse" is community property,<sup>121</sup> suggesting that effort, skill, and industry may produce something *other* than property. The manner of acquisition should not be considered in determining what constitutes "property."<sup>122</sup> Alternatively, Louisiana could adopt the reasoning of the courts in either California and Washington or Texas. Probably the best alternative is for the courts to attempt to define property with more precision by devising tests for distinguishing patrimonial rights from purely personal attributes.<sup>123</sup>

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116. *Due v. Due*, 342 So. 2d 161, 165 (La. 1977) (quoting 1 A. YIANNPOULOS, PROPERTY, §§ 1, 27 in 2 LOUISIANA CIVIL LAW TREATISE 1, 77 (1980)). See LA. CIV. CODE art. 2325, comment (b).

117. *E.g.*, *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); *In re Marriage of Lukons*, 16 Wash. App. 481, 558 P.2d 279 (1976); Adams, *Is Professional Goodwill Divisible Community Property?*, 6 COMMUNITY PROP. J. 61, 62 (1979).

118. *Nail v. Nail*, 486 S.W.2d 761 (Tex. Sup., Ct. 1972). See, Adams, *supra* note 117, at 62.

119. See note 117 *supra*.

120. LA. CIV. CODE art. 2338.

121. LA. CIV. CODE art. 2338 (emphasis added).

122. *Accord*, Adams, *supra* note 117, at 64, 68 (discussing the California and Washington courts' rationale for their decisions that goodwill is property and Texas' decisions that goodwill is not property).

123. The jurisprudential definition of property is "patrimony." In *Due* the court found that contingent fee contracts were property because they were "patrimonial

The same issue of what constitutes "property" probably will come before the Louisiana courts in cases concerning a professional education or the right to practice a profession. Whether a right to practice a particular profession, manifested in a professional degree or license, can be conferred only on a person or can be conferred upon a community as well is questionable. If the degree or license is a property right, and if the effort, skill, or industry of one spouse during the regime<sup>124</sup> is the means used to acquire the degree or license, then it is a community asset.<sup>125</sup> However, the acquisition of a degree or license may not be the acquisition of a property right. So far, no community property state has held in a reported case that a professional degree or license is community property.<sup>126</sup>

One proponent<sup>127</sup> of classifying a professional education as community property has analogized a professional education to the contingency fee contracts in *Due*,<sup>128</sup> reasoning that both give rise to patrimonial rights. However, part of the court's holding in *Due* relied on the ability of the attorney to enforce the contingency fee contracts.<sup>129</sup> The attorney there was bound to perform by his contract; an attorney is not bound, however, to practice law simply because he has a license or degree.

#### *Determining Manner of Acquisition*

After determining that an item is "property," the second analytical step is to determine how it was acquired. Normally, this question is not difficult, but in *Reynolds v. Reynolds*,<sup>130</sup> the court had

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rights." 342 So. 2d at 165. But the court did not explain why contingent fee contracts were patrimonial rights; the court made no attempt to distinguish between what is and is not a right. In effect, the court substituted the word "patrimony" for the word "property." Furthermore, the court did not explain why contingent fee contracts are "attached to a person," nor whether they are "for the satisfaction of his economic needs." Indeed, if rights are attached to a person (note the singular form) for the satisfaction of his (again the singular form) needs, then such rights could be only separate property. The court should devise a workable test for determining what constitutes "property."

124. See LA. CIV. CODE art. 2338.

125. LA. CIV. CODE art. 2338.

126. Community property states include Louisiana, Texas, California, New Mexico, Nevada, Idaho, Arizona and Washington. *But cf.* *Inman v. Inman*, 578 S.W.2d 266 (Ky. App. 1979) (the court in this non-community property state held that, in limited cases, a professional education was marital property that could be divided between the spouses upon divorce).

127. Comment, *The Interest of the Community in a Professional Education*, 39 LA. L. REV. 1106, 1117 (1979).

128. 342 So. 2d 161.

129. 342 So. 2d at 165.

130. 388 So. 2d 1135 (La. 1980). The issue was whether income from the wife's separate trust was community or separate. Some income had been distributed, and other income had accrued but had not been distributed during the marriage.

trouble in determining whether income from a trust is to be considered property in itself or is to be considered a fruit of the property interest in the corpus of the trust. Whether the trustee of the corpus has sole ownership of the corpus vested in him or whether the beneficiary of the trust also owns an interest in the corpus prior to dissolution of the trust is determinative. If the trust instrument and trust law are interpreted to mean that ownership of the corpus is vested solely in the trustee, then the trust income cannot be a fruit of the property—i.e., the trust—but may be a gift to an individual spouse.<sup>131</sup> Conversely, all of the income is a fruit if the corpus is owned by the beneficiary. If the beneficiary has a property interest in the corpus, the result is that either all of the trust income must be a fruit<sup>132</sup> or the distributed income is community property and the undistributed income is separate property.<sup>133</sup> The court, having split along at least three lines of reasoning, finds no assistance in the 1979 legislation. Amendments to the 1979 legislation that would have eliminated this classification problem failed to pass in the 1981 legislative session.<sup>134</sup>

#### *Determining Time of Acquisition*

The third analytical step in classifying a particular item of property is to determine the time of acquisition by using the most ap-

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131. *Id.* at 1149-50 (Dixon, J., dissenting in part and concurring in part on rehearing).

132. *Id.* at 1140 (Dennis, J., dissenting on original hearing); *id.* at 1147 (Blanche, J., dissenting on rehearing); *id.* at 1150 (Marcus, J., dissenting in part and concurring in part on rehearing). In the opinion on original hearing, the court stated that the third circuit's position was that the "beneficiary of the trust was the owner of the corpus of the trust." *Id.* at 1138. A careful reading of the third circuit's opinion, however, shows it only recognized the beneficiary as owner of "an interest in the trust." *Reynolds v. Reynolds*, 365 So. 2d 530 (La. App. 3d Cir. 1978), *rev'd*, 388 So. 2d 1135 (La. 1980). Presumably, when Justices Marcus and Blanche stated they would affirm the third circuit, it was an affirmation that the beneficiary owned an interest in the property, not the entire corpus itself. If, however, their opinions were intended to "affirm" a holding that the corpus was wholly owned by the beneficiary, then the *Reynolds* decision is split not in three ways, but four.

133. *Id.* at 1142 (Watson, J., for the majority on rehearing).

134. An amendment to article 2339 was proposed during the 1981 legislative session that would have made the fruits and revenues of a trust the separate property of the beneficiary spouse. Proposed by the House Committee on Civil Law and Procedure, the amendment was deleted from House Bill 904 when it reached the floor of the House. Digest to H.B. 904, 7th Reg. Sess. (1981). The effect of the amendment would have been to eliminate the issue presented in the *Reynolds* case because all distributions from a trust would be the separate property of the beneficiary spouse. Presently, if a trust is established for the benefit of the community, all the fruits would be community property. LA. CIV. CODE art. 2338. If the amendment had passed, its effect on fruits from such a community-owned trust would have been to require those fruits to be classified as separate.

appropriate theory, when one is not required by the legislation. A troublesome item for Louisiana courts has been pensions, whether public or private. Pensions are to be classified under article 2338 as property acquired through the effort, skill, or industry of a spouse,<sup>135</sup> because they are considered forms of deferred compensation, rather than gratuities.<sup>136</sup> Pensions also may be classified under the first clause of article 2341 as "property acquired by a spouse prior to the establishment of a community property regime."<sup>137</sup> As noted above,<sup>138</sup> the courts may apply any of the three theories to determine the time of acquisition of property classified under these two clauses of articles 2338 and 2341.

Where private pensions are involved, the courts have been applying pro rata to apportion the interests in the pension rights between the community and the separate estate of the potential pensioner,<sup>139</sup> and the courts probably will continue to do so under the revision. Where the pension is granted pursuant to public employment, however, the courts have had to deal with a possible preemption by federal law or state statutes governing the particular pension plan in question. In the area of federal military retirement plans, the United States Supreme Court has found that federal statutory language forbidding garnishment and "process of any kind" exempts the pension benefits from community property claims. Therefore, all of the benefits must be classified as the separate property of the employee-pensioner.<sup>140</sup> Thus, the Louisiana courts must follow these precedents when federal retirement systems are at issue.<sup>141</sup> When the case involves a public retirement system established by state statute that contains similar anti-garnishment provisions, the Louisiana appellate courts have been inconsistent in following the United States Supreme Court's interpretation of anti-garnishment provi-

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135. LA. CIV. CODE art. 2338.

136. T.L. James & Co., Inc. v. Montgomery, 332 So. 2d 834, 846 (La. 1976); Lynch v. Lawrence, 293 So. 2d 598, 599 (La. App. 4th Cir.), writ denied, 295 So. 2d 809, 814 (1974).

137. LA. CIV. CODE art. 2341, as amended by 1981 La. Acts, No. 921, § 1.

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

139. See, e.g., Plumbing & Pipefitting Indus., Local 198 v. Meyers, 488 F. Supp. 704 (M.D. La. 1980); T.L. James & Co., Inc. v. Montgomery, 322 So. 2d 834 (La. 1976); Lynch v. Lawrence, 293 So. 2d 598 (La. App. 4th Cir.), cert. denied, 295 So. 2d 809 (La. 1974) (discounting formula used to apportion).

140. E.g., McCarty v. McCarty, 101 S. Ct. 2728 (1981) (army retirement benefits); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (railroad retirement benefits).

141. The Louisiana Supreme Court followed *McCarty v. McCarty*, 101 S. Ct. 2728 (1981) in holding that Air Force retirement benefits are not community property. *Dedon v. Dedon*, 404 So. 2d 905 (La. 1981). The opinion states: "Watson, J., concurs on the basis of the U.S. Supreme Court opinion, but personally adheres to the views expressed in *Swope v. Mitchell*, 324 So. 2d 461 (La. App. 3d Cir. 1975)."



sions.<sup>142</sup> Should the Louisiana Supreme Court find that the community property laws were not intended to be overridden by the anti-garnishment provisions in statutes governing state retirement systems,<sup>143</sup> the courts could continue to use the pro rata approach in classifying those public pensions.

The question of which theory to apply also arises in the case of partnership interests. The principles for classifying a partnership interest do not appear to be changed by the revision, despite the addition of article 2352 which gives the right of management of a partnership interest exclusively to the partner spouse.<sup>144</sup> Louisiana courts usually classify a partnership interest that is acquired prior to marriage by applying the inception of title theory.<sup>145</sup> Thus, if a husband is a partner in a business prior to his marriage, his partnership interest remains separate property after his marriage. Earnings from the partnership would fall into the community;<sup>146</sup> distributions of capital, however, would remain the separate property of the husband.<sup>147</sup> Nevertheless, if the separate funds or assets of the partnership are so commingled with community funds and assets as to become incapable of being traced to their separate nature, the partnership interest becomes community property.<sup>148</sup>

When the partnership interest is acquired during marriage, the

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142. See *Kennedy v. Kennedy*, 391 So. 2d 1193 (La. App. 4th Cir. 1980), *writ denied*, 396 So. 2d 883 (La. 1981) (State Firefighter's Pension and Relief Fund benefits were separate property). *But see Thrash v. Thrash*, 387 So. 2d 21 (La. App. 3d Cir.), *cert. denied*, 393 So. 2d 745 (La. 1980) (state teachers retirement system benefits were community property).

143. Because the Louisiana Supreme Court denied writs in both *Kennedy* and *Thrash* (see note 142, *supra*), the question still is open whether the Louisiana legislature intended such anti-garnishment provisions to override community property laws. The *Hisquierdo* opinion was based heavily on congressional intent; the intent of the Louisiana legislature may well have been different when it drafted anti-garnishment provisions. In Congress, legislators from the forty-two non-community property states may not have considered the provisions' impact on state community property laws. The Louisiana legislature, familiar with community property laws in the state, may have intended that the Code articles on community property be understood to override the statutes containing anti-garnishment provisions.

144. See LA. CIV. CODE art. 2352, which only addresses the issue of who will *manage* the partnership interest. It does not affect the *classification* of a partnership interest.

145. See *Guilott v. Guilott*, 361 So. 2d 1271 (La. App. 3d Cir.), *cert. denied*, 363 So. 2d 68 (La. 1978).

146. *Id.* at 1276.

147. *Id.* at 1277.

148. *Succession of Guercio*, 359 So. 2d 996 (La. App. 4th Cir.), *cert. denied*, 362 So. 2d 576 (La. 1978).

court might apply an inception of title theory to classify<sup>149</sup> it as community property, reasoning that the acquisition took place at the time the partnership agreement was executed. The court also might apply pro rata in the case of a partnership interest that is acquired partially during the community through the effort, skill, and industry of the partner spouse and partially either prior to or after dissolution of the marriage.<sup>150</sup> Indeed, the Louisiana Supreme Court hinted that it would prorate a partnership interest between the community and the partner spouse in *Due dictum*.<sup>151</sup>

A final question is whether the new legislation changes the way in which insurance is to be classified. Until the revision, life insurance policies had been treated as *sui generis*.<sup>152</sup> In the Louisiana Supreme Court's decision, *T. L. James & Co., Inc. v. Montgomery*,<sup>153</sup> the inception of title theory was continued as the single theory to be used in classifying life insurance.<sup>154</sup> The court could have prorated the employer group insurance policy in that case between the first community, the husband, and the second community. Under former article 2402 which allowed pro rata, that insurance policy could be interpreted to be a form of deferred compensation.<sup>155</sup> Likewise, under article 2338, employer group insurance could be called property acquired as a result of the effort, skill, or industry of a spouse.<sup>156</sup> As such, it could be classified using a pro rata, vesting, or inception of title approach. Because the legislature has not shown any intent to deviate from the jurisprudential classification of insurance under the old law, the courts probably will continue to employ only the inception of title approach to classify employer group insurance policies under the new law.

### Conclusions

The new legislation changes little of the old law which concerned the classification of property. Where there are changes, such as the provision allowing the husband to reserve the fruits of his separate

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149. This hypothetical partnership interest was not acquired with both community and separate funds. If it were, then a comparison of values would be necessary to classify it under articles 2338 and 2341. If the funds had been commingled, the partnership interest would fall into the community. LA. CIV. CODE art. 2340.

150. See text at note 97 and note 103, *supra*.

151. 342 So. 2d at 166.

152. *Connell v. Connell*, 331 So. 2d 4 (La. 1976).

153. 332 So. 2d 834 (La. 1976).

154. *Id.* at 847.

155. *Id.* at 846.

156. LA. CIV. CODE art. 2338.

property, the legislature's apparent intent was to bring the classification articles into line with the principle of equal management; that is, the revision seeks to give both spouses the same privileges and obligations. The legislature has eliminated or revised provisions that may have been justified under the old head and master rule, but it has basically adhered to traditional classification concepts.

Because of this intent, and because no wholesale revision of the articles on classification was intended, the courts' freedom to apply any of the theories on the time of acquisition should not be any more restricted under the new law—except where the legislature expressly mandates the use of a particular theory—than under the old law.

Finally, since the legislature's intent was to correct inequities in the classification articles that the elimination of the head and master rule would have produced, there appears to have been no attempt to solve other problems not connected with those inequities. The problems that existed under the old law in classifying particular incorporeal movables have not been resolved by the new legislation. Because the problems are old ones, however, does not mean they do not deserve attention. The burden thus falls—and properly so—upon the judiciary to interpret the new legislation in light of the underlying principles of the Code and to use wisely the latitude granted by the legislature.

*Amanda Palmer*