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Laura Schofield Bailey

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NOTES

MARITAL PROPERTY AGREEMENTS—BEING CREATIVE WITH THE NEW LEGISLATION

Although the legislature's recent alteration of the treatment of matrimonial agreements undoubtedly has made their use more attractive to contemporary spouses, the concept of property division by marital contract is hardly a new one. The practice appears to have been fixed as early as the fourteenth century;¹ lawyers initiated the practice in an effort to protect and regulate "the rights of spouses that might otherwise have suffered in the confusion created by the numerous Customs of that realm."² Reflecting this ancient tradition, the Louisiana Civil Code always has had elaborate provisions concerning marriage contracts and dowry,³ but these institutions were used rarely after the late 1800's. When they were used, it was primarily by mature persons of means who were contemplating a second marriage and wanted to contract a regime of separation of property.⁴

Matrimonial agreements are useful tools which, in some instances, can provide for a more equitable division of property between the spouses than that provided by the legal regime. A couple may contract to modify the community property regime by increasing or decreasing the sharing of assets and liabilities, by providing for sole management in specific situations, and by waiving reimbursement rights upon termination of the regime. Conversely, a couple may want to contract the separation of property regime provided for in the Civil Code,⁵ or they may want to modify that regime in order to provide for a regime which in operation is similar to the old "head and master" regime. This note will examine some of the problems in the new legislation concerning matrimonial agreements and some ways to avoid these problems by contracting a regime responsive to the needs of the parties.

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1. See Dart, *Marriage Contracts of French Colonial Louisiana*, 17 LA. HIST. Q. 229, 232 (1934).

2. *Id.*

3. LA. CIV. CODE arts. 2325-2335, 2337-2382, 2392-2396 & 2424, *repealed by* 1979 La. Acts, No. 709, § 1.

4. It has been reported that a sampling of parish records in Louisiana reveals that the use of marriage contracts, except in rare and scattered instances, had ceased by 1880. It appears that in one parish where French influences remain relatively strong, the custom of registering an inventory of the property of the prospective husband and wife has persisted to some extent.

Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 11 (1959) (footnote omitted).

5. LA. CIV. CODE arts. 2370-2376.

Definition

The first problem that arises in the new legislation is defining matrimonial agreement. According to the Civil Code, a *matrimonial regime* is a "system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons"⁶ and a *matrimonial agreement* is a contract establishing a "regime of separation of property or modifying or terminating the legal regime."⁷ Prior to the recent changes, the Civil Code allowed only antenuptial alteration of the legal regime; this conventional modification was denominated a "marriage contract."⁸ The 1979 revision of the matrimonial regime articles,⁹ which allows modifications both prior to and during marriage, uses the term "matrimonial agreement."¹⁰ Civil Code articles 1734 through 1755, which concern, in part, donations between spouses and donations between those persons contemplating marriage,¹¹ retain the term "marriage contract." Historically, prospective spouses have used these latter articles as authority for donations to one another of property coming into existence during the marriage.¹² The 1979 revision makes it unclear whether spouses may take advantage of these donation articles during marriage or may do so only prior to marriage.¹³

6. LA. CIV. CODE art. 2325.

7. LA. CIV. CODE art. 2328.

8. LA. CIV. CODE art. 2424, *repealed by* 1979 La. Acts, No. 709, § 1.

9. 1979 La. Acts, No. 709.

10. LA. CIV. CODE art. 2329.

11. LA. CIV. CODE arts. 1734-1755.

12. In *Succession of McCloskey*, 29 La. Ann. 237 (1877), the court interpreted a clause in a marriage contract which stated:

Fourth—In consideration of the marriage, and of the love and affection which the said future husband bears to his said future wife, he does by these presents donate to his said intended wife the sum of \$10,000 (ten thousand dollars), in the event that she should survive him, said sum to be taken from the mass of his succession.

This clause was found to be a disposition of future property to take effect at the death of the donor, making the donee a creditor of the estate and entitling her to be paid in preference to the legatees. *See also* *Fabre v. Sparks*, 12 Rob. 31 (La. 1845); *Criswell v. Seay*, 19 La. 528 (1841); *Fowler v. Boyd*, 15 La. 562 (1840).

13. As is pointed out in the comments, the term "marriage contract" historically has referred to antenuptial agreements. Arguably, the legislature intended to limit these donations to antenuptial matrimonial agreements. The comments to articles 2328 and 2329 support this inference. LA. CIV. CODE arts. 2328, comment (c) & 2329, comment (c). The comments, however, do not necessarily reflect the intent of the legislature and are not law. 1979 La. Acts, No. 709, § 7 (comments are not part of the law and are not enacted into law by their inclusion in the Act). The picture is clouded by the simultaneous amendment of article 1888, which had allowed future successions to be the object of a marriage contract. The amendment deleted the term "marriage con-

A second problem concerning the definition of matrimonial agreement is the requirement of judicial approval. Spouses entering into a matrimonial agreement during the marriage must obtain judicial approval as a formal requisite for the validity of their agreement, while other agreements between spouses do not require such approval.¹⁴ Judicial approval, of necessity, will require expenditures by the spouses of their time and money, and some may well perceive the requirement as an intrusion of the state into their private affairs. The legislation does not provide a distinction as to the substance of these two types of contracts; it provides only for different effects. One possible way to distinguish between the two is by taking a functional approach. As a starting point of the analysis, it is suggested that a matrimonial agreement normally regulates future marital property¹⁵ while an interspousal contract most often governs presently

tract" and substituted "antenuptial agreement." LA. CIV. CODE art. 1888, as amended by 1979 La. Acts, No. 711.

Several inferences arise from these modifications of the Civil Code articles. First, by specifically amending article 1888 and by not amending the articles on donations, the legislature may have intended to change the law regarding the latter. Arguably, and despite the assertions of the comments, the legislature may have intended that "marriage contract" be synonymous with "matrimonial agreement." Thus, in order to continue to limit the donation of a future succession to only those persons *contemplating* marriage, the broad class of matrimonial agreements was narrowed by the qualifier "antenuptial" and the restrictive phrase "antenuptial agreement" was substituted for "marriage contract." By failing to make a comparable change in the interspousal donation articles, the legislature arguably intended to change the law therein to permit such donations during marriage, as well as prior to its celebration. Two contrary inferences also arise. The legislature failed to amend articles 1734-1755 because its intention was that the law would remain the same. This argument would render the amendment to article 1888 superfluous. The second inference is that although the legislature intended to keep the law the same, when it amended article 1888 to effectuate that intention, it failed to amend articles 1734-1755 through oversight.

14. LA. CIV. CODE art. 2329. Spouses moving into the state have one year to confect a matrimonial agreement *without* the requirement of judicial approval. The requirement of judicial approval is discussed more fully in Spaht and Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 90-102 (1979). See Pascal, *Updating Louisiana's Community of Gains*, 49 TUL. L. REV. 555 (1975). Whether article 2329 is mandatory, as assumed *arguendo* in the following text, or is suppletive, is discussed at notes 32-43, *infra*, and accompanying text.

15. Future things may be the object of an obligation. LA. CIV. CODE art. 1887. A future succession may only be the object of an antenuptial matrimonial agreement. LA. CIV. CODE art. 1888. See *Alexander v. Gray*, 181 So. 639 (La. App. 2d Cir. 1938). The sole condition placed on this general rule is that the future thing must be possible; if the thing never comes into existence, the obligation lacks an object and is not formed. 2 M. PLANIOL, *CIVIL LAW TREATISE* pt. 1, no. 1008 at 580 (11th ed. La. St. L. Inst. trans. 1959). In the absence of an express intent to the contrary, the sale of a specific future thing is not immediately translatve of ownership. See *Plaquemine Equip. &*

owned property¹⁶—although some categories of agreements pertaining to presently owned property are also properly the subject of a matrimonial agreement.

Interspousal contracts, which the legislation makes clear are *not* matrimonial agreements needing judicial approval, contemplate as their subject matter already-acquired property,¹⁷ for example, a donation by a spouse of an undivided interest in a community thing to the other spouse,¹⁸ a gratuitous or onerous transformation of separate property into community property,¹⁹ and an amicable partition of the community.²⁰ The same is true with other interspousal contracts that result from the new freedom to contract;²¹ spouses will be permitted to lease property to each other, to enter into partnerships, to enter into loan agreements, to create encumbrances, to secure repayment when one spouse advances funds to the other,²² to employ each other, and to enter into compromise agreements.²³

When the provisions of an agreement alter the regime but fail to fit within a specific category of interspousal contract, the provi-

Mach. Co. v. Ford Motor Co., 245 La. 201, 157 So. 2d 884 (1963). Ownership is not transferred until the future thing comes into existence. 2 S. LITVINOFF, OBLIGATIONS § 32 in 7 LOUISIANA CIVIL LAW TREATISE 48-50 (1975).

16. The wording of the legislation and the comments lead to this distinction between future and present property. A matrimonial agreement under the legislation is a "contract *establishing*" a "system of principles and rules" governing the ownership and management of marital property. LA. CIV. CODE arts. 2325 & 2328 (emphasis added). The words "establishing" and "system" suggest the agreement contemplates an ongoing regulation of property as it comes into existence, rather than a one-time division of present marital property. To establish is to "found, to create, to regulate; [t]o bring about or into existence." A system is an "[o]rderly combination or arrangement, as of particulars, parts, or elements into a whole; especially such combination according to some rational principle. Any methodic arrangement of parts." BLACK'S LAW DICTIONARY 490, 1300 (5th ed. 1979). Comment (d) to article 2330 recognizes that a contract specifying the division, ownership, or management of future marital property is a matrimonial regime. See LA. CIV. CODE arts. 2325 & 2328.

17. Comment (b) to article 2834 (Act 627 of 1978) authorized retroactive provisions in a matrimonial regime contract as long as these provisions did not prejudice third parties; Act 709 of 1979 did not contain such authorization. The omission does not mean necessarily that spouses are prohibited from contracting as to already-acquired property. The comments in Act 709 of 1979 are broader than those of Act 627 and can be interpreted to include already-acquired property.

18. LA. CIV. CODE art. 2343.

19. LA. CIV. CODE art. 2343.1 (added by 1981 La. Acts, No. 921, § 1).

20. LA. CIV. CODE art. 2336.

21. LA. CIV. CODE art. 1790.

22. See Bilbe, "Management" of Community Assets Under Act 627, 39 LA. L. REV. 409, 436-37 (1979).

23. LA. CIV. CODE art. 2329, comment (a).

sions' subject matter is more properly that of a matrimonial agreement. For example, a matrimonial agreement might include provisions for apportioning presently owned community property according to unequal fixed shares, for determining whether existing property should be subject to the matrimonial regime, and for the reservation of fruits as separate property of the other spouse.²⁴ Thus, a *matrimonial agreement* regulates future marital property and any division of present property not covered by a recognized category of interspousal contract, while an *interspousal contract* concerns presently owned property which is the subject of a contract falling within a recognized category of interspousal dealings.

General Policies

The spouses' ability to contract during marriage, whether by matrimonial agreement or by interspousal contract, gives them a flexibility never before available in Louisiana.²⁵ But Louisiana is not alone in its approach; in other legal systems which have adopted the community property regime, the general trend has been to give the spouses increasing freedom to contract a regime.²⁶ Allowing modification of the regime during marriage can be advantageous for a number of reasons—to utilize as an estate planning tool,²⁷ to replace what has become an unfavorable system, to reflect changes resulting from the birth and growth of children, to reflect changes in wealth, etc.²⁸

Once the decision is made to change the regime, how it is to be modified becomes important. Individual interspousal contracts may not provide sufficient flexibility to take into account present and future changes in the family or in the property of the spouses, while a matrimonial agreement (a *system* of rules and principles) may do so. To confect one agreement regulating present *and* future property division is more efficient than to confect a new interspousal contract for each situation as it arises. A matrimonial agreement, by eliminating the need for periodic renegotiation, provides more certainty and pre-

24. LA. CIV. CODE art. 2330, comment (d).

25. LA. CIV. CODE art. 2329, *repealed by* 1979 La. Acts, No. 709, § 1 (a spouse could not alter the matrimonial agreement during marriage).

26. See 3 M. PLANIOL, *supra* note 15, at pt. 1, no. 814A at 34. See generally Bartke, *The Reform of the Community Property System of Louisiana—A Response To Its Critics*, 54 TUL. L. REV. 294 (1980); Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. L. 1 (1975).

27. Bartke, *supra* note 26, at 301. The new revision of Louisiana successions law, 1981 La. Acts 911 & 919 (providing for different devolution of property depending on its status as community or separate), may also be an impetus to the execution of a matrimonial agreement.

28. See Bilbe, *supra* note 22, at 436-37.

dictability of property division than would a series of interspousal contracts.

Spouses who believe that the requirement of judicial approval of all postnuptial matrimonial agreements is an undesirable intrusion into their private affairs may attempt to minimize judicial involvement by initially contracting a regime containing a mechanism to change it. They could, for example, include in their original agreement a "termination" provision and an alternate regime to be adopted upon the lapse of the original regime. This type of matrimonial agreement could be entered into either before marriage upon consent of the future spouses or during marriage by obtaining judicial approval of the agreement. One possibility would be to contract a matrimonial regime that provides for a successive plan (or successive plans) which comes into operation *automatically* upon the happening of a specified condition²⁹ or after a set time period. This type of complex regime would contemplate the occurrence of an event in the future—the birth of a child, perhaps. A second possibility is to provide an *optional* alternative regime; the change could be effective at the option of one or both spouses. A combination of the two approaches is also possible.

There should be no serious problem with the first approach. No provision of the Civil Code prevents such conditional obligations. To the extent one could argue that a successive regime is a new matrimonial agreement requiring judicial approval, the simple answer is that there is no new exercise of will by the spouses and thus no new agreement. If the matrimonial agreement is entered into after marriage, article 2329 requires the judge to determine whether the regime is in the best interests of the spouses. The judge would make this determination by evaluating the original plan in light of the spouses' best interests and then by evaluating the successive plan (or plans) in light of possible conditions.

More serious difficulties arise with alternate plans which go into effect at the will of one or both spouses. The mechanism to trigger the change could be simply the declaration of one or both spouses, or such a declaration to be made after the occurrence of an event, with or without a delay for decision making and consultation with legal and financial advisors. The plan arising *solely* at the option of the spouses may be the most desirable for many because it is the most flexible; the plan conditioned upon the happening of an event is still less restrictive than the automatic successive regime. However,

29. LA. CIV. CODE art. 2021 (conditional obligations are those that depend on an uncertain event).

if the rationale behind judicial evaluation of the matrimonial agreement is the disinterested determination of the best interests of the spouses, a purely optional regime probably would have less chance of being approved than an automatic successive regime. In the alternate plan which arises solely at the option of the spouses, the judge has no facts upon which to measure "best interests," since the spouses are free to decide when and if they will adopt the alternate plan. On the other hand, an optional plan arising upon the happening of an event should be less risky. If the event occurs and the spouses fail to exercise their option, the original plan would still be in effect. This "minimum" is similar in result to a judge's approval of a simple matrimonial agreement without alternate provisions. If the spouses do exercise the option, the result would be the same as a successive regime.³⁰ Spouses who want the flexibility of a matrimonial regime composed of an original plan with an optional plan have the best chance of approval if the optional plan is conditioned upon the occurrence of a specific event and may be adopted only upon the consent of both after a reasonable delay for decision making. Requiring the consent of both spouses, rather than the declaration of only one, gives the less worldly spouse more of a veto power, which can keep the regime to the "minimum" the judge would have approved without the alternate plan.

In order for a matrimonial regime composed of an original plan and a successive or optional alternate plan to be enforceable, the judge must have the authority to approve this type of regime and there must be a continuity of the regime between plans. The judge is authorized to approve a matrimonial agreement if it is in the best interests of the spouses and they understand its rules and principles.³¹ In order to make his determination, the judge necessarily must look beyond the facts before him as to the present situation of the spouses; he must anticipate whether the regime will be effective both now and in the future. The judge can and should weigh the petitioners' career and family plans to decide if the contemplated property regime is in their best interests. By evaluating both the original and the alternate plan in the context of the present and future situations of the spouses, the judge is making the same type of decision he is authorized to make when approving a matrimonial agreement without any alternate provisions.

When confecting a matrimonial agreement composed of an original

30. Spouses must still provide for the possibility that the event may fail to occur, otherwise they risk invalidating the whole agreement.

31. LA. CIV. CODE art. 2329.

plan and an alternate plan, continuity is important. Even if the judge has the authority to approve complex postnuptial agreements, a break in continuity caused by the adoption of an optional plan may render them unenforceable, since this plan arises upon the future consent of the parties and resembles a "new" agreement; thus it may be classified as a new regime rather than as part of one, continuous regime. During that period of time between the two plans, the legal regime arguably would go into effect, thus perhaps necessitating further judicial approval. The spouses may minimize the probability of judicial intrusion by avoiding the use of words of termination when providing for the pivotal event which triggers the ensuing alternate plan, by providing for the original plan to remain in effect until the new rules become operative and by specifying that the original plan will continue in effect if the spouses fail to exercise the option.

Prudent planning requires that any matrimonial agreement composed of more than one plan should include a severability clause. If the alternate plan is not allowed, arguably the whole matrimonial agreement is invalid due to a failure of cause. Either spouse could invalidate the agreement by claiming he would not have agreed to one plan without the other. A severability clause ensures the minimum agreement to which the spouses are entitled, since they could have contracted a simple matrimonial regime before marriage and the judge can always approve a matrimonial agreement without any alternate provisions. In this way, the spouses can attempt to obtain the maximum flexibility the law allows without being penalized for attempting to exceed the as yet undelimited maximum.

The preceding discussion presumes that the requirement of judicial approval is mandatory;³² arguably though, the requirement is suppletive and may be derogated from conventionally.³³ Article 2329 states that spouses may modify or terminate a regime "during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules."³⁴ This language appears to be clear and unambiguous,³⁵ and the words in their most usual context appear to

32. See text at notes 28-31, *supra*.

33. See text at notes 37-43, *infra*, for a possible exception to this requirement.

34. LA. CIV. CODE art. 2329.

35. "If the text is clear and unambiguous, the plain meaning must not be disregarded." LA. CIV. CODE art. 13. "The words of a law generally must be understood in their most usual context, giving less importance to the rules of grammar than to the general and popular use of the words." LA. CIV. CODE art. 14. The word "only" is defined as: "Solely; merely; for no other purpose; at no other time; *in no otherwise*; along; of or by itself; without anything more; exclusive; nothing else or more." BLACK'S

be imperative. Only two exceptions to the requirement of judicial approval appear in article 2329: spouses moving to Louisiana from another state have a one year grace period in which to contract a regime, and spouses may change to the legal regime at any time. These narrow exceptions support the contention that the article is mandatory. The presumed legislative intent of this article, that of protecting the less worldly spouse who is unfamiliar with familial property acquisition and distribution, would be defeated if the other spouse could avoid the requirement of a judicial determination that the matrimonial agreement "serves their best interests."³⁶

However, an argument also can be made that the article is suppletive, despite its apparently restrictive language. Neither the text nor the comments to the 1979 revision impose any sanctions for the failure to obtain judicial approval. Yet article 2330, which imposes substantive limitations on matrimonial agreements, includes a comment which supports the absolute nullity of any derogation from those limitations by agreement.³⁷ Similarly, the donation articles contain limits as to both form and substance.³⁸ Failure to satisfy either the formal or substantive requisites renders a donation invalid by express codal provision.³⁹ Article 2353 also specifies that an unauthorized alienation of community property is a relative nullity. Article 2329 arguably falls under the general category of supplemental law since it contains neither a commentative nor textual directive of absolute nullity when the parties fail to obtain judicial approval. Another factor supporting the supplemental character of this requirement is the general trend of increasing spousal contractual freedom.⁴⁰ The legislature dropped the historical bars to interspousal contracting⁴¹ on the assumption that modern spouses have equal bargaining strength⁴² and can rely on general contractual enforcement and protective devices to prevent overreaching.⁴³ Requiring *mandatory* judicial approval is inconsistent

LAW DICTIONARY 982 (5th ed. 1979) (emphasis added). In *Whittaker v. Ill. Cent. R.R.*, 176 F. 130, 131 (E.D. La. 1910), the court, when construing the word "only" said, "[W]ithout reference to the lexicographers, the word has a plain, ordinary, common-sense meaning equivalent to 'solely'"

36. LA. CIV. CODE art. 2329.

37. LA. CIV. CODE art. 2330, comment (a).

38. See generally LA. CIV. CODE arts. 1493, 1497, 1519-1521, & 1528-1530.

39. LA. CIV. CODE arts. 1536 & 1538.

40. See text at note 26, *supra*.

41. LA. CIV. CODE art. 1790, as amended by 1978 La. Acts, No. 627, § 3 (eliminating interspousal contractual incapacity). Spouses, whether or not judicially separated, may sue each other on causes of action arising out of contracts and out of the provisions of the Civil Code articles on matrimonial regimes. LA. R.S. 9:291 (Supp. 1980).

42. See text at note 14, *supra*.

43. LA. CIV. CODE arts. 1819-1859.

with this assumption; article 2329 should not be considered mandatory absent an express directive. In any event, the question of the mandatory or suppletive nature of article 2329 warrants further clarification by the legislature.

Substantive Limitations on Matrimonial Agreements

Despite the apparently broad contractual freedom given to spouses confecting a matrimonial agreement, general Civil Code limitations on contractual freedom still apply,⁴⁴ and the spouses, of course, may not execute an agreement that prejudices the rights of creditors or forced heirs. A creditor may use three actions to protect his rights: the revocatory action, the oblique action and the action in declaration of simulation.⁴⁵ Forced heirs also may use the action in declaration of simulation as well as the rules governing reduction of excessive donations.⁴⁶

Article 2330 prohibits spouses from contracting a matrimonial agreement which renounces the marital portion or alters the established order of succession.⁴⁷ Spouses also may not *limit* with respect to third persons the right that one spouse alone has under

44. For example, spouses may not contract concerning objects contrary to public policy. LA. CIV. CODE art. 11. A contract waiving alimony *pendente lite* has been held to be an absolute nullity, because public policy dictates that the husband should aid and assist his wife during the existence of the marriage. *Holliday v. Holliday*, 358 So. 2d 618 (La. 1978). On the other hand, at least one case has held that a waiver of permanent alimony is *not* contrary to public order, because permanent alimony is merely a pension given by one spouse to the other after divorce, when there is no longer a duty to support. *Monk v. Monk*, 376 So. 2d 552 (La. App. 3d Cir. 1979).

45. The revocatory action requires both an actual intent to defraud and an actual injury to the creditor. The act complained of must be real and not merely a sham. LA. CIV. CODE arts 1970-1977. The oblique action allows a creditor to assert any right not merely personal to the debtor. LA. CIV. CODE art. 1990. The action in declaration of simulation arises whenever "the effects of an apparent act are modified or suppressed by another act which is supposed to remain secret." Litvinoff, *The Action In Declaration of Simulation In Louisiana Law*, in *ESSAYS ON THE CIVIL LAW OF OBLIGATIONS* 139 (J. Daniow ed. 1969). A creditor, by this action, attempts to reveal the actual transaction evidenced by the true intentions of the parties. This action differs from the revocatory action in that a mere sham suffices to justify it; an actual intent to defraud is unnecessary.

46. LA. CIV. CODE arts. 1502 & 1754. The meaning of the "indirect" gifts as used in article 1754 is obscure. Code Napoleon article 1099 (1804), from which this article was taken verbatim, contained other specific rules on "reduction by children of a previous marriage of benefits conferred by matrimonial agreements." Spaht & Samuel, *supra* note 14, at 97. The benefits conferred by a matrimonial agreement's provisions probably are the indirect gifts referred to in article 1754, and if excessive, they are merely reducible, not null. *Id.* at 98, n.100.

47. LA. CIV. CODE art. 2330.

the legal regime to obligate the community, or to lease, alienate, or encumber community things.⁴⁸ Although they are free to contract between themselves as to the management of the community, such an agreement would have effect only between the spouses. Conversely, they may stipulate that one spouse has *more* power to act alone than the legal regime provides—for example, a stipulation in an agreement that one spouse has sole management in instances where both spouses must ordinarily consent.⁴⁹ The purpose of the third limitation in article 2330 is to assure a third person dealing with one spouse that the spouse has at least the powers allowed under the legal regime.⁵⁰

Modifications of the Community Property Regime

The legal regime may be modified by agreement in countless ways, ranging from minimal changes to drastic deviations bearing little or no resemblance to the original regime. Spouses may contract to increase or decrease the community assets, to increase or decrease the community's liability for satisfaction of antenuptial obligations, to modify the management of the community within the limits allowed by the legal regime, or to modify the division of the community assets and obligations upon dissolution.

Modifying the Distribution of Assets: Increasing the Community

A variety of options are available to spouses who wish to increase the assets of the community by modifying the legal regime,⁵¹ including conversion of separate property to community or stipulation of a universal community.⁵² Neither technique is very common, for spouses contracting a regime have a tendency to exclude as much as possible from the community.⁵³

Conversion is a partial or total transfer of present or future property.⁵⁴ A transfer by one spouse of a thing forming part of his separate property to community property is now allowed under the legal regime⁵⁵ and may be the subject of a gratuitous or onerous inter-

48. LA. CIV. CODE art. 2330.

49. LA. CIV. CODE art. 2347.

50. Spaht & Samuel, *supra* note 14, at 102. Civil Code articles 2345-2346 and 2350-2352 are instances where one spouse alone has the power to obligate the community.

51. See Note, *Interspousal Contracts*, 42 LA. L. REV. 727 (1982).

52. See 3 M. PLANIOL, *supra* note 15, at pt. 1, no. 978 at 129.

53. *Id.* at no. 980 at 129-30.

54. *Id.* at no. 979 at 129.

55. 1981 La. Acts, No. 921, § 2 enacted article 2343.1 of the Louisiana Civil Code of 1870 which provides:

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

spousal contract. The effect of this transfer is that the donor spouse loses an undivided one-half interest in his property, while the donee spouse gains an undivided one-half interest in the property. A transfer of future separate property to community property by a matrimonial agreement may be onerous or gratuitous. For example, a conversion might provide that any property acquired by a spouse by inheritance or donation or any damages or other indemnity awarded to a spouse would belong to the community.

Although spouses may increase the community by gratuitous or onerous transfers of future separate property, the process is not without its difficulties. These transfers are subject to the rules protecting forced heirs⁵⁶ and creditors.⁵⁷ The availability of this type of transfer as to future property also may be limited to premarital agreements due to the rules governing donations made by marriage contract.⁵⁸

The difficulties should be obviated if the conversion is classified as an exchange. An exchange "is a contract, by which the parties . . . give to one another, one thing for another, whatever it be, except money . . ." ⁵⁹ It is complete upon consent of the parties,⁶⁰ and full ownership is transferred at that time. In the preceding hypothetical conversion, both spouses presently would be contributing reciprocally their right to receive future separate property to the community. The transfer arguably would not be a donation, but rather a type of exchange, which would not be subject to any of the restrictions concerning donations of future things.⁶¹

Contracting a universal community will also increase the assets of the community. According to Planiol, this community would be comprised of all of the spouses' property interests, real and personal, present and future. Only a few assets would remain separate: (1) property donated or bequeathed to a spouse on the condition that it remain separate and (2) interests which by their nature are not assignable. All obligations would be community except those encumbering gifts or bequests made to the separate property of one spouse.⁶²

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.

56. See text at note 46, *supra*.

57. See text at note 45, *supra*.

58. See text at notes 11-13, *supra*.

59. LA. CIV. CODE art. 2660.

60. LA. CIV. CODE art. 2661.

61. See text at notes 11-13, *supra*.

62. See 3 M. PLANIOL, *supra* note 15, pt. 1, no. 989 at 133 & no. 1127 at 209.

The French Code Civil and the Draft Civil Code of Quebec both provide for a universal community as an optional regime.⁶³ The Quebec codal provision allows spouses, by marriage contract, to "establish a universal community of their property, moveable and immovable, present and future, of all their present property alone, or of all their future property alone."⁶⁴ Spouses are free to change the matrimonial agreement and regime during marriage as long as the agreement complies with the requisite formalities⁶⁵ and does not compromise the interest of the family or the rights of creditors.⁶⁶ The recently enacted Civil Code of Quebec⁶⁷ deleted the section entitled "Principal clauses that may modify the community of moveables and acquests"⁶⁸ which contained, among other modifications,⁶⁹ the articles which provided for the establishment of a universal community.⁷⁰ Presumably, the deletion was not meant to prohibit this type of modification⁷¹ but was simply the result of an effort to make the Code more concise and flexible.

Louisiana courts have upheld antenuptial matrimonial agreements establishing a universal community.⁷² The availability and utility of a postnuptial universal community, however, may be limited by the

63. FRENCH CIV. CODE art. 1526 (J. Crabb trans. 1977); QUE. CIV. CODE 1977 Draft, Book Two, arts. 67, 97 & 215 (Service de traduction, Ministère des Communications trans. 1977).

64. QUE. CIV. CODE 1977 Draft, Bk. Two, art. 215.

65. QUE. CIV. CODE 1977 Draft, Bk. Two, art. 77.

66. QUE. CIV. CODE 1977 Draft, Bk. Two, arts. 69 & 76.

67. As reported in CIV. CODE OF QUE. arts. 400-659.

68. QUE. CIV. CODE 1977 Draft, Bk. Two, arts. 206-215.

69. The section includes articles which provided for a community reduced to acquests and a community composed of fixed unequal shares.

70. QUE. CIV. CODE 1977 Draft, Bk. Two, art. 215.

71. The chapter covering the articles on matrimonial regimes was reduced from 165 articles in the 1977 Draft to 61 articles in the enacted version. The substance of the remaining articles is the same with the exception of new articles 470 & 473, which removed the requirement of court homologation of a change in the matrimonial agreement during marriage upon a finding that the change did not compromise the interests of the family or the rights of their creditors, QUE. CIV. CODE 1977 Draft, Bk. Two, arts. 72 & 76. Spouses are free to make any kind of stipulation in their marriage contract, "subject to the imperative provisions of law, public order and good morals," CIV. CODE OF QUE. art. 463.

72. In *Fabre v. Sparks*, 12 Rob. 31, 31 (La. 1845), the marriage contract stipulated that "there shall be community between the parties, which shall comprehend all their estate, real and personal, present and to come." See also *Hanley v. Drumm*, 31 La. Ann. 106 (1879) (all of the property brought in to the marriage—husband's valued at \$20,000 and wife's valued at \$4,000—became community; profits were to be distributed in proportions similar to the amount each invested in the community); *Desobry v. Schlater*, 25 La. Ann. 425 (1873) (all property brought into the marriage or falling to one or both spouses during the marriage became community).

restrictions on donations of future things.⁷³ If future things may be *donated* only by *antenuptial* agreement, Louisiana spouses contracting a postnuptial universal community should structure their transaction as an exchange or limit the composition to all of their present property. If donations of future things are in fact limited to an antenuptial agreement, the restriction is unfortunately at odds with reality. Spouses desiring to contract a universal community usually do so later in their married life when their relationship has matured.⁷⁴

Modifying the Distribution of Assets: Decreasing the Community

Agreements between spouses limiting the property comprising the community are more common than those increasing the community. One modification of this type is the "community reduced to gains" in which spouses exclude from the community all property and debts⁷⁵ acquired prior to the regime and all future acquisitions made with separate property. The exclusion may be total or partial and of present or future property.⁷⁶ Community assets thus are reduced to earnings and income from separate property. Under article 106⁷⁷ of the Draft Civil Code of Quebec, spouses may stipulate that there will be only a *community of acquets* between them by excluding from the community all property and debts existing when the regime began and any future acquisitions deemed private property.⁷⁸ At termination, partition is made of community acquets only.⁷⁹

73. See text at notes 11-13, *supra*.

74. See Bartke, *supra* note 26, at 301.

75. See text at notes 78-86, *infra*.

76. 3 M. PLANIOL, *supra* note 15, at pt. 1, no. 992 at 134 & no. 995 at 135. The usual form of the exclusion clause is that it is mutual and takes in both present and future interests. *Id.* at no. 999 at 139.

77. QUE. CIV. CODE 1977 Draft, Bk. Two, art. 206.

78. Private property is defined as:

1. property owned or possessed when the regime comes into effect;
2. property that accrues to him during the regime by succession, legacy or gift, and the fruits and income derived from that property if the testator or donor has so provided;
3. property acquired by him to replace private property, and any insurance indemnity relating thereto;
4. the rights or advantages that accrue to him as a contingent owner or as a beneficiary under a contract or plan for a retirement pension or other annuity, or for insurance of persons;
5. his clothing, personal linen and papers, wedding ring, decorations and diplomas;
6. the instruments required for his occupation, saving compensation where applicable.

CIV. CODE OF QUE. art. 482.

79. QUE. CIV. CODE 1977 Draft, Bk. Two, art. 206.

Although Louisiana no longer has a specific Code provision for limited communities created by matrimonial agreements, several Louisiana cases treat this issue under prerevision article 2424. The spouses in *Barrow v. Stevens*⁸⁰ contracted a modified community which excluded the income from the wife's plantation. The court held that specifically excluding the income of the plantation from the community by marriage contract was a permissible modification of the community.⁸¹ Another permissible modification is found in *Clay v. United States*,⁸² in which the community was limited to future acquisitions only; all income from properties obtained prior to the marriage remained separate income.⁸³

Another possibility of limiting the community is by restricting the community to gains only by excluding from the community all property and income other than the earnings of the spouses. This restriction should not be contrary to public policy since the articles allow a complete exclusion of the legal community.⁸⁴ Nor does this restriction derogate from the prohibition in article 2330, as it does not limit either spouse's right to obligate the community. It simply limits the amount of assets comprising the community, a possibility referred to approvingly in the comment to article 2330.

Although limitations of the community may be accomplished through the use of matrimonial agreements, the community can in fact be limited without an agreement. Under the legal regime, a spouse may limit the community assets without the knowledge of the other spouse. By making a unilateral declaration, he may classify the income from his separate property as separate⁸⁵—without this declaration, the income would be community property. Once the declaration is made, however, any of this income spent on the ordinary and customary expenses of the marriage may entitle the spouse to a claim for reimbursement against the other spouse upon termination of the community.⁸⁶ To avoid reimbursement from separate funds, the non-

80. 27 La. Ann. 343 (1875).

81. *Id.* at 344. See LA. CIV. CODE art. 2424, repealed by 1979 La. Acts, No. 709, § 1; LA. CIV. CODE art. 2330, comment (d).

82. 161 F.2d 607 (5th Cir. 1947).

83. *Id.* at 608. Before article 2424 was repealed, it specifically provided for this type of modification of the legal community by marriage contract. LA. CIV. CODE art. 2424, (repealed by 1979 La. Acts, No. 709, § 1).

84. LA. CIV. CODE arts. 2328, 2356 & 2370-2376.

85. LA. CIV. CODE art. 2339.

86. LA. CIV. CODE arts. 2358, 2360 & 2365. See generally Note, *Termination of the Community*, 42 LA. L. REV. 789 (1982).

working spouse who needs assurance that the other spouse will not make such a declaration should include in the matrimonial agreement a provision permanently classifying income from separate property as community property.⁸⁷

With equal management,⁸⁸ each spouse is liable for the debt he incurs, whether for his separate benefit or for the benefit of the community. The debt may be satisfied prior to termination of the community from community property or from the separate property of the spouse incurring the debt.⁸⁹ Even premarital debts can be satisfied entirely from community property.

This liability of the community probably can be limited by matrimonial agreement. Article 2330 arguably should not be construed to prohibit limiting antenuptial creditors' ability to satisfy their debts from the community property through a separation of debts clause, for the text of the article is clear—it refers to a "*spouse . . . under the legal regime.*"⁹⁰ Since the parties could have contracted a pure separate property regime in which the creditors of each spouse could not have reached into the other's patrimony at all, a modified community which has the same result with respect to creditors but allows the spouses to share their resources between themselves likewise should be permissible. The recorded agreement should give creditors more than adequate notice.

Indeed, the legal regime has been criticized as being a boon to creditors by extending the reach of the antenuptial creditor to community funds. Allowing the creditor to recover from the nonobligor spouse's one-half of the community, to the extent that it is not enhanced by property or efforts of the obligor spouse, is subjecting the property of one person to the satisfaction of an obligation of another. Also, the creditor probably does not rely on the uncertainty of his obligor's future marriage plans when he extends credit.⁹¹ Furthermore, the policy reasons supporting a prohibition of a separation of debts clause cannot be very strong if the nonobligor spouse is able

87. Spaht & Samuel, *supra* note 14, at 95-96. A sample provision might use the following language: "The following are to fall into the community of gains between the spouses: the fruits, revenues, and income from each spouse's separate assets."

88. LA. CIV. CODE art. 2346.

89. LA. CIV. CODE art. 2345.

90. LA. CIV. CODE art. 2330 (emphasis added).

91. In order to rely on the marriage of his debtor, the creditor would have to consider: (1) whether the debtor would marry at all, (2) whether the spouses would adopt a separation of property regime, and (3) if the spouses fail to adopt a separation of property regime, the amount of assets the nonobligor spouse would bring into the community.

to avoid liability by other means. For example, a spouse may limit immediate input into the community or limit future contributions to the community. A spouse also may insist on a separation of property regime modified to resemble the Quebec model⁹² and still obtain approximately the same benefits of the growth of the community and the obligor spouse's income.

An argument against allowing such separation of debts provisions does not come from the rights of creditors to reach the community, for they have no such right. The spouses could specify a complete separation of property regime, leaving each creditor with no access to the other spouse's assets. The argument, instead, has to be based on a possible violation of the provision of article 2330 which prohibits agreements that would "limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community."⁹³ The phrase "obligate the community" presumably refers to the power of one spouse to contract debts which are collectible out of the community property. However, even if this argument is accepted, the provision applies by its terms to debts contracted during the existence of the community; the provision does not extend to debts contracted before the marriage, and it still ought to be permissible to limit the access of antenuptial debtors to the community.

However, it is also arguable that the conceptual framework of the articles governing satisfaction of debts contemplates satisfaction of antenuptial debts from community property. Article 2363 lists three kinds of separate obligations categorized according to the time the obligation is incurred: (1) those incurred prior to the establishment of the community, (2) those incurred during the community, and (3) those incurred after the community is terminated.⁹⁴ Implicit in the structure of article 2357 is that a separate obligation incurred after the community is terminated cannot be satisfied from the former community. In that instance, the Code sets up a limitation by exclusion, which is based on the time the obligation is incurred.⁹⁵ Yet article 2345, which allows separate obligations to be satisfied during the community regime from community property, does not limit separate obligations as to the time incurred and thus includes both separate debts incurred during the community *and* antenuptial debts.

92. See text at notes 140-153, *infra*.

93. LA. CIV. CODE art. 2330.

94. LA. CIV. CODE art. 2363.

95. LA. CIV. CODE art. 2357. See also Succession of Acosta, 396 So. 2d 499 (La. App. 4th Cir. 1981) (contracts entered into by a widow after the termination of the community by the death of one spouse but prior to the settlement of the estate were separate property of the wife and did not create obligations in favor of the community).

Behind this statutory authority lies the possibly conflicting policies of not allowing third parties to become partners in the community and of assuring that a debtor's property remains the common pledge of his creditors. The extensive reimbursement articles help align these two goals by placing the ultimate burden of accounting on the spouses. Since an undivided one-half of the community belongs to the obligor spouse,⁹⁶ a clause eliminating the liability of the community for prenuptial debts removes this property from the creditor's reach. This type of limitation on a donation from a stranger would not be effective as to a nonparty creditor;⁹⁷ and spouses, through a matrimonial agreement, should not be able to circumvent this restriction. On first impression, a clause limiting the liability of the community to the one-half owned by the obligor would appear to be reasonable. However, if a creditor attempts to execute on this half of the community or on a particular community thing, he is prohibited from doing so by express Code articles.⁹⁸ Although spouses may *voluntarily* partition the community, they may not *judicially* partition it during the community property regime.⁹⁹ Nor can a spouse evade the mandate¹⁰⁰ of article 2337 and alienate his share of the community prior to termination. The policy behind these articles is to keep strangers from becoming partners in the community—a relationship which is far more personal than a mere partnership or joint ownership. Therefore, a creditor apparently is unable to execute on the obligor spouse's undivided one-half of the community. This result, however, is contrary to article 3183, which makes the property of the debtor the common pledge of his creditor. Thus, if a separation of debts clause *is* allowed, the necessary conclusion is that the legislature intended article 2337 to limit significantly article 3183.

Rather than concluding that the legislature impliedly intended this result, a better view reconciles article 2337 with article 3183 by allowing an antenuptial creditor to reach *all* community property by reason of its "attachment" to the debtor's patrimony. The augmentation of the debtor spouse's patrimony is no more of a windfall to the creditor than that which he receives when the debtor unexpectedly comes into a large inheritance. Only by allowing a creditor to reach the whole interest in a community thing is it possible to prevent him from becoming a partner in the community. The advantage to the debtor spouse is compensated by rendering the nondebtor spouse a "creditor"

96. LA. CIV. CODE art. 2336.

97. See text at notes 44-45, *supra*.

98. LA. CIV. CODE arts. 2336 & 2337.

99. LA. CIV. CODE art. 2336.

100. See LA. CIV. CODE art. 2337, comment (b).

within the reimbursement scheme. Thus, a burden is placed upon the nonobligor spouse to ascertain the credit status of the other spouse. Placing the burden on the spouses is more reasonable than allowing the creditor to interfere in the community. Although a separation of debts clause appears to be prohibited, a nondebtor spouse has other means of protection, provided the spouses are willing to forego whatever benefits the community may proffer, by adopting a separation of property regime. If this protective measure is taken, the creditor will suffer a corresponding loss of ability to reach the property of the nondebtor spouse.

Modification of Community Management

Under the legal regime, both spouses acting alone have equal management capacity.¹⁰¹ As an exception, a spouse is given exclusive management authority over the movable assets of a community business he alone manages,¹⁰² over movables issued or registered in his name only,¹⁰³ and over his interest in a partnership.¹⁰⁴ Also, concurrence of both spouses is required to alienate, lease, or encumber community immovables, furniture located in the family home, all or substantially all of the assets of a community enterprise, and community movables registered in both spouses' names.¹⁰⁵ The donation of community property to a third person, other than a usual or customary gift, also requires concurrence of both spouses.¹⁰⁶

Attempts to change these powers by matrimonial agreement are limited by article 2330, which prohibits a modified community which limits with respect to third persons "the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property." However, the concurrence requirements may be altered by a matrimonial agreement *without* violating article 2330's prohibitions. Because the joint management provisions are not instances in which one spouse alone has any power, a spouse who alters his right to concur does not *limit* the ability, with respect to third persons, that he alone has to alienate, encumber, or lease community property. On the contrary, the other spouse obtains *more* power to act alone than the legal regime gives him.¹⁰⁷

101. See generally, Note, *Management of Community Assets: Incorporeal Movables*, 42 LA. L. REV. 770 (1982).

102. LA. CIV. CODE art. 2350.

103. LA. CIV. CODE art. 2351.

104. LA. CIV. CODE art. 2352.

105. LA. CIV. CODE art. 2347.

106. LA. CIV. CODE art. 2349.

107. See Spaht & Samuel, *supra* note 14 at 103.

The ability of a spouse to alter his right to concur may be limited by article 2348. This article gives a spouse the power expressly to renounce the right to concur as to: (1) the alienation, lease, or encumbrance of some or all of the community immovables, (2) the alienation, lease, or encumbrance of all of a community enterprise, and (3) participation in the management of a community enterprise. Because this listing is not coextensive with article 2347's enumeration of the instances where concurrence is required, *dual* management may be required for the alienation, lease, or encumbrance of furniture or furnishings while located in the family home and for movables registered jointly in the spouses' names. The rationale behind the requirement of dual management of these assets could be due to their extremely mobile character. However, a more likely reconciliation of the articles is that article 2348's enumeration of permitted *unilateral renunciations* of the right to concur does not limit the more general ability to avoid such requirements by *matrimonial agreements* to which both parties consent. As a matter of basic policy, it is hard to understand why one should be able to renounce the right to concur in the alienation of a valuable immovable, but not with respect to an old couch.

Modifications of the Rules Governing Termination of the Community

Although the usual rule at dissolution is to divide the community equally, a matrimonial agreement may provide for ownership of the community in other portions upon dissolution of the community by death.¹⁰⁸ The purpose of this type of stipulation is to favor the surviving spouse, and it is made usually on the condition that there be no children of the marriage¹⁰⁹ or on the condition that the allocation will not impinge on the legitime. Such a stipulation would be subject to the rights of creditors and could be attacked as an indirect donation or as a contract in fraud of creditors.¹¹⁰

Spouses also may want to alter the provisions concerning reimbursement for community funds used for the acquisition, use, improvement, or benefit of separate property or used to pay separate debts

108. LA. CIV. CODE art. 2330, comment (d). See generally Note, *Termination of the Community*, 42 LA. L. REV. 789 (1982).

109. See 3 M. PLANIOL, *supra* note 15, at pt. 1, no. 1311 at 302. See also *Fabre v. Sparks*, 12 Rob. 31 (La. 1845); *Criswell v. Seay*, 19 La. 528 (1841); *Parquin v. Finch*, 1 Mart. (La.) 465 (La. 1823).

110. See text at note 45, *supra*. Two possible classes of creditors can sue to annul the contract—those whose rights arise before the agreement is executed and those whose rights arise before dissolution. Arguably, any predissolution creditor should be able to annul this contract. This type of contract is subject to a suspensive condition (death of the spouse), and creditors are not actually prejudiced until the happening of the condition—dissolution by death.

of the other spouse.¹¹¹ Under the legal regime, the measure of compensation is one-half the amount or value of the community property used unless the increase in value was due to the uncompensated labor of either spouse, in which case the other spouse is entitled to one-half the increase in value.¹¹² In an inflationary time, this type of compensation often results in a transfer of wealth to the owner of the separate asset because the community is being reimbursed with inflated dollars. Even if the amount of community property used is computed in inflation-adjusted dollars, the increase in value of the separate asset may be far greater than the sum of money expended. To prevent the possibility of augmenting the separate property of one spouse in times of inflation, the spouses could provide in a matrimonial agreement that the increase in value of the separate property adjusted for inflation will be the measure of recovery upon termination.¹¹³

In some instances, spouses may want to waive any claim to reimbursement, by a clause in their matrimonial agreement. For example, a wealthy spouse might want to pay for all the expenses of the marriage from his separate property and might not want the poorer spouse to face a claim for reimbursement. Although creditors of the wealthy spouse at dissolution might attack such a waiver by the use of a revocatory action,¹¹⁴ it is doubtful the rights of the creditors would have been prejudiced. Had no waiver been in the matrimonial agreement, the spouse could have refused to exercise his right to reimbursement. If the spouse so elected, the creditors' only remedy would be to use the oblique action¹¹⁵—whereby the creditors would exercise the nonpersonal¹¹⁶ right which the spouse refused to exercise. Whether the right to reimbursement is personal to the debtor is not settled. However, according to article 1991, a creditor may not require the separation of property between husband and wife, make their debtor accept a donation *inter vivos*, or call for a coheir of the debtor to collate, as these rights are personal to the debtor.¹¹⁷ The policy behind the article seems to be that of keeping third parties from interfering in the family unit. Because forcing a spouse to demand reimbursement arguably is as personal to the debtor as the examples cited in article 1991, the policy of promoting family harmony would be fur-

111. LA. CIV. CODE arts. 2358, 2364 & 2366.

112. LA. CIV. CODE arts. 2358 & 2364-2368.

113. See Bartke, *supra* note 26, at 329; Spaht & Samuel, *supra* note 14, at 142 (the advance is treated as an interest-free loan, rather than as an investment; risk of loss is eliminated, as is the risk of gain).

114. LA. CIV. CODE arts. 1968-1994. See text at note 45, *supra*.

115. LA. CIV. CODE art. 1990.

116. See text at note 45, *supra*.

117. LA. CIV. CODE art. 1991.

thered by characterizing the right to claim reimbursement as personal to the debtor, thus precluding a successful oblique action by the creditor. Furthermore, the comment to article 2358 states that the articles governing claims for reimbursement are applicable only between the spouses and their universal successors.¹¹⁸ Perhaps this comment indicates that the right to reimbursement is to be considered personal to the spouses, since a universal successor "represents the person of the deceased, and succeeds to all his rights and charges."¹¹⁹ If this right is considered personal to the debtor, the oblique action cannot be used by the creditor. The spouse furthermore can use the same argument to thwart the revocatory action when there is a waiver provision in the matrimonial agreement. Although the personal character of the right is irrelevant in a revocatory action, the spouse can argue that the creditor was not prejudiced—an essential element for a successful revocatory action.¹²⁰ Since the creditor has no remedy when there is a refusal to exercise the right, the waiver of this right in a matrimonial agreement could not be said to prejudice the creditor's rights.

Separation of Property Regimes

Articles 2370-2376 of the Civil Code provide the rules for a regime of separation of property. This type of regime may be desirable for several reasons. Through the use of the legal regime, spouses may not be able to achieve the management scheme they want due to the limitation of article 2330;¹²¹ similarly, spouses who wish to limit the liability of the community for premarital debts¹²² may want to do so through a separation of property regime. If, in their matrimonial agreement,¹²³ the spouses simply establish a regime of separation of property without further provisions, the codal scheme of articles 2370-2376 will be in effect. In this scheme, ownership of *all* property is separate. Each spouse has the "sole"¹²⁴ management of his property without the need for the concurrence or consent of the other spouse.¹²⁵ Each spouse is solidarily liable for necessities for himself and the

118. LA. CIV. CODE art. 2358, comment.

119. LA. CIV. CODE art. 3556 (28).

120. LA. CIV. CODE art. 1969.

121. See text at notes 44-50, *supra*.

122. See text at notes 47-50, *supra*.

123. LA. CIV. CODE art. 2370. The separation of property regime must be created by a matrimonial agreement or must result from a judgment of separation in order to be effective.

124. This aspect contrasts sharply with the legal regime which provides for sole (arts. 2348, 2350, 2351 & 2352), equal (art. 2346), and joint management (art. 2347).

125. LA. CIV. CODE art. 2371.

family¹²⁶ and is proportionately liable for expenses of the marriage, according to his means.¹²⁷ If the debt is neither an expense of the marriage nor a "necessary," the obligor spouse is solely liable. Also, spouses who adopt a regime of separation of property, rather than the legal regime, will be making a significant change in the area of intestate succession, as separate property devolves differently than does community property.¹²⁸ If the spouses are separate in property and one spouse is adjudicated a bankrupt, the creditors of the bankrupt spouse will not be able to reach the property of the other spouse; they could have reached it, however, had the spouses been living in community.¹²⁹

Some spouses may want to avoid the automatic consequences of the codal separation of property scheme yet retain the flexibility not afforded by a simple modification of the *legal* regime due to the limitation imposed by article 2330. If a spouse wants a type of exclusive management of the assets he acquires but is not willing to eliminate the advantages of community property ownership, alteration of the separation of property regime may provide a possible solution.¹³⁰ A modified separation of property regime may be particularly beneficial for the "traditional" family in which one spouse is the sole wage earner and acquirer of property and one spouse works in the home for no compensation, as well as for the "two-income" family in which both spouses earn and acquire property. The "traditional" couple may want to contract a modified separation of property regime for several reasons. The assets acquired by the wage-earning spouse would remain in the patrimony of the acquiring spouse subject to this exclusive

126. LA. CIV. CODE art. 2372.

127. LA. CIV. CODE art. 2373. The matrimonial agreement may specify the relative contributions of the spouses to the expenses of the marriage. Contributions may be made, for example, on a percentage basis or on a class of debts basis.

128. If there are no children of the marriage, separate property of the deceased passes to his brothers and sisters or their descendants subject to a usufruct in favor of the surviving parent or parents. The surviving spouse succeeds to the property only if there are no children of the marriage, or brothers and sisters or their descendants, or parents of the deceased. On the other hand, community property passes to the surviving spouse if there are no descendants. LA. CIV. CODE arts. 889-894.

129. See Pedlar, *Community Property and the Bankruptcy Reform Act of 1978*, 11 ST. MARY'S L.J. 349, 357-358, (1979).

130. It is important to refer to this regime as a modification of the separation of property regime to avoid the operation of article 2330—which would be implicated if the agreement is classified as a modification of the legal regime. Prudence might also dictate including the following provision: "This agreement shall be governed only by the separation of property articles, subject to any modifications and additions included in this instrument. The rules governing the legal regime of community property shall not apply, and are hereby wholly excluded to the extent allowed by law."

control and management. Creditors of the nonwage-earning spouse would not be able to seize the assets acquired by the wage-earning spouse. Upon termination, the nonwage-earning spouse would have the opportunity to accept or reject partition of the marital assets which has been subject to sole management by the acquiring spouse. A "two-income" family may be desirous of a regime that allows separate, exclusive management by each spouse of the assets he acquires during the marriage, yet which also provides the ultimate advantages of co-ownership, *e.g.*, partition and distribution of assets upon termination.¹³¹

Since spouses are allowed to deviate so drastically from the provisions of the legal regime, and but for the limitation of article 2330 could reach a regime similar to the modified separation of property regime, it seems that they should also be able to deviate, by matrimonial agreement, from the provisions of the codal separation of property regime. The text of article 2328 implies that spouses have this ability. That article gives spouses the power to "establish by matrimonial agreement a regime of separation of property" or to "modify *the* legal regime."¹³² In the phrase "a regime of separation of property," the word "a" implies there may be more than one type of separation of property regime. On the other hand, in the phrase "*the* legal regime," the word "the" implies there is only one legal regime. The spirit of the legislation is to allow the fullest freedom to modify agreements as to their content, within the limits prescribed by public policy. For these reasons, spouses should be able to modify the codal separation of property regime in order to provide for their needs.

Such modifications may be limited by the rules governing necessities¹³³ and expenses of the marriage.¹³⁴ Article 2372 makes the spouses solidarily liable for an obligation incurred for necessities. This solidary liability applies only as to third parties; between themselves, the spouses may apportion the debt according to their matrimonial agreement, or in the absence of such a provision, according to their means.¹³⁵ Although spouses may *modify* this solidary liability for necessities between themselves, they may not alter it as to third parties by *renouncing* one spouse's solidary liability with the other spouse. Even though the comments to article 2372 do not characterize the

131. See text at notes 160-163, *infra*.

132. LA. CIV. CODE art. 2328 (emphasis added).

133. LA. CIV. CODE art. 2372.

134. LA. CIV. CODE art. 2373.

135. LA. CIV. CODE arts. 2372, comment (a), & 2373. Necessaries are a subset of the category of expenses of the marriage, and therefore spouses may apportion payment for these necessities among themselves.

article as a rule of public order, its source is French Civil Code article 220 which makes solidary liability for necessities a matter of public order.¹³⁶

Article 2373 allows apportionment between the spouses as to the expenses of the marriage. This allocation can be accomplished by a specific stipulation as to particular expenses or by a pro rata contribution to the expenses of the marriage. In the absence of such provisions, the expenses of the marriage will be borne according to the means of the spouses.¹³⁷ A spouse's responsibility allocated by apportioning necessities or the expenses of the marriage may not fall below the level of mutual support imposed by article 119.¹³⁸

Possible Models for a Modified Separation of Property Regime

The general trend in most community property jurisdictions has been to give the spouses more flexibility in choosing a matrimonial property regime.¹³⁹ Several of these jurisdictions, including Louisiana, recently have rewritten their matrimonial regimes law, making their legal regimes more liberal and giving spouses more freedom to contract their own regime. Some of these legal regimes may be used as models for possible modifications of the codal separation of property regime. They offer these attractive features: (1) each spouse has exclusive management over the property he acquires, and (2) the advantage of co-ownership of property acquired by either spouse is retained. The following discussion will focus on two possible models, the Quebec partnership of acquests¹⁴⁰ and the 1977 proposal by the Louisiana Law Institute.¹⁴¹

The legal regime of Quebec, sometimes referred to as a "deferred community," is the partnership of acquests. All marital property

136. See Spaht & Samuel, *supra* note 14, at 105. The French Civil Code, however, circumscribes this joint obligation. The limitation does not apply for expenditures manifestly excessive, with regard to the way of life of the household, to the utility or inutility of the transaction, to the good or bad faith of the contracting third party. It does not hold either for obligations resulting from installment purchases if they have not been concluded with the consent of the two spouses.

FRENCH CIV. CODE art. 220 (J. Crabb trans. 1977).

137. This is a change in the law. Prior to the enactment of the "equal management" regime, the measure of contribution in the absence of an agreement was up to one-half of the *income* of the wife. LA. CIV. CODE art. 2395 (repealed by 1979 La. Acts, No. 709, § 1).

138. The spouses owe each other mutually, fidelity, support, and assistance. LA. CIV. CODE art. 119.

139. See text at 25-26, *supra*.

140. CIV. CODE OF QUE. arts. 480-517.

141. La. H.B. 783, Reg. Sess. (1977).

is divided into private property and acquests,¹⁴² with a presumption that property acquired during the existence of the regime is an acquest.¹⁴³ Acquests include all property not declared to be private property, proceeds of work of the spouse during the regime, fruits and income of all private property or acquests, any monetary benefits from disability allowances, support judgments, retirement pensions, and annuities, and proceeds or income arising from intellectual and industrial property rights.¹⁴⁴ Private property is analogous to our separate property. Each spouse freely holds and manages his private property and any acquests he may acquire during the regime,¹⁴⁵ with the exception that concurrence of the spouses is required in order to dispose of acquests *inter vivos* other than modest amounts or customary gifts.¹⁴⁶ During the existence of the regime, each spouse is solely liable, out of his acquests and private property, for all debts he incurred either during or prior to the existence of the regime. The spouse is not liable for the debts of the other spouse while the regime exists.¹⁴⁷

After termination and partition, a creditor of one spouse may sue the nondebtor spouse, but only to the extent of the benefit derived by him.¹⁴⁸ Upon termination of the regime, each spouse retains his private property and has the opportunity to accept or renounce the partition of the acquests of the other spouse.¹⁴⁹ If a spouse renounces his right to a partition, his creditors may attack the renunciation as being prejudicial to their rights and may accept the share of the spouse to the extent of their claim.¹⁵⁰ On the other hand, if the partition of the spouse's acquests is accepted, the patrimony of the partitioning spouse is divided into two masses: one comprising the private property and the other the acquests.¹⁵¹ A statement is compiled of the compensation owed by one mass to the other, *e.g.*, reimbursement for certain debts paid with separate funds, or for private property enhanced through the use of acquests.¹⁵² Once this settlement is completed,

142. CIV. CODE OF QUE art. 480.

143. CIV. CODE OF QUE. art. 481.

144. CIV. CODE OF QUE. arts. 481, 485 & 490.

145. CIV. CODE OF QUE. art. 493.

146. CIV. CODE OF QUE. art. 494.

147. CIV. CODE OF QUE. art. 496.

148. CIV. CODE OF QUE. art. 517. The spouse has recourse against the other for one-half of the sums that he has been forced to pay.

149. CIV. CODE OF QUE. art. 499.

150. CIV. CODE OF QUE. art. 502.

151. CIV. CODE OF QUE. art. 507.

152. CIV. CODE OF QUE. arts. 483, 484 & 508. The compensation is measured by the enrichment of one mass to the detriment of the other, as of the day the regime dissolves. CIV. CODE OF QUE. art. 509.

the mass of acquests is divided equally between the spouses.¹⁵³

The proposal of the Louisiana Law Institute differs from the Quebec model mainly in its management and dissolution provisions. The classification of assets is similar: separate property is analogous to private property and community property is analogous to acquests. The Louisiana model also classifies as separate property minerals produced from separate property and revenues derived from mineral rights in separate property.¹⁵⁴ In addition, spouses are able to file an act declaring that all income from separate property be classified permanently as separate, rather than community.¹⁵⁵ Community property is treated similar to the Quebec system with the exception that the Louisiana model categorizes damages received in a personal injury award for loss of earnings during the community regime as community property.¹⁵⁶

The major difference between the two systems is the manner in which property is managed. Each spouse has the right to possess, manage, alienate, and encumber all things produced by his *individual* effort, skill, or industry, whereas, *either* spouse may do so with things, produced by *joint* effort. Thus each spouse manages his own separate property and has sole management over part of the community, while leaving a part of the community to be managed jointly.¹⁵⁷ A spouse's liability for his debts can be satisfied out of his separate property, which is, with respect to community property, that portion under his sole administration, or with respect to joint community property, only that portion administered by the debtor spouse.¹⁵⁸

Upon dissolution, as in the Quebec model, a Louisiana spouse has the opportunity to accept or renounce the partition of the community assets administered by the other spouse.¹⁵⁹ The renouncing spouse is not liable for the debts of the other spouse, provided the renouncing spouse is not otherwise responsible for them. Nor does the renunciation impair the undivided interest of the renouncing spouse in the community property under his sole administration. A spouse may accept the partition in one of two ways. He may accept simply and

153. CIV. CODE OF QUE. arts. 513 & 514.

154. La. H.B. 783, § 2838 (7), Reg. Sess. (1977).

155. *Id.* § 2838 (5).

156. *Id.* § 2839.

157. *Id.* § 2841. The portion of the community subject to joint management arguably would be fairly small, if it exists at all; most community assets come from wages of the spouse, which would fall into the part of the community subject to his sole administration. Spouses who are partners in a business, on the other hand, would have the largest portion of their community subject to the control of either.

158. *Id.* § 2847.

159. *Id.* § 2853.

become personally liable for his portion of the debts incurred by the other spouse for their common interest. Or he may accept with benefit of inventory, in which case he is liable for the debts incurred by the other for the common interests of the spouses, but only to the extent of the value of his portion of the community property administered by the debtor spouse. Thus if the debts incurred by one spouse are greater than the undivided interest of the nondebtor spouse, the separate property and the community property the nondebtor spouse administers will not be subject to seizure by creditors of the debtor spouse. Such a contractual regime should not run afoul of the provisions of article 2330 prohibiting agreements that limit one spouse's rights to manage *community* assets, for there simply is no community to manage. A deferred sharing arrangement does not provide for a present undivided interest in the assets, which is seemingly a requisite for community property under article 2336.

A modified separation of property regime may be preferred to the legal regime in both the "traditional" family and the "two-income" family described previously.¹⁶⁰ Under the Quebec model,¹⁶¹ in the "traditional" family in which the wife works in the home and the husband is the sole wage earner, the husband is the sole acquirer of assets. Since these assets form part of his patrimony, he has sole control over most of the marital assets. The wife manages the home, and the ordinary expenses of the marriage are divided according to the spouses' matrimonial agreement. As the marital assets are in the patrimony of the wage-earning spouse, separate creditors of the wife cannot seize the assets of the marriage. The husband's creditors, however, can attack the marital assets and the husband's private property in order to satisfy the husband's separate debts. If the debt is one for necessities, the creditor can satisfy the debt from the marital assets and the private property of both spouses. The marital assets in the husband's patrimony are divided equally upon dissolution if the wife chooses to accept the partition. Thus, the wife who works in the home is assured of an eventual ownership interest. This type of regime is similar to the old "head and master" regime as long as the wife has no income. If she chooses to earn an income or receives any income from her private property, the assets become part of her patrimony subject to her sole management.

The "two-funds" model proposed by the Louisiana Law Institute¹⁶² would be substantially similar to the Quebec model in both arrange-

160. See text at notes 130-131, *supra*.

161. See text at notes 139-153, *supra*.

162. See text at notes 154-159, *supra*.

ment and effect. To lessen confusion and to avoid any potential problems caused by the prohibition of article 2330,¹⁶³ spouses should establish clearly that they are not creating a community. Thus, each spouse will have sole management of the assets he acquires during the marriage and both can manage any assets they acquire jointly. One advantage of this model over that of Quebec is acceptance of a partition with the benefit of inventory. In such a case, although the spouse has accepted the partition of assets managed solely by the other spouse, the accepting spouse is liable only for the debts incurred by the other spouse up to the amount the accepting spouse will receive through partition. A disadvantage of this model is that the joint assets managed by both spouses may be seized by the creditors of either spouse. Therefore, if the spouses have substantial joint assets and one spouse has many premarital creditors, the spouses may better protect the assets of the marriage by using the Quebec model. On the other hand, the "two-funds" system may be advantageous for spouses who have received or anticipate receiving joint donations or inheritances. The asset simply will fall into the jointly managed fund, thus avoiding uncertainty of decision concerning allocation of the sum between the spouses. Sole management by one spouse of the assets of the marriage may be a desirable goal, especially if the other spouse is physically or mentally incapacitated.

The modified separation of property regime also may provide a flexible alternative regime for the "two-income" family previously discussed. Under the Quebec model, each spouse acquires assets which become part of his own patrimony. His premarital and marital creditors can seize his private property and the marital assets in his patrimony to satisfy his obligations. Upon termination of the regime, each spouse has the opportunity to accept or renounce the partition of the marital assets managed by the other spouse. This system differs from the legal regime, for each spouse solely administers and manages the assets he brings into the marriage. In addition, creditors of one spouse cannot reach the private property or the marital assets of the other spouse prior to termination of the regime. This system differs from a separation of property regime by allowing partition of the marital assets upon dissolution of the regime. The two-fund model of the Louisiana Law Institute differs in the ways discussed previously. Both spouses have the ability to accept a partition with benefit of inventory, which may be beneficial if a spouse has incurred a substantial number of debts and his income is not sufficient to meet the obligations. Also, creditors of either spouse can reach the jointly managed

163. See text at notes 47-50, *supra*.

fund of marital assets. The two-fund model may be a desirable model for spouses who work together as co-owners of a family business because the jointly produced income would fall into a jointly managed fund.

Conclusion

Despite the "comprehensive" revision of the matrimonial regimes law, some areas of community property law still need attention. A matrimonial agreement is a useful device to avoid these potential problem areas. A well-written matrimonial agreement can provide an alternative to the legal regime, whether it be a simple modification, or a total exclusion of the legal regime. The matrimonial agreement provisions suggested in this article are not, however, the only solutions. These proposals are simply examples of the vast number of possible contractual modifications which may be used to tailor a regime to a couple's needs and which explore the limitations on creative contracting by spouses.

Laura Schofield Bailey