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# **PROBLEMS IN THE LAW OF SUCCESSIONS: SUCCESSION REPRESENTATIVES, SURVIVING SPOUSES, AND USUFRUCTUARIES**

*Karl W. Cavanaugh\**

## *Introduction*

The Louisiana Code of Civil Procedure articles on administration of successions are clear and admirably comprehensive. These provisions should make administering a succession a straightforward matter. Problems arise, however, from the substantive law which the Code of Civil Procedure implements. Extensive revisions to the substantive law since the Code of Civil Procedure was adopted have, probably unwittingly, reopened issues previously settled. This article concentrates on two of those issues. First, what property does the succession representative administer? Does he administer the decedent's one-half interest in the community or does he administer the whole community? Second, what debts may the succession representative pay? May he pay to the extent of the decedent's liability or to the extent of community liability? Or is there some other measure? A related issue concerns the role that a usufructuary plays in the administration of a succession. The Civil Code provisions on community property have never coordinated perfectly with the law on administration of successions. New legislation in the areas of community property and usufruct has aggravated this lack of coordination.

Prior to the enactment of the new legislation, the Civil Code never detailed any machinery for liquidation and settlement of the community after it terminated. This absence was an organic defect in Louisiana law. The courts, for want of better tools, applied the law of partition if the community terminated during the lifetime of the spouses, and the law of successions if it terminated by the death of a spouse. The new legislation on community property again fails to provide machinery for post-termination liquidation, and while death is recognized as an event terminating the community, many of the substantive provisions on debts

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seem to contemplate a termination *inter vivos*.<sup>1</sup> A special statute on partition between spouses likewise appears to contemplate that the community was terminated while both spouses were living.<sup>2</sup>

A partition offers machinery, however cumbersome, to deal with the former community if both spouses are living, but death creates problems which simply do not arise when a community terminates by other means. The surviving spouse and the heirs may, for instance, have only sketchy knowledge of the decedent's business affairs, and, hence, it may take some time and effort to identify assets and liabilities. Furthermore, the debtor-creditor relationships created by the decedent may have a significant personal element to them, so that business creditors may be unwilling to continue the relationship with the decedent's successors. If the decedent was a mortgagor, his death is an act of default which allows the creditor to accelerate the debt under the terms of commonly used mortgages, including those of savings and loan associations.<sup>3</sup> Buy-sell agreements among business associates are also triggered by death, but frequently are not triggered by divorce or legal separation. Death may result in the imposition of certain taxes, which in large estates are of such moment that estate planning is a highly technical specialty in the legal profession. Property rights of minors may be initiated by death of the ancestor, and if some of these minors are grandchildren, the heirs may be widely scattered geographically. Death frequently initiates the rights of a usufructuary. If that usufructuary happens to be the second spouse of the decedent and the heirs are children of a prior marriage, these parties have violently conflicting interests which are not easily accommodated.<sup>4</sup> Heirs are, in general, strangers to the community, moreso when they are unrelated to the surviving spouse.

Indeed, whenever there is both a surviving spouse and children, there is a conflict among the generations which does not exist when the community terminates by legal separation or divorce. If substantial assets and liabilities exist, the succession may require administration. Universal succession, established by Civil Code articles 871, 872, and 877-879, as

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1. Spacht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 *La. L. Rev.* 83, 141, 141 n. 354 (1979) indicate that it was widely assumed, even in the Legislature, that the law of successions applied if the community terminated by death. The Legislature rejected certain proposed legislation dealing with settlement of the community after termination.

2. *La. R.S.* 9:2801 (1983).

3. Mortgages, of course, do not always demand payment in full upon the death of the mortgagor, and if they do, there may be credit life insurance to extinguish the debt. Death is frequently an act of default allowing acceleration of the debt in many promissory notes and certain other contracts.

4. See, e.g., *Succession of Pyle*, 434 *So. 2d* 523 (*La. App.* 2d Cir. 1983).

amended, makes the heirs of the decedent personally liable for the decedent's debts, unless the heirs accept under benefit of inventory, that is, accept the residuum after an administration. An administration consists of partial or complete liquidation of the estate and satisfaction of creditors prior to any division of the assets among the ultimate successors. Its primary purpose is to pay creditors so that the residuum may be delivered to the heirs, who accept under benefit of inventory, free of creditors' claims. Even if the successors attempt to avoid an administration by accepting the succession unconditionally, a creditor can compel the successors to secure his debt or force an administration if the security is not furnished.<sup>5</sup> Code of Civil Procedure article 3302, requiring a three month delay before payment of creditors (intended to allow all creditors to present their claims before assets are distributed), and article 3303, on ranking of claims (designed for equitable treatment of all creditors), provide valuable protections which illustrate the liquidation/satisfaction-of-creditors function of an administration. Administration proceedings resemble a corporate liquidation or even a bankruptcy liquidation in which all claims, of whatever nature, against certain assets are consolidated in a single proceeding.

The partition statute, on the other hand, proposes to divide assets without any sort of liquidation. It too contemplates a division of debts to some extent, but it neither intends nor provides the machinery for the liquidation of the community and the satisfaction of creditors. Instead, it merely assigns responsibility for debts, *as between the spouses*, without diminishing creditors' rights.<sup>6</sup> Use of the partition statute when the community is terminated by the death of a spouse would leave the heirs with contingent liabilities for community debts until such time as those debts were fully discharged, and, as noted below, it is by no means clear that such debts can be discharged in full in succession proceedings for the deceased spouse. The partition statute simply does not offer a solution to the unique problems created by death.

#### *What a Succession Representative Administers*

So, what does the succession representative administer? The question could hardly have arisen in the nineteenth century. If the wife died,

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5. La. Code Civ. P. arts. 3007, 3008. Furnishing security when the assets are already encumbered (negating the possibility of a first mortgage) can be a problem. If the heirs apply for a bond, the insurance industry treats an undertaking of this type as a supersedeas bond. Insurers frequently will not issue a supersedeas bond without adequate collateral, usually cash. In practice, it is frequently necessary to pay off the demanding creditor or allow an administration.

6. Succession assets cannot be seized by unsecured creditors or judgment creditors while the succession is under administration. La. Code Civ. P. arts. 3247, 3248. Post partition seizures of community property by community creditors, however, are quite possible.

the husband remained head and master of the community, and the community itself maintained a fictitious existence during which the husband could use community property to satisfy community debts.<sup>7</sup> The succession of the husband, however, involved that of the community itself, and his succession representative could lawfully sell community property to pay community debts in the husband's succession.<sup>8</sup> This could not be done in the wife's succession over the objection of the husband.<sup>9</sup> These principles clearly have no relevance subsequent to the new community property legislation.

By their terms, the pertinent articles of the Code of Civil Procedure<sup>10</sup> give the succession representative authority over property of "the succession." Logically, that means the decedent's half of the community (and any separate property which exists). Nevertheless, the statutes do not use that language and they could be interpreted, without too much violence, to give the succession representative full control over the entire former community. There are sound practical reasons for accepting the second interpretation.

Under the new legislation, it is quite possible for the community property to be liable for debts for which the decedent had no personal liability.<sup>11</sup> Stated otherwise, the decedent has *in rem* but not personal liability for a community debt incurred by the other spouse. Succession assets are vulnerable, at some point, to a community creditor's *in rem* claim, and that liability clearly cannot be discharged by paying half the debt and referring the creditor to the surviving spouse for the other half. The liquidation/satisfaction-of-creditors function of an administration is best served by giving the succession representative authority over the entire community. If the decedent incurred the community debt, then the decedent would have personal liability and the surviving spouse *in rem* liability. It still makes sense for the succession representative to have authority to use community property to discharge community debts, as the decedent could have done during his or her lifetime. If the

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7. Succession of Dumestre, 42 La. Ann. 411, 7 So. 624 (1890). The invention of the "fictitious community" was one of the courts' responses to the previously mentioned organic defect in the law, i.e., the absence of any machinery for liquidating and settling a terminated community.

8. Fontenot v. Fontenot, 157 La. 511, 102 So. 590 (1925); Succession of Bertrand, 123 La. 784, 49 So. 524 (1909); Berthelot v. Fitch, 45 La. Ann. 346, 12 So. 625 (1893); Succession of Lamm, 40 La. Ann. 312, 4 So. 53 (1888); Oriol v. Herndon, 38 La. Ann. 759 (1886); Durham v. Williams, 32 La. Ann. 162 (1880).

9. Hewes v. Baxter, 46 La. Ann. 1287, 16 So. 199 (1894); Succession of Fernandez, 50 La. Ann. 564, 23 So. 457 (1898); Succession of Merrick, 35 La. Ann. 296 (1883); Succession of Bright, 38 La. Ann. 141 (1886); Bourgeois v. Ducos, 182 So. 2d 539 (La. App. 1st Cir. 1966).

10. La. Code Civ. P. arts. 3191, 3211, 3221.

11. La. Civ. Code art. 2357.

decedent maintained a securities trading account, it may be very important to dispose of this community asset quickly because of a volatile market. The Code of Civil Procedure provides the tools for a succession representative to do so,<sup>12</sup> and it is highly desirable that he have the power to dispose of the whole asset rather than half of it. It makes little sense, for instance, for a succession representative to administer one-half of a going business which was community property. Indeed, unless the surviving spouse is the succession representative, the successful operation of the business in these circumstances becomes doubtful.<sup>13</sup>

There is some dubious jurisprudential authority that the succession representative does, at least in certain circumstances, administer the entire community. *Succession of Sharp*<sup>14</sup> declared that the purpose of an administration is to liquidate the community in order to divide the net assets between the surviving spouse and the heirs or legatees. This rationale reflects the old notion that the spouses have only an interest in the residuum after community creditors are paid, and it ignores the usufruct of the surviving spouse. Relying on earlier cases,<sup>15</sup> the court explained that the expense of administration was usually divided equally between the decedent's share and that of the surviving spouse. But, if the administration of the community was unnecessary (how could it be in view of the rationale?), the court held that the expenses were payable solely from the decedent's share. *Succession of Sharp* appears to assume, without discussion, that a succession representative can administer the entire community.

*Succession of Caffarel*,<sup>16</sup> held that a surviving spouse can be placed in possession of her half of the community by her petition alone, under Code of Civil Procedure articles 3001-3004 (in spite of articles 3361 and 3362), even if the succession is being administered by a succession

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12. La. Code Civ. P. art. 3285.

13. La. Code Civ. P. arts. 3224 et seq. allow the succession representative to be authorized to continue a going business. The surviving spouse, of course, is very often the succession representative. Surviving spouses are as variable as the human race itself, so generalizations are difficult. It can be stated, however, safely that if the surviving spouse is feeble, bedridden, or senile, someone else should be and usually is the succession representative. It is important to realize that successions normally deal with property of elderly people. The surviving spouse in such instances is likely to be elderly, too. Frequently, an elderly surviving spouse can be dominated and manipulated by one of the children. Counsel must tread warily in such situations if the surviving spouse is nominally the succession representative. Counsel must remember that the other children might well have taken a different view of matters if the dominating child had been proposed as the succession representative in the first instance.

14. 288 So. 2d 413 (La. App. 4th Cir. 1973).

15. *Succession of Helis*, 226 La. 133, 75 So. 2d 221 (1954); *Succession of Ratcliff*, 212 La. 563, 33 So. 2d 114 (1947); *Succession of Bertrand*, 123 La. 784, 49 So. 524 (1909).

16. 378 So. 2d 202 (La. App. 4th Cir. 1979).

representative. Indeed, the court upheld a judgment placing the widow in possession of the *community*, as owner of one-half and as usufructuary of the other half. Given the powers of the usufructuary under current law, what functions can the succession representative perform after such a judgment?

A different problem arose in *Succession of Dunham*.<sup>17</sup> Did the surviving spouse (who had been removed as succession representative for breach of fiduciary duties) or the new succession representative have the power to vote corporate stock which was assumed to be community property? The court held that the succession representative could register the stock in his name and vote it over the objection of the surviving spouse. The court interpreted *Sharp* and *Caffarel* to mean that the succession representative had *de jure* possession of the surviving spouse's interest in the community until such time as the surviving spouse is placed in possession by the judgment of a court. That the surviving spouse had been removed as executrix and testamentary trustee for breach of fiduciary duties probably was an unarticulated factor in the court's decision.

*Succession of Pyle*<sup>18</sup> was a virtual repetition of *Succession of Caffarel*. The court allowed the surviving spouse (the second wife of decedent) to be placed in possession, *ex parte*, as owner of one-half of the community and as usufructuary of the other half.

As the cases now stand, *Sharp* and *Dunham* support the proposition that the succession representative administers the whole community, to the exclusion of the surviving spouse, at least in the absence of a judgment of possession. *Caffarel* and *Pyle* suggest that the surviving spouse may prevent or abort an administration by procuring, *ex parte*, a judgment of possession. These cases, together with the uncoordinated legislation, result in an unsatisfactory state of the law.

#### *Succession of Dunham and the Survival of Equal Management*

A fundamental misconception may underlie some of the cases. At the time the Code of Civil Procedure was enacted, the substantive law gave the surviving widow the option to accept the community unconditionally (and become personally liable for its debts), to renounce the community (and escape its debts), or to accept the community with benefit of inventory (and accept the residuum after payment of debts, which implies an administration).<sup>19</sup> The husband, of course, had no such option, and, indeed, the community was part of his patrimony.<sup>20</sup> The

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17. 428 So. 2d 876 (La. App. 1st Cir. 1983).

18. 424 So. 2d 523 (La. App. 2d Cir. 1983).

19. La. Civ. Code art. 2410 (1870).

20. *Creech v. Capital Mack, Inc.*, 287 So. 2d 497 (La. 1973).

widow's option to accept the community with benefit of inventory is the only statutory basis that ever existed for the administration of the terminated community, and that basis was repealed in 1980. Code of Civil Procedure articles 3001-3008, as originally enacted, were designed to implement the widow's options then provided by substantive law. Since the substantive law changed in 1980, the references to the surviving spouse in these articles are anachronisms. These articles were amended to remove references to the widow's options, and it is puzzling why any reference to the surviving spouse remains. Because of this statutory history, the precedential value of *Succession of Pyle* is quite dubious.

The rationale of *Succession of Dunham*, that the succession representative has *de jure* possession of the surviving spouse's interest in the community, might be thought to resurrect the spectre of the spouses having only an inchoate interest in community property.<sup>21</sup> The new legislation attempted to lay that spectre to rest with Civil Code article 2336.<sup>22</sup> Yet, under the *Dunham* rationale, the interest of the surviving spouse is no more "inchoate" than that of an heir whose interest has never been considered inchoate after the ancestor's death. An heir, for instance, may not sell his interest in a succession asset, even if it is the only succession asset, prior to a judgment of possession, although he may sell his entire right to inherit.<sup>23</sup> In *Succession of Stauffer*, the supreme court explained:

By the fiction of the law, "le mort saisit le vif," the heir is seised of right, but not in fact, until he accepts the succession and is sent into or takes possession according to law. As long as the property is under administration it remains in the custody of the law, and the rights of heirs and legatees are in abeyance until the administration is closed.<sup>24</sup>

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21. For federal tax purposes, it is very important that spouses own a present interest and not an inchoate interest in the community property.

22. La. Civ. Code art. 2336 states:

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime.

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. The partition is effective toward third persons when filed for registry in the manner provided by Article 2332.

23. The rule originated as a piece of nineteenth century metaphysics, but it has sound practical consequences (a contrary rule would unduly complicate succession administration), and it is well established. See *Estate of Rice v. Deville*, 240 So. 2d 379 (La. App. 3d Cir. 1970); *Fortson v. Lake, Inc.*, 176 So. 2d 703 (La. App. 4th Cir. 1965); *Succession of Griffin v. Davidson*, 125 So. 2d 30 (La. App. 2d Cir. 1960).

24. 119 La. 66, 69, 43 So. 928, 929 (1907).



Under the maxim, "le mort saisit le vif," no one doubts that the heir's ownership rights commence at the moment of the ancestor's death. These rights, however, are subject to prior claims of the ancestor's creditors, and the law may insist on an administration of the assets and, satisfaction of these creditors before the heir exercises his rights of ownership. By analogy, *Succession of Dunham* can be construed to say that although the surviving spouse owns and has always owned a half interest in the community, upon the death of one spouse the ownership rights of the surviving spouse are subject to claims of community creditors, and the law may insist on an administration of the assets before the surviving spouse exercises further rights of ownership.

This interpretation of *Succession of Dunham* may be open to some theoretical objections. But the real difficulty with *Succession of Dunham* is otherwise: however desirable it may be for the succession representative to administer the entire community, there simply is no statute which authorizes the succession representative to do so after the repeal of former Civil Code article 2410.<sup>25</sup>

Rather, the new provisions on community property may vest the surviving spouse with authority to administer the whole community to the exclusion of any succession representative! Comment (d) to Civil Code article 2336, as amended, states:

Although the patrimony of each spouse includes only an undivided one-half of the mass of the community property, each spouse has by provision of law the right to manage and dispose of the entire mass and the things that compose it, Article 2346, *infra*, subject to certain exceptions, Articles 2347, 2349, 2350, and 2352, *infra*. The spouses's right of equal management is neither a tacit mandate granted by the other spouse nor authority deriving from co-ownership. It is an attribute of any regime of community property, established by provisions of law. It may not be curtailed, insofar as third persons are concerned, by a matrimonial agreement. Art. 2330, *supra*.

The most remarkable thing about this rather mysterious language is its failure to suggest that this "right of equal management" ceases on the termination of the community. The Civil Code appears to treat management of the community as if it were a power held in solido by the spouses. The death of one creditor in solido certainly would not prevent the surviving creditor from receiving payment from the debtor and discharging the debt. By analogy, perhaps the death of one holder of

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25. La. Civ. Code art. 2410 (1870) provided: "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

a power in solido (if such a thing is possible) does not terminate the power of the other holder. Civil Code article 2357<sup>26</sup> certainly encourages the thought; that article seems to authorize the surviving spouse, after death of the other, to sell not just his or her interest but the entire community interest in a community asset to pay community debts.<sup>27</sup> This article seems to revive the nineteenth century notion of the "fictitious community" with a vengeance, although surely the draftsmen did not intend to do so.<sup>28</sup> Indeed, under article 2357, community property somewhat resembles a common law estate by the entirety, which belongs to the survivor outright. If the surviving spouse's "right of equal management" survives termination of the community and can be used post-termination as article 2357 suggests, this right completely uproots the authority of a succession representative (even a testamentary executor—Comment (b) to article 2336 seems to prevent the spouses from inhibiting the right) whenever there is a community regime and a surviving spouse. Worse still, none of the protections for heirs and creditors built into the Code of Civil Procedure appear to apply to a surviving spouse operating under Civil Code article 2357. In a *Succession of Pyle* fact pattern, where the surviving spouse is the decedent's second spouse and the heirs are children of the first marriage, the absence of these safeguards could be unfortunate. A succession representative has very serious

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26. La. Civ. Code art. 2357 provides:

An obligation incurred by a spouse before or during the community property regime, may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation.

If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up to the value of that community property.

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

27. *Caveat*: for the surviving spouse to do so after the decedent's death and prior to a judgment of possession appears clearly to violate La. R.S. 47:2407 and 2408 (1952 & Supp. 1986) which, in effect, prohibit anyone other than a succession representative from dealing with property in which the decedent had an interest prior to the filing of a State Inheritance Tax return and the payment of any tax due. In a large estate in which there will be Federal Estate Tax due, it would be extremely risky for the surviving spouse to assert such dominion over property in which the decedent had an interest.

28. Almost certainly the draftsmen visualized the possibility that after a legal separation or divorce, one spouse in possession of an asset might sell it. Such transactions are commonplace and form part of the bone and gristle of community property settlements between the former spouses while both are living. Article 2357 should be thought of as providing a penalty for such behavior. It seems dubious to import this penalty provision into the law of successions and convert it into a charter of powers for the surviving spouse, but nothing in the community property legislation excludes this possibility.

fiduciary duties.<sup>29</sup> It remains to be seen if a surviving spouse acting under article 2357 has fiduciary duties to anyone.<sup>30</sup>

If the rules of equal management survive termination of the community, creditors presumably must seek out the surviving spouse for payment of their claims. There may be problems with this procedure. The "dead man statute," Louisiana Revised Statutes (La. R.S.) 13:3721,<sup>31</sup> seeks to protect the heirs from trumped up claims against a decedent. It does so by prohibiting the use of parol evidence to prove a liability of the deceased, unless within one year from death, the creditor: (1) sues the "succession representative, heirs or legatees of the deceased"; (2) gets the succession representative to acknowledge the debt; (3) opposes a tableau of distribution which omits the debt; or (4) presents a formal proof of claim to the succession representative. None of the appropriate acts by the creditor involve the surviving spouse as such. If the surviving spouse acts under Civil Code article 2357, in lieu of a succession representative, there is no way for the creditor to comply with the statute short of the drastic and expensive procedure of suing the "heirs and legatees of the deceased."<sup>32</sup>

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29. A succession representative, rather than a trustee, is the classic fiduciary in Louisiana law. Succession of Dunham, 408 So. 2d 888 (La. 1981); Succession of Irving, 436 So. 2d 1263 (La. App. 1st Cir. 1983); Succession of Demarest, 418 So. 2d 1368 (La. App. 4th Cir. 1982); Succession of Hearn, 412 So. 2d 692 (La. App. 2d Cir. 1982); Succession of Robinson, 393 So. 2d 268 (La. App. 1st Cir. 1980); and Succession of Elrod, 362 So. 2d 1191 (La. App. 4th Cir. 1978) are illustrative.

30. See La. Civ. Code art. 2354, which provides: "A spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property." Since establishing fraud may entail carrying a quasi-criminal burden of proof, this language hardly suggests fiduciary duties. See, e.g., *Pierce v. Kyle*, 241 So. 2d 604 (La. App. 2d Cir. 1970). There is authority to the contrary, and Civil Code article 1957, as amended, specifies a preponderance of the evidence as sufficient to prove fraud. "Fraud and bad faith," however, are by no means the measure of a fiduciary's duty. A fiduciary has the highest duty imposed by law. *Edwins v. Lilly*, 422 So. 2d 1217 (La. App. 1st Cir. 1982). A fiduciary must "zealously, diligently and honestly guard and champion the rights of his principal against all other persons whomsoever." *Noe v. Roussel*, 310 So. 2d 806, 819 (La. 1975). Thus, a fiduciary must always place the interest of the principal ahead of his own interest. Succession of Simpson, 311 So. 2d 67 (La. App. 2d Cir. 1975). See generally 1 L. Oppenheim & S. Ingram, *Trusts*, § 366 in 11 Louisiana Civil Law Treatise. Article 2354 thus does not establish fiduciary duties for the spouses. Since the husband was formerly held to be a fiduciary to his wife with respect to the community, *Pitre v. Pitre*, 247 La. 594, 172 So. 2d 693 (1965), our courts might logically hold, in spite of the limited language of article 2354, that now each spouse owes fiduciary duties to the other with respect to the community.

31. La. R.S. 13:3721 (1968).

32. See also La. Civ. Code arts. 2277 and 2278. In current practice, creditors of the deceased typically present a claim to the succession representative if there is one, to the surviving spouse and heirs if they are put into possession without administration, and to any known relative of the deceased if there is no succession opened. Because expenses

By its terms, La. R.S. 13:3721 offers no protection to the surviving spouse. Can a creditor prove a trumped up claim by parol evidence against the surviving spouse? Under Civil Code article 2357, presumably the deceased spouse would have personal liability for the alleged debt (which might bring it under La. R.S. 13:3721), while the surviving spouse would have *in rem* liability. To allow the creditor to assert the claim for *in rem* liability against the surviving spouse, to prove it by parol evidence, and then to execute against assets of the former community, would utterly frustrate the policy of La. R.S. 13:3721. If the "right of equal management" survives termination of the community, it must be hoped that the courts will apply La. R.S. 13:3721 to claims made against the surviving spouse.

If the creditors must apply to the surviving spouse, instead of to a succession representative, their remedies may be problematical. Where the succession is not liquid or is insolvent, the race may be won by the swift. The wise provisions of the Code of Civil Procedure on payment of debts by a succession representative avoid an unseemly race by allowing time for all creditors to file their claims before any are paid, and then by requiring a ranking of claims by lawful priorities before court approval for payment.<sup>33</sup> Obviously, these provisions, and the three-month moratorium they impose, do not apply to a surviving spouse acting under Civil Code article 2357. There is nothing to preclude a creditor from instituting immediate collection procedures against the surviving spouse. If the creditor doubts the liquidity of the community or the intentions of the surviving spouse (who may plan to retire to Arizona), he would be well-advised to do so.

The interest of the heirs will receive much less protection in the payment of debts by the surviving spouse than it does in succession administration. The statutes requiring court approval prior to payment of alleged succession debts are designed to allow interested parties, including heirs, to enter their objections to alleged debts. If debts are paid informally by the surviving spouse, this protection is lost. The loss could be critical in a *Succession of Pyle* fact pattern if the second spouse, as surviving spouse, should decide to pay as creditors the surviving spouse and members of his or her family for alleged loans or services rendered. The inheritance of the children of the first marriage

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of the last illness are frequently so large, succession representatives are beginning to take a very hard look at medical bills when there is no insurance to discharge them. La. R.S. 13:3721 (1983) can present a formidable obstacle to medical practitioners (particularly consultants who have no direct contact with the patient or the patient's family). See, e.g., *Bourque v. Schroeder*, 418 So. 2d 25 (La. App. 3d Cir.), cert. denied, 422 So. 2d 165 (La. 1982).

33. See *Succession of Kilpatrick*, 422 So. 2d 483 (La. App. 2d Cir.), cert. denied, 429 So. 2d 126 (La. 1983).

could be wholly dissipated in this manner.<sup>34</sup> All in all, the idea that the "right of equal management" survives termination of the community is fraught with unhappy consequences. Likewise, if the "right of equal management" survives the death of one spouse, it follows logically that the spouse who dies first cannot make a valid testamentary disposition of community assets. Civil Code article 2349<sup>35</sup> requires concurrence of both spouses to donate community assets, and that language is not limited to donations inter vivos. Since Civil Code article 1572 prohibits joint wills, it remains a nice question how the concurrence of the other spouse can be validly expressed for a donation mortis causa. Since even a testamentary disposition of the decedent's interest in the community would interfere with the "right of equal management" vested in the surviving spouse,<sup>36</sup> the spouse who dies first may not be able to make a valid will with respect to community assets.<sup>37</sup> Common sense rebels at this possibility and urges that the community terminates on the death of one spouse and that the "right of equal management" terminates

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34. Compare Succession of Lacroix, 408 So. 2d 1170 (La. App. 4th Cir. 1982) in which the court held the succession representative breached fiduciary duties by treating silverware, furniture, etc. as "perishables" and selling them to relatives. Civil Code article 2354 seems to offer the only protection to the heirs against a surviving spouse's acts. When can the heirs assert a claim under article 2354? Can they assert the claim before all community debts have been paid? Must they bring a suit to partition the community via La. R.S. 9:2801 (1983) in order to assert their claim? Even that statute does not contemplate a liquidation of the former community and payment of debts. Can the heirs force a liquidation (and assert the 2354 claim) in the succession proceedings in view of *Succession of Pyle* and *Succession of Caffarel*? The absence of any clear-cut machinery for forcing a liquidation of a community terminated by death leaves the procedural aspects of the heirs' article 2354 action murky.

35. La. Civ. Code art. 2349 provides: "The donation of community property to a third person requires the concurrence of the spouses, but a spouse acting alone may make a usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation."

36. The final portion of Comment (d) to Civil Code article 2336 says of the right of equal management: "It may not be curtailed, *insofar as third persons are concerned*, by a matrimonial agreement." (emphasis added). By negative implication, this language suggests that the spouses may curtail the right of equal management *as between themselves* by matrimonial agreement. The quoted language appears to address something different from the renunciation of the right to concur in certain transactions treated in Civil Code article 2348, as the Comments thereto indicate that such renunciation is binding on third parties. The quoted language suggests that the power of testation could be reserved to the spouses by matrimonial agreement, although Comment (b) seems to deny it. But query: if it can, can a creditor be heard to object to the use of testamentary powers on the ground that such a matrimonial agreement is not binding on third parties?

37. Conversely, if the spouse who dies first does have testamentary powers, in spite of Civil Code article 2349, does this spouse have the power to dispose of the *whole community*? Comment (d) to Civil Code article 2336 seems to say that the spouse can indeed dispose of the whole community. It is hard to believe the courts will accept such a proposition.

with it. Perhaps. No Louisiana statute establishes common sense as the measurement of Civil Code article 2336 or 2349. Indeed, the Civil Code is essentially to be applied as written, and, as written, article 2349 seems to destroy the power of testation with respect to community property for the spouse who dies first.

Civil Code article 890, as amended, regarding the usufruct of the surviving spouse, offers a much sounder argument that the first spouse to die does have testamentary power with respect to community property. By the very terms of article 890, the usufruct of the surviving spouse may be denied, diminished, or enlarged by the testament of the decedent. Obviously, articles 2349 and 890 conflict rather than coordinate.

How the courts resolve the conflict between the two articles may depend very much on the facts of the first case which raises the issue. If, in the first such case, the surviving spouse merely asserts an abstract right, and the testament of the decedent does not seriously prejudice the surviving spouse in fact, the courts may be expected to support article 890 and allow testation. But if the testament directs that all the decedent's property be sold and the proceeds distributed to named legatees while denying a usufruct to the surviving spouse, the spectacle of a surviving spouse being dispossessed from the community home may tempt the court to apply article 2349 and deny power of testation with respect to community property to the spouse who dies first.

#### *Usufruct Under Universal Title*

Can the surviving spouse avoid or abort an administration by procuring a judgment of possession as suggested by *Succession of Pyle*<sup>38</sup> and *Succession of Caffarel*?<sup>39</sup> If the judgment of possession places the surviving spouse in possession of the community, as owner of one half and as usufructuary of the other, is there any duty left for the succession representative to perform? The solution reached in *Succession of Caffarel*, by aborting an administration in progress, places the succession representative in an awkward position. How is the succession representative to fulfill his duties to creditors and heirs who accept the succession under benefit of inventory? For instance, Code of Civil Procedure article 3222 requires the succession representative to deposit all funds in a fiduciary bank account. There is a penalty of twenty percent per annum interest for the failure to do so. Thus it is quite essential for the succession representative to remove from any community bank accounts the decedent's portion of the funds and deposit them in the fiduciary bank account. *Succession of Caffarel* requires the succession

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38. 434 So. 2d 523.

39. 378 So. 2d 202.

representative to violate article 3222 by delivering the funds to the surviving spouse. How are the heirs who accept under benefit of inventory to be protected from creditor's claims?

Remembering the provisions of Code of Civil Procedure article 3222, suppose that there are debts still to be paid. The surviving spouse as usufructuary has certain obligations. Civil Code article 589 provides: "Neither the universal usufructuary nor the usufructuary under universal title is liable for the debts of the succession. Nevertheless, the property subject to the usufruct may be seized and sold for the payment of succession debts." (This provision, which creates a species of *in rem* liability for the usufructuary, does not coordinate with current community property provisions on liability of spouses for debts. It is quite possible for the surviving spouse to have personal liability under article 2357 and only *in rem* liability under article 589.) Civil Code article 590 goes into further detail:

When it is necessary to satisfy a creditor of the succession, the succession representative with the authorization of the proper court or the universal successor may sell so much of the property subject to a universal usufruct or usufruct under universal title, as may be required to yield a sum for the discharge of the indebtedness. The usufructuary may prevent the sale by advancing the funds needed in accordance with the following provisions.

Article 591 proceeds to *require* the universal usufructuary to loan the funds necessary to discharge the debts of the succession, while requiring the usufructuary under universal title to contribute pro rata to the payment of such debts. Article 592 permits the usufructuary to recover the principal loaned, without interest, at the termination of the usufruct.<sup>40</sup> If the usufructuary fails to do so, the "universal successor" may make the loan and collect interest, presumably at the legal rate, from the usufructuary during the usufruct, or sell part of the property subject to the usufruct.

While the comments to these articles state that they reflect no change in the law, it is significant that all the cases cited are at least fifty years

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40. This backhanded procedure can have an unfortunate side effect in large estates where Federal Estate Tax is due. Although the debt of the children to the surviving spouse (as usufructuary) for the loan may be extinguished by confusion on the death of the surviving spouse, the debt may be an asset of the surviving spouse's estate for purposes of calculating Federal Estate Tax. The net result is that Federal Estate Tax is paid (in the succession of the surviving spouse) on the *debts* owed in the succession of the spouse first to die. Likewise, provisions of the Federal Income Tax laws on interest-free loans may require the usufructuary to take into income a certain amount of interest for tax purposes although no interest in fact is received.

old and many are from the nineteenth century. These Civil Code articles apparently apply even if the surviving spouse is sent into possession in the *Succession of Pyle* fashion, so they may have a significant future. Working through all the verbiage, one concludes that the usufructuary's rights are subordinated to those of succession creditors and that the succession representative does have a role to play even if the surviving spouse is sent into possession of the community. He appears to have the duty to apply to the usufructuary for the loan to pay succession debts, and if the loan is not made he can seek court approval for the sale of property subject to the usufruct to pay debts, even after the surviving spouse is placed in possession by judgment of the court as in *Succession of Pyle*.

What are "succession debts" in this context? Louisiana law distinguishes between debts of the decedent and debts of the estate.<sup>41</sup> Funeral expenses and other post mortem expenses are considered debts of the estate, not debts of the decedent. Comment (d) to Civil Code Article 589 states that the contemplated succession debts are debts of the deceased and "administration charges, if the estate of the deceased is under administration." This language leaves open the status of funeral expenses and death taxes.

Furthermore, it cannot be assumed that the usufruct of the surviving spouse will always be a universal usufruct or a usufruct under universal title. Civil Code article 587 provides in part: "The usufruct of an entire succession is universal, of a fraction thereof is under universal title, and of individually determined things is under particular title." Two cases are easy. If the decedent died intestate and had only community property, the legal usufruct of the surviving spouse is universal. Or, if the testator reduces the usufruct to that of the family home, it is under particular title. The uncertain case arises where the decedent owned both community and separate property and limited the usufruct to the community property. While the ratio of the community property to the entire patrimony can always be expressed as a fraction (which suggests that the usufruct is under universal title), it is not altogether clear that the lawmakers contemplated this result. Certainly with respect to legacies, the test for universal title is whether the testator assigned aliquot portions, such as one-half, one-third, etc.,<sup>42</sup> and it can be argued that a usufruct over community property is not of that nature.

The distinction is important because the usufructuary under particular title is not liable for the debts of the succession.<sup>43</sup> This usufructuary

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41. See, e.g., *Maggio v. Papa*, 206 La. 38, 18 So. 2d 645 (1944); *Rochelle v. Russ*, 54 So. 2d 856 (La. App. 2d Cir. 1951).

42. See *Succession of McCarron*, 247 La. 419, 172 So. 2d 63 (1965); *Succession of Lambert*, 210 La. 636, 28 So. 2d 1 (1946).

43. La. Civ. Code art. 588.



may, but is not forced to, pay *secured* debts which encumber property subject to the usufruct and seek reimbursement on termination of the usufruct. While the secured creditor obviously can seize and sell the property which is his security, there is no authority for the succession representative to do so to protect the equity in the asset for the heirs or to sell it for the benefit of unsecured creditors. Hence, a holding that the usufruct of a surviving spouse over community property (when separate property also exists) is a usufruct under particular title would be unfortunate, and in some cases disastrous, as it would burden the heirs to the decedent's separate property with all succession debts.<sup>44</sup> On the other hand, if the community is small and the separate estate is large, a designation of the usufruct over community property as a usufruct under universal title might well make the usufruct illusory, as the whole of the property subject to it might be sold to discharge the separate debts of the decedent.<sup>45</sup>

Presumably, if the usufruct of the surviving spouse is universal or under universal title, the succession representative must demand of the surviving spouse the cash with which to discharge succession debts. If the surviving spouse refuses, then the succession representative can petition the court for authority to sell a succession asset subject to the usufruct to pay debts.<sup>46</sup> In view of the substantive law in Civil Code articles 587-592, it must be seriously questioned: (a) whether any succession sale is lawful without prior demand on the usufructuary, and (b) whether a court can lawfully authorize any succession sale without allegations of and proof of a prior unsuccessful demand on the usufructuary. This point needs emphasis since the much used McMahon and Rubin form book<sup>47</sup> makes no reference to it.

These conclusions make hash of the Code of Civil Procedure provisions on the succession representative's possession, control, management, and sale of succession property, but the substantive law must prevail. Since Civil Code articles 2357 and 587-592 limit a succession representative's authority, the Code of Civil Procedure articles must be seriously discounted whenever a surviving spouse or usufructuary exists.

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44. Here again, the various parts of the Civil Code simply do not coordinate. The conclusion in the text is easily drawn from the articles on usufruct. The articles on community property, however, suggest to the contrary: since assets of the former community are available to community creditors, they should be available to the succession representative to satisfy community creditors. The outcome should result from considered policy, not from the quiddity that the articles on community property were revised after the articles on usufruct.

45. *Caveat*: the Civil Code articles on community property suggest to the contrary; the surviving spouse would be entitled to claim reimbursement in such event.

46. La. Civ. Code arts. 589 et seq.

47. West's Louisiana Statutes Ann., Code of Civil Procedure, Vol. 11 (1964 and Supp. 1986).

The Code of Civil Procedure articles presumably apply in full force if neither surviving spouse nor usufructuary exists.

*What Debts May the Succession Representative Pay?*

What debts may the succession representative pay? The debts of the decedent? The debts of the community? This is another significant problem in succession administration which needs clarification in light of the revised Civil Code articles on community property. Former article 2403<sup>48</sup> made it easy to determine the proper allocation of liability for debts between the spouses in a succession (by always assuming the widow accepted the community). While former article 2403 did not quite say so, successions were administered on the assumption that each spouse "owed" one-half of each community debt (as between themselves).<sup>49</sup> Accordingly, community debts were routinely divided between the spouses and the succession during any administration. Quite possibly this should still be done, but the revised articles are less than crystal clear on this subject.

The revised articles take a somewhat different approach to liability for debts. Comment (c) to article 2336 teaches that the community is not a legal entity (i.e., it cannot sue and be sued as a corporation can), but it is "a patrimonial mass, that is, a universality of assets and liabilities." While half of this "mass" is part of the patrimony of a spouse, the *whole* of the "mass" is liable to creditors of either spouse for the satisfaction of separate or community debts. Articles 2345<sup>50</sup> and 2357 continue this idea by providing that, during the existence of the community or after its termination, a debt may be satisfied from the property of the community (existing or former) and from the separate property of *the spouse who incurred the obligation*. In a sense, this principle is self-evident, for under article 3182 a debtor is bound to use all his property to discharge his debts. Such is the meaning of "personal liability." The net result is that the spouse who incurs an obligation is *personally* liable for it; the other spouse has only a species of *in rem*

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48. La. Civ. Code art. 2403 (1870) provided:

In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, while the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

49. Former Louisiana Civil Code articles 2403 and 2410 (1870) together properly led to the conclusion that both spouses had personal liability for community debts if the widow accepted the community and hence as co-debtors they should divide the debt equally between themselves.

50. La. Civ. Code art. 2345 provides: "A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation."

liability, that is, to the extent of the community property. Spouses are not liable in solido with respect to a debt contracted by one spouse only.<sup>51</sup>

These articles seem to deal with *creditors' remedies*, not with the rights between the spouses themselves. Commencing with article 2358, the revised articles deal with the spouses' rights inter se to reimbursement and accounting for such things as payment of separate debts with community property or payment of community debts with separate property. Nowhere, however, does this legislation repeat the principle of former article 2403 that spouses are equally liable (as between themselves) for community debts. The omission may be significant, for the articles on creditors' remedies definitely give the impression that which party incurred the debt is more significant than whether it is a community or separate debt. While the omission of former article 2403 probably makes no difference during the existence of the community, it may be important once the community terminates upon the death of one spouse, because death is similar to an acceleration clause which matures all debts.<sup>52</sup>

Suppose then that the deceased spouse incurred a debt for \$100,000 which is clearly a community debt under revised article 2360, and the succession representative receives a demand from the creditor for payment in full *from the succession*. Under article 2357, the creditor is surely entitled to make this demand, and his right to make the demand implies some obligation on the part of the succession representative to pay the debt in full. If the succession representative gets court authority to do so and pays the debt in full using property of the former community, which represents only the interest of the deceased spouse<sup>53</sup> (which

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51. Other laws bear on this question, too. For instance, La. R.S. 10:3-401(1) (1983) declares, "No person is liable on an instrument unless his signature appears thereon." Thus if one spouse signs a promissory note which is a community debt, under the Uniform Commercial Code the other spouse positively is not personally liable on the note. It is unclear whether the holder can or must join both spouses in a suit on the note, but he cannot in any event obtain a personal judgment against the spouse who did not sign the note.

52. See, e.g., La. Code Civ. P. arts. 3301-3308. Literally, of course, death is not a statutory acceleration clause. But death is quite commonly an act of default in conventional acceleration clauses, and because the three month moratorium makes installment obligations messy to handle in succession administration, succession representatives frequently prefer to discharge unsecured installment obligations.

53. As noted earlier, La. Code Civ. P. art. 3222 requires the succession representative to deposit all succession funds in a fiduciary bank account. There is a penalty of twenty percent interest per annum on funds that should have been deposited for failure to do so. See *Succession of Dykes*, 258 So. 2d 606 (La. App. 1st Cir.), cert. denied, 260 So. 2d 320 (La. 1972). Thus it is quite essential for the succession representative to remove from bank accounts the decedent's portion of the funds and deposit them in his fiduciary

is probably all the succession representative can administer), does the surviving spouse now owe the succession \$50,000, i.e., one-half the debt?

Very serious issues are at stake here. For one thing, if the succession representative can include and pay the whole of this debt in the administration of the succession, it will generate double the previously available deduction from the gross estate in preparing the Federal Estate Tax return (and the Louisiana Inheritance Tax return). In this respect, it also would raise the question of whether the surviving spouse realizes \$50,000 of taxable income under Federal Income Tax laws.<sup>54</sup> In other contexts, the procedure could be highly detrimental to the interest of the forced heirs. On the other hand, if the surviving spouse simultaneously becomes indebted to the succession for one-half the debt paid by the succession representative, the interest of the forced heirs is protected and presumably the succession must pick up the indebtedness of the surviving spouse as an asset for Federal Estate Tax purposes.

The revised community property articles give no clear answer to the basic question. Certainly there is no article which expressly requires reimbursement in this situation, and the absence of such a provision is a powerful argument that no reimbursement is required. If no reimbursement is due, however, the debt has been paid not from the whole community but from one-half of it, specifically the half allocated to one spouse, and nothing in the revised articles seems to contemplate that result.<sup>55</sup> But for the "fictitious community" notions of article 2357, it would be possible to assert that the payment by the succession representative is made from the *separate* property of the deceased spouse (since the community terminates upon the death of one spouse) so that reimbursement is due under article 2365. It seems abundantly clear, however, under article 2357, that community property retains its status as such after termination of the community by death.

The problem arises from the structure of the revised articles on debts. Article 2357 treats the subject from the creditor's point of view.

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account. (Note how this very positive duty conflicts with the results of *Succession of Pyle* and *Succession of Caffarel*). On the facts assumed in the text, the succession representative has done so and has sufficient funds to pay the debt.

54. See, e.g., 26 U.S.C. § 61(a)(12) (1983).

55. It can be argued on the basis of the exposition in Comment (d) to article 2336 that since the community is a patrimonial mass, i.e., a mass of assets and liabilities, and each spouse's patrimony includes one-half of the community, the community debts must necessarily be divided equally as between the spouses. Furthermore, although La. R.S. 9:2801 (1983) clearly does not require exact division of each debt between the spouses, it does require that the net assets (assuming a solvent community) distributed to each former spouse be equal, even if the court has to order one spouse to pay funds or execute a promissory note, i.e., contribute property which is not community property. Thus, La. R.S. 9:2801 (1983) supports, although indirectly, the basic idea that the spouses have equal obligations with respect to community debts.

In the articles treating the subject as between the spouses, the question posed seems never to have been asked. Possibly, everyone assumed that the spouses would be equally liable (as between themselves) for community debts. Such an assumption is a fair inference from articles 2336 and 2346, but since the legislation gives no direct answer to the question, the courts may decide that no reimbursement is due. Succession representatives, forced heirs, and taxing authorities—not to mention attorneys doing succession work—badly need to know the answer.

On the same assumed facts, suppose the surviving spouse pays the \$100,000 debt pursuant to article 2357, using community property which falls solely in the surviving spouse's share of the community. Does the succession of the deceased now owe the surviving spouse \$50,000? If not, does it realize \$50,000 income taxable under Federal Income Tax law? Presumably, if reimbursement is due, it works both ways so that the answer, whatever it is, is the same in either situation.

Add to the assumed facts the supposition that the decedent had assigned a life insurance policy to the creditor and the proceeds of the policy discharge the \$100,000 debt. The questions become more complex. By legislative fiat, life insurance proceeds generally are not succession assets.<sup>56</sup> The proceeds belong to the beneficiary. The question then is whether the beneficiary can claim reimbursement from the succession on the theory that the beneficiary has paid a debt owed by the succession. Civil Code article 1829(4) tells us that: "Subrogation takes place by operation of law: . . . (4) In favor of an heir with benefit of inventory who pays debts of the estate with his own funds." Thus, if the insurance policy beneficiary is also an heir of the deceased, it can be argued that legal subrogation occurs in favor of this beneficiary, and he can demand reimbursement from the succession, as the policy proceeds are definitely "his own funds." Against this conclusion, it may be argued that, since the decedent assigned the policy during his lifetime to the creditor, the creditor is in fact the beneficiary of the policy. If the named beneficiary in the insurance policy is not an heir (the surviving spouse, for example, frequently will not be an heir), legal subrogation does not take place under article 1829. Furthermore, under article 1855, as amended, while

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56. La. Civ. Code art. 1515(c), as amended. See also La. R.S. 22:647 (1978). Louisiana has a long, if misguided, tradition that life insurance proceeds, if payable to other than the succession or succession representative, do not form part of the succession assets. Succession of Emonot, 109 La. 359, 33 So. 368 (1902); Nulsen v. Herndon, 176 La. 1097, 147 So. 359 (1933). The ingenious notion that such proceeds flow from a "contract" is not supportable intellectually. If the insured pays the premium on a life insurance policy, as is usually the case, the insured simply makes a donation of the policy proceeds to the named beneficiary. There is no reason to exempt such a donation from the operative laws of forced heirship and collation. Louisiana jurisprudence and statutes, however, are to the contrary.

a third party may pay the debt of another, he *must not be subrogated* when he does so.<sup>57</sup> Article 1829(3), however, permits subrogation in favor of one bound with or for others (co-debtor or surety). On the hypothesis of a community debt incurred by the deceased spouse, the surviving spouse has *in rem* liability for the debt, and it can be argued that the surviving spouse is bound "for others" so that legal subrogation is possible.<sup>58</sup> Alternatively, the surviving spouse could seek reimbursement under article 2365 for half the debt paid on the theory that the policy proceeds were this spouse's separate property. There is no jurisprudence exploring the questions generated by debts paid by assigned life insurance policies.

It has been suggested that the community should be partitioned under Louisiana Revised Statutes 9:2801 prior to succession proceedings.<sup>59</sup> The suggestion is plausible and might resolve some of the perplexities about payment of debts in succession proceedings. Nevertheless, in *Succession of Brown*,<sup>60</sup> the court held that Louisiana Revised Statutes 9:2801 did not apply to partitions after the death of one spouse. The court's conclusion was based in part on legislative history and in part on a highly literal reading of the statute. Another court might come to a different conclusion, but there are some substantial policy reasons to accept the conclusion of *Succession of Brown*.

The Louisiana Department of Revenue, which administers the State Inheritance Tax, would have a vital interest in post mortem proceedings under Louisiana Revised Statutes 9:2801, since a free form partition, which the statute authorizes, could affect the tax ultimately payable in the succession.<sup>61</sup> Use of the partition statute might be held to violate Louisiana Revised Statutes 47:2407 and 2408, which in effect prohibit

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57. La. Civ. Code art. 2134 (1870) so provided expressly. The comments to amended article 1855 state that it makes no change in the law, but the new language could be construed to allow conventional subrogation in this situation.

58. Considering the spouse with *in rem* liability only for a community debt as a species of surety for the spouse who incurred the debt is an idea fraught with perils. If the idea were applied generally as between the spouses, the spouse with *in rem* liability would always be due reimbursement, for a surety is always entitled to exoneration from the principal debtor! That particular application of the idea should be strangled at birth by insisting that the revised Civil Code articles determine rights between the spouses according to the *status* (separate or community) of the debt and that only the creditor is concerned with who incurred the debt.

59. Spaht, *Developments in the Law, 1982-1983—Matrimonial Regimes*, 44 La. L. Rev. 441, 446 (1983).

60. 468 So. 2d 794 (La. App. 1st Cir. 1985).

61. Consider, for instance, the special method of valuing encumbered immovable property for Louisiana Inheritance Tax purposes which is set out in La. R.S. 47:2404(B) (Supp. 1986). The same property might be valued very differently in partition proceedings under La. R.S. 9:2801 (1983) and assigned to the succession with a substantial loss to the Department of Revenue.

anyone other than the succession representative from dealing with property in which the decedent had an interest until the tax is paid. For the same reason, in large estates, the Internal Revenue Service, which administers the Federal Estate Tax, would have a vital interest in such pre-succession partition proceedings. At a minimum, such a partition might well be a "distribution"<sup>62</sup> which sets the alternative valuation date for Federal Estate Tax purposes.

The use of the partition statute was suggested on the premise that the surviving spouse should have greater authority in post mortem affairs.<sup>63</sup> The premise is far from universally true. Where the surviving spouse is aged and feeble, even if not legally incompetent, someone else is likely to be the succession representative. In such instances, the need is for greater authority for the succession representative, not greater authority for the surviving spouse. Where the surviving spouse is in a position adverse to the forced heirs (stepchildren, for instance), it seems highly desirable to increase the power of the succession representative, who is a fiduciary and accountable as such, rather than to increase the power of the surviving spouse, who is not a fiduciary and is accountable only for provable fraud and bad faith. When it is further considered that the surviving spouse usually will be the succession representative, whenever physically and mentally sound, it seems abundantly clear that there is a much greater need to increase the powers of the succession representative than to increase the post mortem powers of the surviving spouse.

Finally, Code of Civil Procedure articles 686, 695, 735, and 743, as amended, make both spouses "necessary parties" in a suit to enforce a right of or against the marital community or community property. Article 642 requires joinder of all "necessary parties" when timely objection is made to their nonjoinder. Query whether this legislation requires the succession representative to proceed jointly with or contradictorily against the surviving spouse whenever authority is sought to pay succession debts which are also community debts? Interestingly, revised Code of Civil Procedure article 801, on substitution of parties, makes no reference to the surviving spouse, but requires substitution of the succession representative or the heirs and legatees for a deceased party. Article 801 may conflict with articles 686 and 735.

### *Conclusion*

The Civil Code articles on usufruct, those on community property, and the Code of Civil Procedure articles on succession administration

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62. See 26 U.S.C. § 2032 (1983).

63. See Spaht, *supra* note 59, at 446.

are like so many ships passing in the night. Coordination is urgently needed. Directly or indirectly, sooner or later, every capital asset in the State of Louisiana will be the subject of succession proceedings. The need for clear and stable law with respect to succession administration is obvious. Practicing attorneys badly need a holiday from legislative changes so the law can stabilize. Regrettably, the lack of coordination of the various aspects of the law probably requires further legislation. The most profitable legislation would make it absolutely clear that the rights of a surviving spouse, as such and as usufructuary, are subordinated to those of creditors and, hence, to those of the succession representative.

Given the accounting and reimbursement concepts in the present legislative scheme on community property,<sup>64</sup> and given the consequences of universal succession and acceptance under benefit of inventory, a liquidation of the community on the death of one spouse seems desirable. Where the surviving spouse is the second spouse and the decedent's heirs are children of the first marriage, a liquidation seems imperative. It is a wholly inappropriate occasion to revive the notion of a "fictitious community" under the management of the surviving spouse. If the heir is postponed from receiving control of his inheritance until the termination of the usufruct, accounting and reimbursement claims will be too old and stale for judicial resolution, if, indeed, they have not prescribed. If the succession of the deceased spouse needs administration, almost certainly the whole community needs and will benefit from administration. After all, the best disposition of community debts is to pay them. In the absence of a testamentary executor, the surviving spouse is the first in line for the office of succession representative. If the surviving spouse is the succession representative, there is little objection to the administration of the entire community within the succession proceeding. The basic premise underlying the current community property legislation is to establish absolute equality between husband and wife with respect to the community. Since formerly the succession of the husband involved the whole community, to hold under present law that the succession of either the wife or the husband involves the whole community would admirably implement the basic premise of the revision.

*Succession of Elrod*<sup>65</sup> may present a problem in this respect. It holds that the succession representative's fiduciary duties absolutely preclude his assertion of adverse claims against the succession or the heirs. If this decision is correct, and it certainly comports with the general law of fiduciaries, a surviving spouse would be obliged to decline the office of succession representative whenever he had a claim to assert against

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64. See La. Civ. Code arts. 2358 et seq.

65. 362 So. 2d 1191 (La. App. 4th Cir. 1978).



the succession. Given the accounting and reimbursement concepts of the current community property laws, the surviving spouse will frequently have a claim to assert against the succession—for funeral expenses, if nothing else—and would be unable to accept the role of succession representative.<sup>66</sup> In other instances, the lack of business competence, physical debilitation, or senility of an aged and infirm surviving spouse will make them poor candidates to undertake the office. It still seems preferable to allow the succession representative to administer the whole community in these circumstances. The same factors that make the surviving spouse a poor candidate to be succession representative equally discourage the idea that they are proper candidates to exercise the “right of equal management” to the exclusion of a succession representative. The Code of Civil Procedure wisely leaves it to the court to appoint the best qualified of the candidates as succession representative. Extending that officer’s authority over the whole community can only benefit every interested party, and given a succession representative’s fiduciary duties, it could not prejudice anyone.

What debts the succession representative may pay goes to the heart of succession administration, for payment of debts is the *raison d’être* of an administration.<sup>67</sup> Due to the express provisions of Civil Code article 2357, as amended, the accepting heirs will have personal liabilities for all debts incurred by the deceased spouse (whether separate or community debts) and they will have *in rem* liability (to the extent they receive property of the former community) for all community debts incurred by the surviving spouse during the existence of the community. The basic idea of an administration is for the succession representative to pay these debts and then deliver the residuum of the assets to the heirs and legatees free of the debts of the deceased. The succession representative cannot accomplish this goal unless he has the power to pay all debts of the former community. On the other hand, it would be grossly unjust in many cases to authorize the succession representative to pay all debts of the former community (from the property representing the decedent’s interest in the community assets), and then deny the succession representative the right to demand reimbursement for one-half of the community debts from the surviving spouse. The inescapable

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66. See also La. Code Civ. P. arts. 3083, 3098. Under the present statutory framework, the surviving spouse, competent heirs and legatees, and representatives of incompetent heirs and legatees are in the first priority for appointment as succession representative (other than a named testamentary executor). Nominees of the above are in the second priority. If *Succession of Elrod* disqualifies persons in the first category as succession representatives, article 3098 should be amended to place such person’s nominee in the same level of priority as the person disqualified.

67. *Succession of Roberts*, 255 So. 2d 610 (La. App. 1st Cir. 1971), cert. denied, 257 So. 2d 148 (1972).

conclusion is that the primary function of an administration can be achieved equitably only by allowing the succession representative to administer the entire community, to use community property to pay community debts, and to allocate half of each community debt to the deceased spouse and half to the surviving spouse.

