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THE EVOLVING ROLE OF WOMEN IN THE LOUISIANA LAW: RECENT LEGISLATIVE AND JUDICIAL CHANGES

Nina Nichols Pugh*

The women of Louisiana owe a special debt of gratitude to Spain for placing them in a legal status far superior to that of their sisters in most of the other states in America. Until comparatively recently, women and children in these "Common Law states" enjoyed a position little better than that of chattels. The Moreau-Lislet source notes to the Digest of 1808¹ establish the predominantly Spanish source and character of Louisiana's law of persons, marriage, and matrimonial regimes, three major areas of the private law which contain special provisions governing women. One cannot read the various Spanish laws cited there without becoming aware of the high degree of respect accorded women in Spain. This same respect for the rights of women was transferred to and augmented in the Louisiana Digest of 1808 and has been preserved and intensified in later legislation.

EQUAL MANAGEMENT

The most notable change in the role of women in recent times, heralded in some circles as a great victory for women and regarded in others as an anomalous event, was the revision by the Legislature in 1978² of Louisiana's community of gains law, designed to eliminate the husband's sole authority to manage the common fund and to contract community debts. The husband's statutory authority as administrator of the community of gains is a concept popularly misconstrued as making him "lord and master" over his wife, as well as her patrimony, and has become a battle cry for those wishing changes in Louisiana's matrimonial regimes law. Although the Legislative Study Committee which drafted the 1978 legislation was under a mandate to draft an "equal management" act,³ one giving the wife equal

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1. See Pugh, Nina, *The Spanish Community Gains in 1808: Sociedad de Gananciales*, 30 LA. L. REV. 1, 1 n.1 (1969). Even today in the Louisiana Civil Code, Book I, Title I, "Distinction of Persons," 92.8% of the articles have Moreau-Lislet source notes to the Spanish and Roman law; Book I, Title IV, "Of Husband and Wife," has 50% of its articles with Moreau-Lislet notes; and Book III, Title VI, "Matrimonial Regimes," has 46.5% of its articles with Moreau-Lislet source notes, showing the profound influence which the Spanish law still exerts upon certain areas of Louisiana's private law.

2. 1978 La. Acts, No. 627, repealed by 1979 La. Acts, No. 709, § 5, replaced by 1979 La. Acts, Nos. 709, 710, 711.

3. LA. R.S. 9:2841-42 (Supp. 1978), repealed by 1979 La. Acts, No. 709, § 5.

responsibilities and privileges with the husband in the management of their common assets and liabilities, the result was not as much an adoption of absolute equality between the spouses in regard to the management of their economic affairs as it was an act giving the wife the right to more participation in the management of their common affairs. In the words of Mrs. Spaht and Miss Samuel, the new equal management principle, so-called, emerged "more like a debutante entering society under the cautious restraint of her parents," than like a "fiery women's libber out of control."⁴

Nature of Property

The nature of the spouse's ownership is clearly spelled out now in Civil Code Article 2335, which provides that: "Each spouse owns a present undivided one-half interest in the community property." The classification of the spouses' property as separate or community⁵ has not been changed substantially, although a couple of changes were made that have particular significance for married women. A privilege which the Louisiana wife has had since 1908, that of retaining the fruits of her separate property as part of her separate patrimony when managed by her alone, has been extended to the husband.⁶ This is in direct contrast to the situation in Spain, where the fruits of both spouses' separate patrimonies fall into the common fund,⁷ with the idea that those patrimonies form part of the capital for the marriage to be used for the common good of the spouses, in accordance with the classic idea of a community property system.⁸ Thus, in Louisiana there appears to be a trend away from using the spouses' separate patrimonies for their common good and toward using them for the separate advantage of the owner-spouse, with the richer spouse getting richer and the poorer spouse, so often the wife, getting poorer.⁹ In accordance with the same trend, husbands are now permitted to retain as separate property damages received for injuries sustained during the existence of the marriage,¹⁰ just as the wife alone was previously entitled to do.¹¹ New Civil Code Article 2344 provides that:

4. Spaht & Samuel, *Equal Management Revisited: Legislative Modification of the 1978 Matrimonial Regime Law*, 40 LA. L. REV. 84 (1979) [hereinafter cited as Spaht & Samuel].

5. LA. CIV. CODE art. 2338, 2341, 2342.

6. LA. CIV. CODE art. 2339, as amended by 1980 La. Acts, No. 565, § 2.

7. SP. CIV. CODE arts. 1401(3), 1385.

8. "Toda cosa que el marido y muger ganaren o comparen, estanda de consumo, layando ambos por medio. . . ." FUERO REAL bk. 3, tit. 3, L. 1; NUEVA RECOPIACIÓN bk. 5, tit. 9, L. 2, NOVÍSIMA RECOPIACIÓN bk. 10, tit. 4, L. 1.

9. Riley, *Analysis of the 1980 Revising of the Matrimonial Regime Law of Louisiana*, 26 LOY. L. REV. 453, 481 (1979) [hereinafter cited as Riley].

10. LA. CIV. CODE art. 2344.

"Nevertheless the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property." The result of these two new classifications, even though they may appear to offer fair treatment to both husband and wife, is to reduce the portion of the common fund eventually available to the wife. At the same time, the wife has lost the privilege afforded her under the previous law¹² of retaining her earnings when living separate and apart from her husband although not separated by judgment. All earnings of both spouses are now community property.¹³

Vastly more important to married women is the newly acquired and greater freedom of contract between the spouses,¹⁴ a freedom which married persons have always had in Spain.¹⁵ The correlative capacity of women to sue their husbands is still limited, however, with only four additional exceptions to their former incapacity being: "(1) enforcement of a lawful conventional obligation; (2) a loss sustained as a result of fraud or bad faith in the administration of the community property by the other spouse; (3) avoidance of an unauthorized alienation, encumbrance or lease of community property; and (4) judicial authorization to act without the consent of the other spouse."¹⁶

With the new contractual freedom established between the spouses it has now become possible for them to vary their matrimonial regime even after marriage, but "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. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval."¹⁷ Likewise, "During the first year after moving into and acquiring a domicile in this state, spouses may

11. LA. CIV. CODE art. 2402, *repealed by* 1979 La. Acts, No. 709, § 1.

12. LA. CIV. CODE art. 2334, *repealed by* 1979 La. Acts, No. 709, § 1. For an interpretation of that article prior to its repeal, see *Houghton v. Hall*, 177 La. 237, 258, 148 So. 37, 43 (1933).

13. LA. CIV. CODE art. 2338.

14. LA. CIV. CODE art. 1790, *as amended by* 1978 La. Acts, No. 627, § 3; 1979 La. Acts, No. 711, § 1. As pointed out by Professor Pascal, the former text of Article 1790 merely forbid contracts between the spouses in certain cases specially provided by law, but the judiciary of the state misconstrued the article and held that it forbid spouses to contract with each other generally. Pascal, *Louisiana's 1978 Matrimonial Regimes Legislation*, 53 TUL. L. REV. 105, 130 (1978).

15. There was no prohibition in ancient Spain against contracts between husband and wife, and none exists today. See *LAS SIETE PARTIDAS* bk. 5, tit. 5, L. 2; *LAW OF TORO* 55; *LLAMAS Y MOLINA, Comment No. 8*; *FEBRERO CONT. 2.7.1.2*; *LLAMAS Y MOLINA, Comment No. 8*; *MANRESA*, arts. 1457-59, at 119-25.

16. LA. R.S. 9:291, *as amended by* 1978 La. Acts, No. 627, § 4.

17. LA. CIV. CODE art. 2329, *as amended by* 1980 La. Acts, No. 565, § 1.

enter into a matrimonial agreement without court approval."¹⁸ By a new provision adopted in 1981,¹⁹ a spouse may now change the nature of a thing from separate property to community by executing a stipulation to that effect. "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."²⁰ The donation by a spouse to the other spouse during marriage of his or her undivided interest in a thing forming part of the community automatically transforms the thing into the separate property of the donee and, unless specified otherwise in the act of donation, thereafter all civil fruits and mineral interests of every kind, including royalties, that flow from the thing also form part of the donee's separate property.

Although all things in the possession of a spouse during the existence of the community regime are presumed to be community property, either spouse may prove that they are actually separate.²¹ The old jurisprudentially created "double declaration" rule,²² which required only the husband to state in the act of acquisition of an immovable that he had acquired it with separate funds for his separate estate or be barred forever from proving it, has been replaced by a potentially much more dangerous provision. The new legislation provides:

A declaration in an act of acquisition that things are acquired with separate funds as the separate property of the spouse may be controverted by the other spouse unless he concurred in the act. *It may also be controverted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse.*²³

Although an action for fraud is available as between the spouses in the event one spouse has misrepresented the nature of the funds used,²⁴ the last paragraph of Article 2334 has the effect of favoring a third-party acquirer of such property, even one in bad faith, who has relied upon the public records to the detriment of the other spouse. In such an instance, that spouse is not able to recover the thing mortgaged, sold, or leased,²⁵ which remains the property of the third-party acquirer.

In summary, the classification of property has been altered very little under the new Matrimonial Regimes Acts, but the spouse who

18. *Id.*

19. LA. CIV. CODE art. 2343.1.

20. *Id.*

21. LA. CIV. CODE art. 2340.

22. *See, e.g., Phillips v. Nereaux*, 357 So. 2d 813 (La. App. 1st Cir. 1978).

23. LA. CIV. CODE art. 2342, as amended by 1980 La. Acts, No. 565, § 3 (emphasis added).

24. LA. CIV. CODE art. 2354.

25. For a criticism of this provision, *see Riley, supra* n. 9, at 489-92.

has benefited the most from the elimination of former inequities is the husband. Without commenting upon the fairness of the relevant new legislation, one must point out that the result is that the wife has lost access to one-half of the fruits and revenues of her husband's separate estate. She has also lost access to one-half of any damages the husband may receive for personal injury. Meanwhile, the earnings of a wife living separate and apart from her husband for reasons which would be grounds for legal separation no longer are her separate property, but form part of the common assets between them.

Management of Community Property

It is in the realm of management that married women have gained the greatest advantage from the recent Matrimonial Regimes Acts. Under the new law, "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law."²⁶ Formerly the husband managed the community property, as a general rule, and obligated it for debts, and disposed of it by onerous title.²⁷ The wife had a limited veto power in the case of the family home²⁸ and in the alienation, hypothecation, and lease of other immovables in certain instances.²⁹ Under a tacit mandate recognized by custom, the wife could obligate her husband for ordinary family expenses.³⁰ She could obligate her husband also when she acted as a public merchant with his approval.³¹ Since 1975, the wife's creditors could enforce their claims against her own earnings,³² although she had no general power to spend those earnings or otherwise obligate community property for debts she may have created.

The wife may now obligate the community funds, not only for the debts she creates during the marriage, but also for her antenuptial debts, just as in the case of the husband under the prior law. The common funds are now available to creditors of both husband and wife during marriage, and an individual spouse's creditors may seek satisfaction from the community assets in the possession or control of either spouse, as well as from the separate assets of the debtor-spouse.³³ Married women, formerly wailing for access to one-half of the community property as security for their debts in order

26. LA. CIV. CODE art. 2346.

27. LA. CIV. CODE art. 2404, *repealed by* 1978 La. Acts, No. 627, § 6; 1979 La. Acts, No. 709, § 1.

28. LA. R.S. 9:2801-04 (Supp. 1976), *repealed by* 1980 La. Acts, No. 237, § 1.

29. LA. CIV. CODE art. 2334, *repealed by* 1978 La. Acts, No. 709.

30. LA. CIV. CODE arts. 119, 120, 2985-3034.

31. LA. CIV. CODE art. 131, *repealed by* 1979 La. Acts, No. 709, § 1.

32. LA. R.S. 9:3581-85 (Supp. 1977).

33. LA. CIV. CODE art. 2345.

to promote increased extension of credit to them, now have that credit in double measure. Those who used to argue against the inequality of the old Article 2403 of the Civil Code now urge the courts to invoke strict interpretation.³⁴ It is the best of all possible worlds for the creditors.

Employing elements used in the three management systems found among six of the other community property states,³⁵ Louisiana at one time has given the married woman more authority to act alone³⁶ and has required her concurrence in many instances where formerly the husband could act alone. Thus, her "concurrence is required for the alienation, encumbrance, or lease of community immovables, furniture or furnishings located in the family home, all or substantially all of the assets of a community enterprise, and movables issued or registered as provided by law in the names of the spouses jointly."³⁷ Previously it was only in the case of movables registered in the name of both spouses that the wife's concurrence was required in an act of alienation.³⁸ Concurrence is now also required in the instance of the donation of community property to a third person,³⁹ except that 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.⁴⁰

A spouse may, nonetheless, expressly renounce the right to concur in the alienation, encumbrance, or lease of community immovables, of all or substantially all of the community movables, or of all or substantially all of a community enterprise.⁴¹ The spouse may also renounce the right to participate in the management of a community enterprise.⁴² Such renunciations may be irrevocable for a stated term,⁴³ and they may be in any form. The renouncing spouse, however, may reserve the right to concur in the alienation, encumbrance, or lease of certain, specifically described community immovables.⁴⁴

34. Riley, *supra* n. 9, at 492 *et seq.*

35. ARIZ. REV. STAT. ANN. § 25-214 (amended 1973); CAL. CIV. CODE § 5125 (amended 1977), § 5127 (amended 1974), § 5127.5 (amended 1971), § 5128 (amended 1974); IDAHO CODE § 32-912 (amended 1974); NEV. REV. STAT. § 123-230 (amended 1975); N. M. REV. STAT. ANN. §§ 40-3-13, 40-3-14 (amended 1975); WASH. REV. CODE ANN. § 26.16.030 (amended 1972).

36. LA. CIV. CODE art. 2346.

37. LA. CIV. CODE art. 2347.

38. LA. CIV. CODE art. 2404, *repealed by* 1979 La. Acts, No. 709, § 1.

39. LA. CIV. CODE art. 2349, *as amended by* 1979 La. Acts No. 709, § 1.

40. *Id.*

41. LA. CIV. CODE art. 2348, *as amended by* 1981 La. Acts No. 132.

42. *Id.*

43. *Id.*

44. *Id.* See Riley, *supra* n. 9, at 503, for a criticism of the right to renounce and calling for further amendments.

When concurrence is required, but has been refused arbitrarily, or is impossible to obtain because of the physical incapacity, mental incompetence, commitment, imprisonment, or absence of the other spouse, the court may authorize the spouse requesting the concurrence to act alone upon a showing that it is in the best interest of the family.⁴⁵

In providing for concurrent acts Louisiana has been a little more specific than have other states, but in the matter of extending exclusive management over community assets she has been far more generous, appearing almost to have created the possibility of a "two-fund" system, a concept in fact rejected by the Legislature in 1977.⁴⁶ The spouse who is the sole manager of a community enterprise has the exclusive right to alienate, encumber, or lease its movables, unless they are issued in the name of the other spouse or in their joint names, in which case concurrence of the other spouse is required by law.⁴⁷ Likewise, Louisiana permits the spouse who is a business partner to have exclusive management over the partnership interest,⁴⁸ contrary to the practice in other states. Additionally, a spouse has the exclusive right to manage, alienate, encumber, or lease movables,⁴⁹ such as automobiles,⁵⁰ aircrafts,⁵¹ boats,⁵² insurance policies,⁵³ securities,⁵⁴ and savings and loan and bank accounts⁵⁵ issued in that spouse's name alone. Only in Louisiana is a spouse provided such exclusive management of a community movable. Furthermore, there is no provision regarding the nullity of an act affecting a movable. In the case of immovables, however, when there has been no renunciation, the alienation, encumbrance, or lease of a community immovable requiring concurrence of the spouses is considered a relative nullity if attempted by one spouse only.⁵⁶ The alienation, encumbrance, or lease of the assets of a community enterprise by the non-manager spouse is also subject to attack as being a relative nullity.⁵⁷ Presumably the general law of obligations, and the specific laws governing banking and securities, apply in such instances.

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45. LA. CIV. CODE art. 2355.
 46. La. H.B. 783, 3d Reg. Sess. (1977).
 47. LA. CIV. CODE art. 2350.
 48. LA. CIV. CODE art. 2352.
 49. LA. CIV. CODE art. 2351.
 50. LA. R.S. 32:707 (Supp. 1981).
 51. 49 U.S.C. § 1403 (1976).
 52. LA. R.S. 34:851.8 (Supp. 1974).
 53. LA. R.S. 22:624 (Supp. 1958).
 54. LA. R.S. 12:103 (Supp. 1968).
 55. LA. R.S. 6:731(c) (Supp. 1976).
 56. LA. CIV. CODE art. 2353.
 57. *Id.*

The dangers inherent in "exclusive management" are such that there remains a need for more protection of the spouse who is neither the managing partner in such an enterprise nor the person in whose name the movable is registered. The effect of the husband's exclusive management of movables upon the stay-at-home wife without earnings and without access to a separate patrimony and its fruits (and there are still a substantial number of wives in Louisiana today in this position) could well be to perpetuate the dominant position of the husband in the administration of community assets.⁵⁸ When one considers that the primary wealth of the average Louisiana family is in movables, the dangers inherent in exclusive management become even more alarming. A typical family in Louisiana probably owns only one immovable, the family home, and invests the greater part of its income in furniture, an automobile, a boat, a few shares of stock, and some insurance. Surely the freedom of commerce does not justify such an unfettered and exclusive form of management. It would seem that once again creditors' rights have prevailed over concern for the protection of spouses.⁵⁹

Termination of Community Regime

In order to balance the dominant powers of administration over the community of gains previously exercised by the husband, the widow or ex-wife was given certain privileges at the time the community regime was terminated, whether by death, divorce, or legal separation. With the increased responsibilities of management conferred upon the wife by the new Matrimonial Regimes Act, she has been deprived of important privileges formerly enjoyed by her upon termination of the community. Again, it is the creditors who have benefited most under the new legislation.

Formerly the widow or ex-wife had the privilege of renouncing the community of gains altogether⁶⁰ or of accepting it with benefit of inventory.⁶¹ During the delays granted for the taking of an inventory and for her deliberation, the wife received her maintenance "and that of her servants out of the provision in store" and, according to this quaint code provision, if that were insufficient, she could borrow on the common stock on hand, provided she used "the privilege with moderation."⁶² She owed no rent for the residence which she occupied if it belonged to the community or to the heirs of the husband and,

58. For a severe criticism of exclusive management of community movables, see Riley, *supra* n. 9, at 495-501.

59. *Id.*

60. LA. CIV. CODE arts. 2410, 2417, *repealed by* 1979 La. Acts, No. 709, § 1.

61. LA. R.S. 9:2821, *repealed by* 1978 La. Acts, No. 627; 1979 La. Acts, No. 709, § 3.

62. LA. CIV. CODE art. 2419, *repealed by* 1978 La. Acts, No. 627, § 6; 1979 La. Acts, No. 709, § 1.

if the marital domicile were being rented, the widow or ex-wife during the period for inventory and deliberation⁶³ could charge the rent to the community. All of these privileges have now been forfeited in the interest of assumption of greater responsibility.

Not satisfied with such paternalistic protection and consideration, married women have cried out shrilly, particularly since the 1973 decision in *Creech v. Capitol Mack, Inc.*,⁶⁴ wherein it was held that during marriage the husband's creditors, but not the wife's, could reach the community funds for the satisfaction of his separate debts. Married women felt that the *Creech* interpretation of the relevant code articles severely limited their ability to obtain credit. With the adoption of the new Matrimonial Regimes Act, the relationships between spouses and their creditors, particularly in the case of the wife's creditors, have changed dramatically.

Obligations incurred by the spouses have been defined a little more precisely by the new act:

A separate obligation of a spouse is one incurred by that spouse prior to the establishment or after the termination of a community property regime, or one incurred during the existence of a community property regime though not for the common interest of the spouses or for the interest of the other spouse. An obligation resulting from an intentional wrong not perpetrated for the benefit of the community, or an obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse, is likewise a separate obligation.⁶⁵

A community obligation was defined previously in relation to the time it was incurred.⁶⁶ To that requirement was added the provision that the obligation be "for the common interest of the other spouse."⁶⁷ All obligations incurred by a spouse during the existence of a community regime, other than those legislatively characterized as separate, are presumed to be common obligations.⁶⁸ Alimentary obligations imposed by law are now deemed to be community obligations,⁶⁹ unlike the situation in Spain where they are considered separate.⁷⁰

63. *Id.*

64. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973), *rev'd and remanded*, 296 So. 2d 387 (La. App. 1st Cir. 1974).

65. LA. CIV. CODE art. 2363.

66. LA. CIV. CODE art. 2403, *repealed by* 1979 La. Acts, No. 709, § 1.

67. LA. CIV. CODE art. 2360.

68. LA. CIV. CODE art. 2316.

69. LA. CIV. CODE art. 2362.

70. LAS SIETE PARTIDAS bk. 4, tit. 19, L. 2 (a natural right); *accord* FERRERO JUL. 1.1.3.3.73-75; NOVISIMA RECOMPILACIÓN 10.4.2, comment by Matienzo; GLOSS VII, No. 10; GUTIERREZ, *Quaestio* CXXIX.

A community property regime terminates by the death of a spouse or by a judgment of divorce, separation from bed and board, or separation of property.⁷¹ Now the spouses may contract to terminate the community regime during their marriage, although judicial approval is required.⁷² The 1981 Legislature provided additionally that the spouses themselves may partition the community assets in whole or in part during the existence of the community regime without judicial approval.⁷³

Although there is a provision for reimbursement as between the spouses after termination of the community regime,⁷⁴ it is quite clear from the language of the primary relevant article that it is the pre-termination creditors who are being favored—not the spouses. Article 2357 provides as follows:

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 for the obligations incurred by the other spouse.

Not only did the wife under the former matrimonial regimes law have the right to renounce the community⁷⁵ or to accept it with benefit of inventory,⁷⁶ but also she had the right to protect her separate assets from the community creditors and from her husband's separate creditors.⁷⁷ It is apparent from the provisions of new Article 2357 that the wife has paid dearly for the privilege of participating in the management of the community property during marriage. The wife's separate property, as well as her share of the community property, is now subject to the claims of the community creditors. If she has been married before, then that property is even subject to the claims

71. LA. CIV. CODE art. 2356.

72. LA. CIV. CODE art. 2336.

73. LA. CIV. CODE art. 2336, as amended by 1981 La. Acts, No. 921, § 3.

74. LA. CIV. CODE art. 2358 *et seq.*

75. LA. CIV. CODE art. 2410, 2411, repealed by 1978 La. Acts, No. 629; 1979 La. Acts, No. 709, § 1.

76. LA. R.S. 9:2821, repealed by 1978 La. Acts, No. 627, § 6; 1979 La. Acts, No. 709, § 1.

77. LA. CIV. CODE arts. 2387-91, 2403-04, repealed by 1979 La. Acts, No. 709, § 1.

of her former husband's separate creditors. As Professor Janet Mary Riley points out:

The first sentence of Article 2357²⁷⁰ permits a spouse who is in possession of more than his one-half interest in the property of the former community, after the termination of the community property regime, to use this half to pay even those of his separate obligations that were incurred before the creation of the legal community property regime. Article 2357 further permits the separate creditor of one spouse to seize all the assets of the former community whether or not they are still in the possession of his debtor. The creditor can thus demand payment of one spouse's separate debt out of property that belongs to the other spouse—the half-interest in the former community property now owned exclusively by the non-debtor spouse. Nothing in the article limits such a creditor's right to the not-yet-partitioned property; therefore, he can apparently follow it even after partition. This gives separate debtor spouses and their creditors far greater rights than those enjoyed by husbands and their separate creditors prior to the 1980 revision;²⁷¹ the result is at once bad law and bad economics. It is, moreover, of questionable constitutionality—possibly constituting a taking of property without due process of law.²⁷²

Once the community was terminated, spouses in the past became, as to their former community property, simply co-owners.²⁷³ As such, each one's undivided half-interest in co-owned property continued to be liable for the satisfaction of its owner's obligations and no more,²⁷⁴ as is true of co-owners who were never married to each other. Before 1980, a husband who ceased to be head and master of the former community property upon dissolution of the

270. See LA. CIV. CODE ANN. art. 2357 (West Supp. 1980) and accompanying comment.

271. *Id.* art. 2409 (West 1971) (repealed 1979); see also *id.* art. 2403 (West 1971) (repealed 1979).

The debt sued on was contracted by G. W. Sims before the marriage between him and Elvira Sims, consequently it must be acquitted out of his own property, and not out of the share of the community belonging to his wife, C. C. art. 2372. *Markham v. Allen*, 22 La. Ann. 513, 514 (1870). Distinguishable are cases referring the wife to her remedy only against the husband, in that the husband or his creditor in those cases exercised the husband's power to pay his separate obligation with community funds during the existence of the community, not after its dissolution. See, e.g., *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973) and cases cited therein; *Stafford v. Sumrall*, 21 So. 2d 83 (La. App. 1st Cir. 1945); *Davis v. Compton*, 13 La. Ann. 396 (1858).

272. U.S. CONST. amend. XIV § 1. The Louisiana constitutional counterpart to the federal due process clause is Art. 1, § 2, of the 1974 Louisiana Constitution.

273. LA. CIV. CODE ANN. art. 408 (West Supp. 1980); see also *id.* art. 2336.

274. *Id.* arts. 3182, 3183 (West 1952).

regime had no right to use more than his own one-half interest in the former community property to pay his separate obligations; nor had his creditor any right against his wife's interest.²⁷⁵ This author vigorously opposes this new legislative attempt to grant one person's creditors a right against another person's property. It is submitted that this provision, if not deleted by the legislature, should be challenged in the courts.⁷⁸

Professor Riley argues, also, that the second sentence of Article 2357 should be amended to change the liability for "all obligations" to "all community obligations,"⁷⁹ so that the non-incurring spouse, with little or no separate assets, would not become liable for whatever future earnings he or she might acquire by using former community assets for ordinary daily living expenses following termination of the community. She points out that the separate liability presently provided is in marked contrast to the maintenance formerly granted the widow or ex-wife during the delays for the taking of an inventory and for deliberation.⁸⁰

Although the new matrimonial regimes law provides generally that one spouse's separate property is not available to a creditor for a separate or community obligation incurred by the other spouse, it makes it possible, nonetheless, for the non-debtor spouse to act in such a way as to make himself or herself liable for such a debt. The first way, as set forth above, is to dispose of former community property for satisfaction of a separate obligation. The last paragraph of Article 2357 provides the other way, for it gives a spouse the privilege of assuming responsibility for one-half of each community obligation incurred by the other spouse, thus limiting his own responsibility for obligations entered into by the other spouse. This limitation does require a written act, however, in contrast to the tacit acceptance⁸¹ formerly accorded the widow or ex-wife, who might have made such an acceptance inadvertently. The written act may be unilateral and executed under private signature. Recordation, however, is not required, which thus leaves this form of obligation open to the possibility of fraud.⁸² The purpose of allowing such a limitation of liability is to bring about a definitive partition and to insulate a spouse's property from seizure by the separate creditors of the other spouse. In the case of antenuptial creditors, Professor George Bilbe finds this

275. See note 273 *supra*.

78. Riley, *supra* n. 9, at 507. The text of Professor Riley's footnotes in the quoted material reads as follows:

79. *Id.* at 513.

80. LA. CIV. CODE art. 2422, *repealed by* 1979 La. Acts, No. 709, § 1.

81. LA. CIV. CODE art. 2412, 2417, 2418, *repealed by* 1979 La. Acts, No. 709, § 1.

82. Spaht & Samuel, *supra* n. 4, at 131.

measure particularly appropriate and, in the case of separate debts incurred during marriage, justifiable.⁸³

Professor Riley continues her profound concern, if not downright outrage, over the possibility of a spouse's acting in such a way that he finds his separate property liable to seizure by the other spouse for an obligation that he himself did not incur:

If there are insufficient community assets at termination, a non-debtor spouse is required to reimburse his spouse (not the creditor) for separate property belonging to that spouse which was used to satisfy community obligations incurred for the ordinary expenses of the marriage or for the support of the children of either spouse.²⁸⁹

As inappropriate as it is to permit one spouse's separate creditor to be satisfied out of the other spouse's half-interest in the property of the former community when the legal regime terminates by separation or divorce, it is far more objectionable to allow such satisfaction when the regime terminates by the death of the non-debtor spouse. At death, the heirs of the non-debtor spouse become the owners of his half of the community property. The heirs have not lived under the community regime. They should not be saddled with claims by the separate creditors of the surviving spouse. There are many unanswered questions. Will the heirs inherit the deceased's "right" to assume responsibility for one-half of the community obligations incurred by the surviving spouse, so as to limit "further responsibility" for the obligations he incurred?²⁹⁰ Or will they be free to dispose of the inherited community property for purposes other than the satisfaction of community obligations without becoming personally liable for all community and separate obligations incurred by the surviving spouse up to the value of the community property?²⁹¹ The right to an accounting²⁹² is declared in a comment²⁹³ to be a heritable obligation. Perhaps, then, all the rights the spouse had, or would have had if he had survived the termination, are subject to the accounting and may be exercised by his heirs.⁸⁴

83. Bilbe, *Management of Community Assets under Act 627*, 39 LOY. L. REV. 409, 431 (1979).

84. Riley, *supra* n.9, at 510. The footnotes in the quoted material read as follows:

289. *Id.* [LA. CIV. CODE ANN. (West Supp. 1980)] art. 2365.

290. *Id.* art. 2357.

291. *Id.*

292. *Id.* art. 2369.

293. *Id.*, comment (b).

Accounting and Reimbursement

The right to an accounting for all community property, a right which is similar to the one formerly granted the wife alone, but only after termination of the community regime,⁸⁵ for all property in the control of the "head and master," now has been extended to both spouses.⁸⁶ The husband's former liability to the wife during the marriage for fraud⁸⁷ escalated upon dissolution to that of a fiduciary.⁸⁸ Although the spouses are responsible to each other for fraud during the marriage, no accounting is required until the community regime is terminated.⁸⁹ Doubtless some kind of accounting during marriage, even on an informal basis, would help to insure a much more intelligent management of the spouses' economic affairs.⁹⁰

If during an accounting it is discovered that the separate property of either spouse has been used for community purposes, or conversely that the community property has been used for separate purposes, reimbursement may be claimed. Articles 2364 and 2365 provide that, when community property has been used to satisfy a separate obligation of a spouse or for the acquisition, use, improvement, or benefit of the separate property of the spouse, the other spouse is entitled to reimbursement for one-half of the amount or value that the property had at the time it was so used. The comment under Article 2364 states that this is in effect an interest-free loan, so presumably the spouses may now contract with each other freely during marriage, and even for interest, just as each could with a third-party lender. If the separate property of a spouse has increased in value as a result of the uncompensated common labor or industry of either spouse, the other is entitled upon termination to reimbursement equal to one-half of the increased value attributable to that labor or industry.⁹¹ Previously there could be no reimbursement without enchancement.⁹² To constitute a real reimbursement, however, and not just a transfer of monies from one pocket to another, both Articles 2365 and 2367 should

85. LA. CIV. CODE art. 2404, *repealed by* 1979 La. Acts, No. 709, § 1.

86. LA. CIV. CODE art. 2354; LA. R.S. 9:291, *as amended by* 1978 La. Acts, No. 627, § 4.

87. *Hodson v. Hodson*, 292 So. 2d 831 (La. App. 2d Cir. 1974).

88. *Pitre v. Pitre*, 247 La. 594, 172 So. 2d 693 (1965), *aff'd*, 248 La. 925, 183 So. 2d 307 (1966).

89. LA. CIV. CODE art. 2354.

90. See *Riley*, *supra* n. 9, at 517. In calling for an accounting during marriage, *Riley* points out the irony in the comments following Articles 2369 which state that the spouse occupies the position of co-owner at the termination of the community regime; yet the preceding article subjects the "co-owner's" half-interest to claims by the other spouse's separate creditors even after termination of the community, "which is a hazard not required of non-spousal co-owners." *Id.* See also *id.* 475.

91. LA. CIV. CODE art. 2368.

92. *Abunza v. Olivier*, 230 La. 445, 88 So. 2d 815 (1956).

be amended to read "entitled to reimbursement *from the other spouse*," meaning from his or her half of the community assets and from his or her separate assets as well.⁹³

If the separate property of a spouse has been used to satisfy a community obligation⁹⁴ or for the acquisition, use, improvement, or benefit of community property,⁹⁵ the obligation for reimbursement by the spouse, upon termination of the community property regime, is quite different from the reverse situation, in which community property is used to reimburse a spouse's separate patrimony. When a separate asset is used for community obligations, the reimbursement may be made only to the extent of the available community assets.

If the community obligations were incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, and education of children of either spouse and in keeping with the economic condition of the community, the spouse providing such amounts is entitled to reimbursement from the other spouse, even if there are no community assets.⁹⁶ This provision reflects the marital obligation⁹⁷ and the parental obligation,⁹⁸ established elsewhere in the Civil Code as a part of the imperative law on persons, which exist irrespective of a community regime. This is the only instance in which a spouse's separate property can be made to satisfy debts incurred by the other spouse without any action on his part, the justification being that it is a personal obligation of the spouse whose separate property is being used. This duty to share the marriage expenses and the children's educational expenses, even if there are inadequate community assets, is owed only to the other spouse, and only at the termination of the community regime.⁹⁹

Conclusions

Basic changes have been made in Louisiana's matrimonial regimes law in the past few years, in the high hopes that they would make it possible for married women to stand tall in relation to their husbands. As married women have been given a greater share in the

93. See Riley, *supra* n. 9, at 521.

94. LA. CIV. CODE art. 2365.

95. LA. CIV. CODE art. 2367.

96. LA. CIV. CODE art. 2365.

97. LA. CIV. CODE art. 120.

98. LA. CIV. CODE arts. 227, 230.

99. LA. CIV. CODE art. 2365. *Cf.* LA. CIV. CODE art. 2372 (which provides for solidary liability of the spouses for the cost of necessities when the spouses have a regime of separate property). This solidary liability is owed to the suppliers, however, and not to the other spouse. Furthermore this liability exists throughout the duration of the separate regime and is not imposed simply at the time of dissolution.

management of the community of gains, they have assumed a far greater financial responsibility at the expense of certain privileges and protection formerly accorded them in regard to their property rights. The power to handle immovables and registered movables granted the married woman amounts to little more than a veto over the husband's acts, which, it should be pointed out, is the same veto power that the husband enjoys. In regard to unregistered movables, however, which probably constitute a large portion of the community assets, the married woman has been given unlimited management ability. In fact, the new matrimonial regimes law, coupled with pertinent Federal laws and regulations, gives her enormous power to borrow, to initiate action, and to obligate her husband and the community assets—a situation previously unthinkable. The Legislature continues to tinker with the matrimonial regimes law each year in an effort to balance the interests of spouses and creditors, but manifests little concern for the institution of marriage itself. Despite the most dire forecasts from a number of quarters decrying this lack of concern and predicting the destruction of the family and the inauguration of unremitting warfare between the spouses, there seems to be little evidence of such disintegration of the family. Certainly, there has been no great avalanche of suits filed in the courts. Were the situation otherwise, it might substantiate or suggest the precipitous demise of the family in Louisiana. As the Legislature continues to amend the matrimonial regimes law each year, and as the courts continue to shed light upon it, many hope, and in some circles anticipate, that the new law as amended and interpreted will some day reach that halcyon state in which the newly created management potential of the wife will greatly enhance the marital circumstances between her and her spouse and reverberate into greatly strengthened relations among all members of the family, including the children. At this time, however, the legislative changes seem to suggest a movement toward the creation of a legal matrimonial regime in which the patrimonies of the spouse are in fact separate and the spouses themselves are assimilated to business partners.

MANAGEMENT OF CHILDREN'S ASSETS

Although successful in gaining management rights in their own patrimonies, women have been much less successful in securing rights in the administration of their children's assets. Many articles in the chapter of the Louisiana Civil Code entitled "Paternal Authority"¹⁰⁰ actually refer to the father and the mother and make it a true parental authority; yet Article 216 leaves no doubt that there is a definite

100. LA. CIV. CODE arts. 81, 97, 216-20, 223, 227-29, 235, 237.

paternal preeminence in Louisiana, even today. Article 216 states in part that "in case of difference between the parents, the authority of the father prevails."

Article 221 of the Civil Code provides that "the father is, during marriage, administrator of the estate of his minor children and the mother in case of his interdiction or absence." The many legislative attempts to broaden the authority of the mother in the administration of the assets of her children have always met with defeat. In 1975, in a session of the Legislature when the right hand apparently did not know what the left hand was doing, a new Article 4502 was added to the Code of Civil Procedure, which increases the mother's right to represent the patrimonial, but not the personal, interests of her children. It provides as follows:

The mother shall have the authority of the father during such time as the father is mentally incompetent, committed, interdicted, imprisoned, or an absentee. Moreover, with permission of the judge, the mother may represent the minor whenever the father fails or refuses to do so; and in any event she may represent the minor under the conditions of the laws on the voluntary management of another's affairs.

Not only does this provision give the mother the opportunity to act in her children's patrimonial interests in more instances than just in cases of the father's interdiction or absence, but also it gives her the right to act, with the judge's permission, whenever the father fails or refuses to do so, as in accepting a succession for the children or suing for damages suffered by the child. Acting in accordance with the laws governing the voluntary management of another's affairs additionally gives the mother an extensive opportunity to manage the assets of her children.

In the same legislative session in which Article 4502 was added to the Code of Civil Procedure, the Legislature rejected an amendment to Article 221 of the Civil Code, which would have incorporated similar provisions into the substantive law. Louisiana thus is left in the anomalous position of providing procedural rights for mothers without enacting corresponding changes in the basic substantive law. Mothers have successfully managed their children's assets, however, under the authorization provided by Article 4502 of the Code of Civil Procedure¹⁰¹ and will, no doubt, continue to do so until the dichotomy between Article 221 of the Civil Code and Article 4502 of the Code of Civil Procedure is discarded.

101. See *Garrett v. Garrett*, 376 So. 2d 623 (La. App. 4th Cir. 1979).

EQUAL RIGHTS AMENDMENT

The right of a mother to serve as co-administrator of her children's assets, or the lack of such right, would seem to cry out for constitutional attack upon Article 221 of the Civil Code and other articles which limit the mother's right to administer her children's patrimonies. In the analogous case of *Reed v. Reed*,¹⁰² the Supreme Court unanimously held that a statutory provision giving a mandatory preference in the appointment of an administrator to a male applicant over a female applicant who is equally qualified and within the same entitlement class under the Probate Code violated the equal protection clause of the Fourteenth Amendment.

In this connection it is interesting to note that, even though the proposed "Equal Rights Amendment" to the United States Constitution has never been adopted, in 1974, Louisiana did adopt a constitution containing a prohibition against "arbitrarily, capriciously, or unreasonably discriminating because of sex."¹⁰³ Women in Louisiana are now well-equipped to attack practices they find discriminatory. In addition to the "equal protection" provided by the Fourteenth Amendment of the United States Constitution they now have a non-discrimination clause in the Louisiana Constitution.

MARRIAGE AND ITS DISSOLUTION

The societal phenomenon of the greatly accelerated dissolution of marriages would seem to be enhanced in Louisiana by the movement toward a "no fault" divorce based on "irreconcilable differences." Although there have been numerous legislative attempts to reduce further the periods for living separate and apart necessary to obtain a judgment of separation or divorce, the present requirement for a legal separation is six months¹⁰⁴ and, for a divorce, one year.¹⁰⁵ Louisiana's version of a "no fault" marriage dissolution, adopted in 1977, provides as follows:

Separation from bed and board may be claimed reciprocally for the following causes. . .

10. When the spouses have lived six months separate and apart, voluntarily and without reconciliation; provided that both spouses shall execute an affidavit attesting to and testifying that they have so lived separate and apart and that there exists irreconcilable differences between the spouses to such a degree and nature as

102. 404 U.S. 71, 30 L. Ed. 225, 29 S. Ct. 51 (1971).

103. LA. CONST. art. I, § 3.

104. LA. CIV. CODE art. 138(10).

105. LA. R.S. 9:301, as amended by 1979 La. Acts, No. 360, § 1.

to render their living together insupportable and impossible. In all such cases proceedings shall be entitled "In the matter of _____ (petitioner) and his (her) spouse _____."¹⁰⁶

Although spouses are able to obtain legal separations and divorces today more easily, more quickly, and without a showing of fault, the same leniency has not yet been applied to obtaining alimony.

Alimony

Despite the adoption of provisions for legal separation and divorce, which are in effect "no fault" dissolutions of marriage, the requirement that the spouse asking for alimony not be at fault still remains in Article 160 of the Civil Code, providing for alimony after divorce. There has been a trend in Louisiana, nonetheless, toward awarding the wife (or husband) "rehabilitative" alimony.

Although the awarding of alimony after divorce was based originally upon a delictual principle¹⁰⁷ in that the spouse from whom it was sought had breached his or her marital obligation of mutual support, such alimony came to represent a societal response to the needy who would otherwise become charges of the state.¹⁰⁸ Only the spouse who is without fault and has not sufficient means for support can be granted alimony out of the property and earnings of the other spouse, but in determining this entitlement the court is now charged by statute:

to consider the income, means, and assets of the spouses; the liquidity of such assets; the financial obligations of the spouses, including their earning capacity; the effect of custody of the children of the marriage upon the spouse's earning capacity; the time necessary for the recipient to acquire appropriate education, training, or employment; the health and age of the parties and their obligations to support or care for dependent children; (and) any other circumstances that the court deems relevant.

In determining whether the claimant spouse is entitled to alimony, the court shall consider his or her earning capacity, in light of all other circumstances.

*This alimony shall be revoked if it becomes unnecessary and terminates if the spouse to whom it has been awarded remarries.*¹⁰⁹

Clearly the jurisprudential considerations and practices of the past

106. LA. CIV. CODE art. 138(10).

107. 1 M. PLANIOL, CIVIL LAW TREATISE pt. 1, No. 1259, at 696 (12th ed. La. St. L. Inst. Trans. 1959).

108. Loyacano v. Loyacano, 358 So. 2d 304, 308 (La. 1978).

109. LA. CIV. CODE art. 160 (emphasis added).

have been set in the stone of legislative prescription. Delictual alimony has progressed from alimony based upon need to alimony necessary to put the claimant spouse on the basis where he or she can support himself or herself without becoming a charge upon society. The thrust of the newly amended article, with its double reference to consideration of the claimant spouse's earning capacity and to revocation of alimony when no longer necessary, is to emphasize that the claimant-spouse (usually the wife) will no longer be awarded what she needs for the remainder of her life or until remarriage, but that she is expected to prepare herself to earn her own livelihood. In other words, she will receive the funds necessary to "rehabilitate" herself, but only for as long as it takes to get her on her feet and make her a self-supporting individual.¹¹⁰ She will no longer be a "kept woman." Once again the societal evolution of a woman's assuming responsibility for herself is reflected in the laws of Louisiana, and once again women, in winning greater freedom and responsibility, have lost certain financial benefits.

In the meantime, it is worth noting that several proposals to limit alimony after divorce to a period of years—for five years or for a period within the discretion of the judge—have been rejected by the Legislature.¹¹¹ This suggests that, thus far, it is recognized that there are some spouses, particularly those of a certain age, who will never be able to be retrained or reeducated and made self-supporting. Those spouses, mostly women, will not yet be cast upon the public for support. The responsibility for these women will continue to be assigned to their former husbands, probably on the theory that, as between an innocent taxpayer and the party presumed guilty under the old quasi-delictual theory, the latter should shoulder the responsibility.

The rejection of a bill filed in the 1980 session of the Louisiana Legislature¹¹² which would have made it possible for a spouse to waive the right to alimony after divorce, but not *pendente lite*, which reflects the mutual support mandated between the spouses during marriage, gives continued credence to the general socio-economic policy "to pre-

110. La. S. Con. Res. No. 164, 6th Reg. Sess. (1980) (calling for inclusion of rehabilitative considerations in approaching awards of alimony). See generally Spaht, *Developments in the Law, 1979-1980—Rehabilitative Alimony*, 41 LA. L. REV. 313, 373 (1981); Weitzmann & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L. Q. 141 (1980).

111. La. S.B. 806, 6th Reg. Sess. (1980).

112. La. H.B. 725, 6th Reg. Sess. (1980). See *Monk v. Monk*, 376 So. 2d 552, 554 (La. App. 3d Cir. 1979) (which was decided one year earlier and upheld the right of divorced women to waive permanent alimony, but not alimony *pendente lite*, which is support between persons still married, while alimony after divorce is considered merely a pension given by one spouse who is better off than the other).

vent the dependency of such divorced women so as to relieve them from destitution and the State from their care."¹¹³

It should be noted briefly, also, that both Articles 148 and 160 of the Civil Code were amended in 1979¹¹⁴ to make alimony *pendente lite* and alimony after divorce available to husbands on the same basis as it is to wives. The Family Relations Council of Louisiana had sponsored this legislative change, not only to correct an inequity, but for the more compelling reason that alimony for wives had been under attack as being unconstitutional, since it did not apply equally to both spouses, and was thus threatened with abolition. Louisiana obviously still thinks that the awarding of alimony under certain circumstances is for the public good.

Custody and Tutorship of Children

Ironically the evolving role of women in assuming responsibility for themselves may mean their relinquishing traditional rights to the care and custody of their children. In 1979, the Legislature amended both Articles 146¹¹⁵ and 157¹¹⁶ regarding the award of child custody. It had always been the jurisprudential rule to award custody, both permanent and *pendente lite*, in accordance with the best interest of the child, but this "best interest" usually dictated that the mother be awarded custody, particularly in the case of young children.¹¹⁷ Presumably the amendment was motivated by a desire to overturn the "maternal preference" rule. The additional language in Article 157, "without any preference being given on the basis of the sex of the parent," supports this idea. It suggests, also, an intention to overturn the old jurisprudential "double burden rule,"¹¹⁸ which was applied when a parent sought a change of permanent custody and under which the parent had to prove that the children's present living environment was detrimental to their interests and that the parent seeking custody could provide them a better living environment.

The new legislation encourages more fathers to seek custody of their children, because previously they could only have hoped to win if the mother were proven to be morally unfit.¹¹⁹ Certainly many more fathers are now receiving legal custody of their children. With divorced women being expected to support themselves today, which often

113. *Montz v. Montz*, 253 La. 897, 907, 221 So. 2d 40, 44 (1969) (Barham, J. dissenting).

114. 1979 La. Acts, No. 72.

115. 1979 La. Acts, No. 718, § 1.

116. *Id.*

117. *Nethkin v. Nethkin*, 307 So. 2d 563, 567 (La. 1975).

118. Comment, *Selected Legislation of the 1979 Regular Session*, 40 LA. L. REV. 473, 474 (1980).

119. *Id.*

means that young children will be placed in day care arrangements, it is easy for the courts to believe that the children will be just as well off with a working father as with a mother who probably is working, too, and receiving less pay for it. Whether increased incidence of fathers' obtaining legal custody of their children represents a deprivation for women who are mothers is impossible to know at this time. Undoubtedly it means freedom to some women who are working and finding it difficult to take care of themselves, their homes, and their children.

In the last session of the Legislature, Louisiana followed the lead of many other states¹²⁰ and adopted the principle of "joint custody," under which the courts may award tutorship and custody jointly to the parents, both temporarily and permanently, provided that they remain domiciled in the state.¹²¹ The feasibility and implications of joint custody remain to be seen. It may be that separated and divorced women will seek "joint custody" and thus preserve some of the rights in the care and custody of their children to which they are no longer automatically entitled.

SUCCESSIONS

Forced Heirship

In 1979, the Legislature reduced the parents' forced heirship portion to include only the separate property of their children who died without descendants,¹²² and then in 1981, the Legislature abolished the parents' forced heirship rights altogether,¹²³ this being due, at least in part, to the influence of certain women's groups who wanted to see wives favored over parents.

Article 915 of the Civil Code was amended also to provide that in the event one spouse died without descendants the surviving spouse alone inherits the deceased's share of the community property,¹²⁴ instead of sharing it with the deceased's parents. Inasmuch as parents are no longer forced heirs of their children who die without descendants, a child may will his entire estate, both separate and community property, to his surviving spouse, if he wishes.

For the wife, perhaps a second wife or a wife of a few years duration, who already owns one-half of the community assets and who will

120. See generally FAMILY ADVOCATE (Summer 1978). See also Miller, *Joint Custody*, 13 FAM. L. Q. 345 (1979).

121. LA. CIV. CODE art. 157, as amended by 1981 La. Acts, No. 283.

122. LA. CIV. CODE art. 1494, as amended by 1979 La. Acts, No. 778, § 1.

123. 1981 La. Acts, Nos. 442, 919.

124. 1981 La. Acts, No. 919.

inherit one-half of the deceased's portion of the community assets and has the possibility of being willed the disposable portion of her husband's entire estate, the new amendment represents a munificent gesture on the part of the Legislature. Another benefit which the surviving wife already enjoyed is the availability of the "marital portion"¹²⁵ granted to the surviving spouse of one who dies rich in comparison to the survivor. The poor old mother, on the other hand, who may well have been depending upon "Sonny" for support in her old age, is now deprived of her former one-fourth share in the deceased's community assets,¹²⁶ and of any interest in his separate estate as well.¹²⁷ That parents be thrown upon the mercy of the long-suffering taxpayers, which is a result easily imagined under the new legislation, is contrary to the philosophy of reciprocal support among family members, upon which Louisiana's family law is founded.

In addition to benefiting by the removal of the parents as forced heirs, spouses were moved up the succession line a notch when the 1981 Legislature provided that they may now inherit the deceased's separate property to the exclusion of other ascendants, if the deceased dies without any children, parents, or brothers and sisters or descendants from them.¹²⁸ Wives have gained as heirs and legatees under the new amendments to Louisiana's succession laws, but it has been at the expense of other women, namely, mothers, grandmothers, and other ascendants, who probably are in greater need.

Usufruct of Surviving Spouse

In yet another instance spouses were favored by the 1981 Legislature but, in this case, at the expense of the descendants. Acts 442, 911, and 919 amending Civil Code Article 916 extended the legal usufruct of the surviving spouse over the share inherited by all descendants, even though they not be children of the marriage. This usufruct terminates when the surviving spouse contracts another marriage, unless the usufruct has been confirmed by testament for life or for some lesser period.

By testament a person may grant a usufruct for life or for some shorter period over his entire separate property or only over some portion of it.¹²⁹ If the usufruct affects persons other than the descend-

125. LA. CIV. CODE arts. 2432-37.

126. LA. CIV. CODE art. 915.

127. LA. CIV. CODE art. 903.

128. 1981 La. Acts, No. 919.

129. See 1982 La. Acts, Nos. 911, 919. There is a serious substantive conflict between these two acts and an equally serious question as to which prevails due to the time of their passage and their dates of effectiveness. Act 911, the more expansive act, provides in part: "The deceased may be testament grant a usufruct for life or

ants, or if it is over the separate property of the deceased, successors in title to the property under usufruct may request security from the usufructuary in an amount sufficient to protect the petitioners' interests.¹³⁰ Thus the surviving spouse has made another considerable gain at the expense of the children.

MISCELLANEOUS MATTERS

Domicile

Although Article 39 of the Civil Code providing that a married woman has "no other domicile than that of her husband" has not been amended or removed from the Civil Code, it has been held unconstitutional insofar as venue requirements for married women are concerned.¹³¹ Presumably this domiciliary provision for married women will be held unconstitutional in other instances when properly attacked.

Assistance to Women-owned Businesses

Typical of the statutes¹³² which the Louisiana Legislature has adopted in recent years to assist women in achieving their goals of independence and self-support is the section added by the 1981

for a shorter period to the surviving spouse over all or part of his separate property." Act 919 provides for a corresponding testamentary usufruct "over so much of the separate property as may be inherited by issue of the marriage with the survivor or as may be inherited by illegitimate children." See Johnson, Alston, Personal Notes Prepared for Talks and Lectures Regarding Louisiana Succession Law (unpublished notes, LSU Paul M. Hebert Law Center, 1981) [hereinafter cited as Johnson]. Professor Johnson writes:

The last act necessary for passage of Act 919 (concurrence by House in Senate amendments) took place prior to 1:45 p.m. on July 13, 1981. House Journal, pp. 29-59, July 13, 1981. The last act necessary for passage of Act 911 (concurrence by Senate in House amendment) took place after 9:30 p.m. on July 13, 1981. Senate Journal, pp. 121, 134, July 13, 1981. The effective date of Act 911 is September 11, 1981. The effective date of Act 919 is January 1, 1982 (dates of death after December 31, 1981). Act 911 provides: ". . . To the extent that the provisions of House Bill No. 817 which became Act 191 . . . are inconsistent with the provisions of this Act, those provisions of House Bill 817 are hereby repealed." Act 919 provides: "In the event of any conflict between the provisions of this Act and those of any other Act adopted by the Legislature at its Regular Session of 1981, regardless of which Act is adopted or signed later by the governor, the provisions of this Act shall prevail."

130. Johnson, *supra* n. 129.

131. Craig v. Craig, 365 So. 2d 1298 (La. 1978).

132. See, e.g., LA. R.S. 28:2221, as added by 1979 La. Acts, No. 746, § 1 (Protection from Family Violence Acts); LA. R.S. 9:3583, as added by 1975 La. Acts, No. 705, as amended by 1978 La. Acts, No. 161, § 1 (Louisiana Equal Credit Opportunity Law); LA. R.S. 10:8-501, as added by 1978 La. Acts, No. 165, § 1 (allowing married women to transfer stock as *femmes soles*); LA. R.S. 46:1991-96, as added by 1978 La. Acts, No. 664, as amended by 1979 La. Acts, No. 786, § 6 (Displaced Homemaker Act).

Legislature to the provisions in the Revised Statutes governing small businesses. That new section, entitled the "Louisiana Procurement Code,"¹³³ provides for assistance to businesses which are fifty-one percent owned and controlled and operated by women. These women must be involved in the day-to-day operation of the business, and the percentage of ownership will not be diminished if the women's share forms part of a community regime. At least ten percent of the value of procurements designated or set aside as awards by the various municipalities and parishes of the state shall be awarded to women-owned businesses if possible.

By the same legislative act of the 1981 session the Louisiana office of Women's Business Enterprise was created within the division of administration.¹³⁴ The Louisiana office of Women's Business Enterprise is mandated to encourage women-owned small businesses and to report on them to the Commissioner of Administration, who establishes all necessary standards and regulations.

Abortion

Finally, a brief comment on the effect in Louisiana of the two famous 1973 Supreme Court cases of *Roe*¹³⁵ and *Doe*,¹³⁶ which are said to have given women a right to their own bodies and to legalize abortions under certain circumstances, thus enhancing the quality of life for women by giving them more independence or providing some other salutary advantage not previously enjoyed.

Although Louisiana's Criminal Code provisions defining abortion as a crime and penalizing it¹³⁷ have never been challenged on constitutional grounds and remain in the Criminal Code, Louisiana's statutes regulating the medical practice of abortion¹³⁸ have been struck down on a number of occasions.¹³⁹ With little success, the Legislature

133. 1981 La. Acts, No. 691.

134. *Id.*

135. 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); 410 U.S. 208, 35 L. Ed. 2d 147, 93 S. Ct. 739 (1973).

136. 410 U.S. 170, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973).

137. LA. R.S. 14:87 *et seq.* (Supp. 1977). By section 1 of Act 74 of 1973, the Legislature adopted a provision making it a crime to fail to sustain the life and health of an aborted, viable infant. LA. R.S. 14:87.1 (Supp. 1977). Additionally, by section 1 of Act 256 of 1976 and Act 128 of 1977 the Legislature defined a person within the meaning of the Criminal Code to include "a human being from the moment of fertilization and implantation." LA. R.S. 14:2.7 (Supp. 1977).

138. LA. R.S. 40:1299.35.3-.6, .8, .10A(2), .14 (Supp. 1980), *as amended by* 1981 La. Acts, No. 744, § 1. *See also* LA. R.S. 40:1299.35.7, .9, .16 (Supp. 1980), *repealed by* 1981 La. Acts, No. 744, § 2.

139. *See, e.g.*, Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977).

continues to enact legislation that it hopes will make abortion so difficult as to be impossible and still be constitutional. No doubt the Legislature is trying to act not only in the best interests of the state but in accordance with the temper of its citizenry.

Meanwhile the basic law of the state governing persons has not been changed. The unborn is still considered a person in Louisiana from the moment of conception,¹⁴⁰ and all successions opened will be held for the unborn¹⁴¹ and all his other interests protected.¹⁴² Women in Louisiana may have rights to their own bodies, because the Supreme Court said they do, but in Louisiana, contrary to most "Common Law states," the unborn has rights which must be considered in juxtaposition to those of the mother, at least until the courts have ruled otherwise. The recognition of the unborn as a person from the moment of conception may have some intimidating effect upon anyone considering abortion, for statistics show that abortion is far from being rampant in Louisiana.¹⁴³

CONCLUSION

The grand tenor of change in the laws of Louisiana affecting women has been toward giving women more independence and making them more self-supporting. Probably the most important of the statutes enacted in the past few decades has been the "Equal Management" act, which gave married women far more rights in the management of their patrimonial interests. Another important indication of the increasing responsibility being placed upon women is the movement toward "rehabilitative alimony." Additionally, in the past year women, as surviving spouses, have gained substantial increases in inheritance and usufruct rights, but often at the expense of the rights of parents and children, respectively.

The Legislature has not restricted its efforts in this regard to the area of marriage and patrimonial rights of married women, ex-wives, and widows, but has extended support to the business environ-

140. LA. CIV. CODE arts. 954, 956, 1482.

141. LA. CIV. CODE arts. 29, 954-56.

142. LA. CIV. CODE arts. 252, 1482, 1734.

143. A telephone conversation with Mr. Tom Ballinger of the Statistics Office of the Department of Health in New Orleans revealed that the latest abortion statistics for Louisiana are dated 1979. There were 13,512 abortions reported that year and 11,236 for 1978. These figures represent 166 abortions per 1,000 live births in Louisiana in 1979, as compared with 150 abortions per 1,000 live births in 1978. Louisiana ranks approximately tenth lowest in the United States in incidence of abortions reported. Mr. Ballinger thinks that abortions the country over are unreported by 35 to 50%, although this figure is declining. Mr. Ballinger opined, also, that Louisiana's low abortion rate probably reflects the conservative mind of its citizenry.

ment as well. For instance, the Legislature has established such entities as the Bureau of Women in the Department of Justice¹⁴⁴ and has adopted many statutes that enable women to become retrained and to enter the work force, such as the "Displaced Homemaker" and the "Assistance to Women-Owned Businesses" acts. Clearly, women are coming of age in Louisiana. As they have gained more rights to manage their own patrimonies and have assumed more responsibility for them, women, however, have also sustained the loss of certain privileges, preferences, and protections to which they were formerly entitled.

144. Executive Order No. 64-12 (1964), establishing a Commission on the Status of Women. The Commission was made permanent by 1968 La. Acts No. 43 and the Bureau was established in conjunction with the reorganization of state government pursuant to 1972 La. Acts. No. 253.

