WOMEN'S RIGHTS IN THE LOUISIANA MATRIMONIAL REGIME

JANET MARY RILEY

Reprinted from

TULANE LAW REVIEW

Vol. L, No. 3, pp. 557-576

March 1976

WOMEN'S RIGHTS IN THE LOUISIANA MATRIMONIAL REGIME

JANET MARY RILEY*

REVISION

France is already a decade ahead of Louisiana in overall reform of its law of matrimonial regimes[1] and 68 years ahead in returning to wives control over that part of their community property earned by their personal energies.[2] There were only 4 years between France's adoption of the *Code Napoléon* in 1804 and Louisiana's adaptation of it in our first "Civil Code" in 1808,[3] and 17 more years until a major revision culminated in Louisiana's Civil Code of 1825, the sesquicentennial of which we celebrate in this happy reunion of French and Louisiana lawyers.

Our slower pace in Code revision today enables us in Louisiana to decide whether we shall copy France's 1965 lead, make adaptations from it, reject it, or simply profit by its experience. Whatever we do, we must realize that our discussions, paralleling those of France of some years ago, will sound archaic to the French and to several other countries that have in recent decades completed major revisions of their codes on matrimonial regimes. At the same time, it must be recognized that although France's revisions were daring and far-reaching a decade ago when adopted, the revisions in most of the American community property states have recently gone so much further than France toward achieving true equality for spouses that retention in France of the husband as "sole administrator" of the community[4] sounds archaic now in those states. This is true despite the fact that the husband's status is far more restricted in France[5] than in Louisiana, where all the revision is yet to come.

---

* Professor of Law, Loyola University, New Orleans.

The author wishes to acknowledge with gratitude the excellent assistance of Eavelyn T. Brooks and Elward Saul.

[1] Law of July 13, 1965, [1965] J.C.P.III. No. 31209.

[2] Law of July 13, 1907, [1907] D.P.IV.149 (codified at C. civ. arts. 224, 1401, 1425), *cited in* 3 M. Planiol, Traité élémentaire de droit civil, nos. 911, 1045-1 (11th ed. La. State L. Inst. transl. 1959) [hereinafter cited as Planiol].

[3] Reprint of Moreau Lislet's Copy of a Digest of the Civil Laws Now in Force in the Territory of Orleans (1808), known as the de la Vergne volume.

[4] C. civ. art. 1421.

[5] *E.g.*, *id.* arts. 215, 220, 1421, 1424.

Louisiana's revision, late as it is in relation to the revisions in France, other European countries, and the seven other American community property states, is at last in progress. The Louisiana State Law Institute, an official law reform agency of Louisiana,[6] has given priority to revision of laws treating the sexes differently, including the law of matrimonial regimes.[7] Its goal is the presentation to the 1976 legislative session of a draft of Book III, Title VI as one of the first parts of a projected long-range revision of the entire Civil Code.[8]

EQUAL MANAGEMENT VERSUS TWO FUNDS AND TWO MANAGERS

Whether or not the present automatic male head and mastership of the legal community in Louisiana[9] is an unconstitutional denial of equal protection,[10] there seems to be general agreement among the members of the Council of the Louisiana State Law Institute, though begrudgingly on the part of some, that it is unfair or at least unworkable in today's Louisiana. With that conclusion agreement stops, for several management systems have been considered, and the tentative adoption of one proposed plan was by a divided council at a sparsely attended meeting.[11]

This writer's preferred management system, not adopted by the Law Institute as of this writing, is closely similar to

---

[6] La. R.S. 24:201 (1950).

[7] La. State L. Inst., 18th Biennial Rep. 16 (1974). *See generally* Riley, *A Revision of the Property Law of Marriage—Why Now?*, 21 La. B.J. 29 (1973).

[8] La. Acts 1948, No. 335, states:

> [T]he Louisiana State Law Institute is instructed to prepare comprehensive projects for the revision of the Civil Code of Louisiana and for the revision of the Code of Practice of Louisiana.
>
> The Louisiana State Law Institute shall proceed to the discharge of this assignment as expeditiously as is consistent with thorough preparation and careful consideration.

The goal mentioned in the speech—sponsorship of revision in the 1976 legislative session—apparently will not be attained. The Law Institute's new goal for revision of Book III, Title VI on matrimonial regimes is 1977.

[9] La. Civil Code art. 2404 (1870).

[10] *See* Bilbe, *Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime*, 19 Loyola (N.O.) L. Rev. 373 (1973).

[11] After the address which was the basis for this article was given in May 1975, the plan adopted in April 1975 was reexamined and again tentatively reaffirmed by a divided vote at a somewhat better attended meeting in October 1975. As recently as December 1975, however, the council requested that at its January 1976 meeting it be favored with a reexamination of basic principles (*e.g.*, Is the community an entity? What is the nature of each spouse's interest?) and of all possible management systems. The tentative character of all its decisions before awarding its sponsorship to any legislation was never more clearly evident. At this time, it would be imprudent to forecast what system it will sponsor.

that adopted in five of the other seven community property states,[12] and adopted as an alternative available upon unilateral action of the wife in a sixth state, New Mexico.[13] The system tentatively adopted by the Law Institute is in some respects similar to that recently adopted by Texas.[14] In April 1975 the Council of the Louisiana State Law Institute instructed the reporter and her advisory committee to return prior to the 1976 legislative session with a draft incorporating a management system in which each spouse would control his or her personal earnings, the revenues of his or her separate property and things acquired with those earnings and revenues, and revenues of things thus acquired. Only at the dissolution of the community regime would the two funds be merged and the community property divided equally. This writer, the Law Institute's reporter, sees that system as conferring an appearance of equality upon a system of inherent inequality. It is equality of control of similar categories of property, but not equality of access to the family's property. It accomplishes nothing at all to improve the status of the unemployed homemaker who presently has and, under the council's proposal, will have money in her purse or credit available only at the whim of her husband.[15] The underemployed wife is not much better off, and it is obvious that child rearing or even husband pleasing may deter her from developing her occupational skills to their highest potential. Variations on this basic plan of two distinct funds managed independently by each earning spouse exist not only in Texas,[16] but also in Quebec,[17] West Germany,[18] and Sweden.[19]

---

[12] Ariz. Rev. Stat. Ann. § 25-214 (Spec. Pamphlet 1973); Cal. Civ. Code §§ 5125, 5127 (Deering Supp. 1975); Idaho Code § 32-912 (Supp. 1975); Nev. Rev. Stat. § 123.230 (Supp. 1976); Wash. Rev. Code Ann. § 26.16.030 (Supp. 1974).

[13] N.M. Stat. Ann. §§ 57-4A-7 to -8 (Supp. 1975).

[14] Tex. Fam. Code Ann. § 5.22 (1975).

[15] After this address was delivered in May 1975, the Louisiana Equal Credit Opportunity Law, La. Acts 1975, No. 705 (codified at La. R.S. 9:3581-85 (Supp. 1976)), was enacted by the Louisiana Legislature, but its effect is questionable. A wife's debts can be satisfied from that part of the community which she earns, but it is not clear whether she has the right in relation to her husband to incur community debts since his authority in article 2404 was not expressly reduced. La. Civil Code art. 2404 (1870). Clearly, it does nothing for the nonearning wife. A similarly titled federal credit act, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-91e (Supp. IV, 1974), forbidding discrimination in extension of credit, permits consideration of state laws affecting credit, so that it will have little effect in Louisiana.

[16] Tex. Fam. Code Ann. § 5.22 (1975).

[17] Que. Civil Code arts. 1266d, 1266o, 1266p (Y. Renaud & J. Baudouin eds. 1974).

[18] BGB §§ 1363(2), 1364 (Forrester, Goren & Ilgen transl. 1975).

[19] *See* I. Baxter, Marital Property 620 (1973); Wallin, *The Status of Women in Sweden*, 20 Am. J. Comp. L. 622, 624 (1972).

Whatever the reason, whether it be the late date of the revisions or the strength of the women's movement in the United States, the American community property states (except Texas, with its two funds and Louisiana, now in labor pains) have enacted systems of true equality. These systems give each spouse acting alone the power and right to spend or encumber community assets regardless of how procured,[20] except where joint action is required for specified acts.[21] These revisions fully implement the concept basic to the community system that neither spouse earns anything alone, but each is a better earner because of the cooperation of his or her spouse.[22] It is true that those other community property states have not lived long enough with their new systems to favor Louisiana with interpretations by their highest courts or with much practical experience; but neither have we in Louisiana heard reports from them that marriages or businesses are suffering hardship because of the new schemes.[23] Minor amendments[24]

---

[20] *See* notes 12-13 *supra*.

[21] Joint action is required in six American community property states, and in France consent is required for *disposition* of community immovables. Ariz. Rev. Stat. Ann. § 25-214(C)(1) (Spec. Pamphlet 1973); Cal. Civ. Code § 5127 (Deering Supp. 1975); Idaho Code § 32-912 (Supp. 1974); Nev. Rev. Stat. § 123.230.1 (Supp. 1976); N.M. Stat. Ann. § 57-4A-7 (Supp. 1975); Wash. Rev. Code Ann. § 26.16.030(3) (Supp. 1974); C. civ. arts. 215, 1424, 1425.

All the above laws except France's also require joint action for *encumbrances* of community immovables. France requires consent of the other spouse for encumbrances. C. civ. art. 1424.

Leases for more than a year in Arizona and California and all leases in New Mexico require joint action. Ariz. Rev. Stat. Ann. § 25-214(C)(1) (Spec. Pamphlet 1973); Cal. Civ. Code § 5127 (Deering Supp. 1975); N.M. Stat. Ann. § 57-4A-7 (Supp. 1975). Consent for certain leases is required in France. C. civ. art. 1424.

Joinder for *acquisition* of community immovables is required in Arizona, Nevada, and Washington. Ariz. Rev. Stat. Ann. § 25-214(C)(1) (Spec. Pamphlet 1973); Nev. Rev. Stat. § 123.230.1 (Supp. 1976); Wash. Rev. Code Ann. § 26.16.030 (Supp. 1974).

Gifts of community personal property may not be made in California by a spouse. Cal. Civ. Code § 5125(b) (Deering Supp. 1975). Nevada and Washington require consent of the other spouse for gifts of community property. Nev. Rev. Stat. § 123.230.1 (Supp. 1976); Wash. Rev. Code Ann. § 26.16.030 (Supp. 1974). Consent is required for community gifts in France. C. civ. art. 1422.

[22] W. de Funiak & M. Vaughn, Principles of Community Property 24 (2d ed. 1971); Planiol, *supra* note 2, no. 773; Muller-Freienfels, *Equality of Husband and Wife in Family Law*, 8 Int'l & Comp. L.Q. 249, 263 (1959).

[23] This writer conversed with practicing attorneys and accountants from all community property states during attendance at a Seminar on Federal Tax Planning with Community Property on October 22-24, 1975, at Las Vegas, Nevada, sponsored by the *Community Property Journal*, and made a point of seeking opinions on the effects of the new equal management system where it has been adopted. No one mentioned any problems, and all seemed to consider it successful and uneventful. Though mentioned frequently in the speeches at the seminar as something to be remembered in planning, no speaker seemed perturbed that the effect is or will be harmful.

[24] *E.g.*, ch. 1206, § 4, [1974] Cal. Stats.; ch. 546, § 14, [1974] Cal. Stats.; ch. 987, § 14, [1973] Cal. Stats. (amending Cal. Civ. Code § 5125 (Deering 1972)).

and comments about the need for such alterations[25] have indicated only that nothing is perfect and that with small revisions their basic idea is sound.

This never-married reporter has observed that when most couples marry, they intend to and during marriage actually do pool their resources and live as the family units they have created; that law means little to them and that many are surprised when they realize how nearly insulated their separate property can lawfully be from satisfying the desires of their spouses; that husbands have expected their paychecks to be shared by their wives and have assumed that their wives' paychecks will be used to raise the family standard of living; that wives have rejoiced when their husbands' salaries were raised or businesses prospered; and that wives have assumed that their salaries, if any, will be merged with those of their husbands, usually in a joint checking account available to both, necessitating as a practical matter, so far as large expenditures are concerned, consultation and agreement.

The equal management now in effect in five of the eight community property states, preferred by this reporter but not approved by the Law Institute, is nothing more than a legalization of the way most married couples actually live throughout the United States. As women's knowledgeability about property matters has increased and male management has become unnecessary, spouses have shared more and more in decision making as they have always shared in contribution of energy, skills, cooperation, and concern. What has happened is simply that most married couples have achieved a far more successful balance of interests than the dated laws have expected of them. They have formed for themselves an internal family law with equal protection expected by and granted to each while legislative law has held back. Law in at least five states has recently caught up with its people. Louisianians, likewise, are ahead of their law. Were they to attempt to live according to the proposed plan of two separate and distinct funds, treating their respective earnings almost as though they had never been married, the marriage probably would not survive. Happily, spouses in successful marriages ignore the law, share their resources, and achieve equality of access to property through mutual respect.

[25] *E.g.*, Cross, *Management and Voluntary Disposition of Washington Community Property*, 2 Community Property J. 13 (1975); Keddie, *Equal Management and Control of Arizona Community Property*, 2 Community Property J. 9, 12 (1975).

Although new in five states, the equal management system is not revolutionary. The system is suitable for all 50 states, but it is appropriate that the initiative should come from the community property states because the philosophy supporting their ancient systems has always recognized the mutual aid given by spouses to each other in each one's activities and endeavors.

OTHER MANAGEMENT SYSTEMS

Proposals other than the two discussed above have been considered by the Louisiana State Law Institute. One, seriously proposed, is to make as few changes as possible, the major change being to give the wife power to execute and record a notarial act before two witnesses declaring that she wishes to retain her personal earnings as separate property, a power she presently has in respect to the revenues of her separate property.[26] Presently, the husband has no comparable power to preserve as separate the revenues of his separate property. This proposal would exacerbate that present discrimination against husbands for they would have no power to preserve as separate their personal earnings. The wife's present power to record a declaration of paraphernality of the revenues of her paraphernal property is seldom exercised. Many wives are unaware of their right, and others fear that marital discord would be created by its exercise. Married women attorneys have told this writer they do not want to hurt their husband's feelings.

This writer thought the proposal was made in jest until it was presented in writing and revived repeatedly at Law Institute council meetings. The only apparent justification for this timid approach to revision is the regrettable fact that although all the rest of the Code revision will probably take many years, there is pressure for a hasty revision of that part of the Civil Code on matrimonial regimes. Because of the interrelationship of marital property laws with almost all other parts of the Code, it is probable that in order to conform to future changes, reconsideration of this first part of the revision will become necessary as other books and titles are revised. There are, however, too many years ahead before ultimate revision is complete for this change-as-little-as-

[26] La. Civil Code art. 2386 (1870).

possible notion to be supportable; and the one change proposed would only compound inequities.

A proposal similar to the French "reserved property" system[27] was the first policy decision of the council. In December 1974 this reporter was given the following instruction: Retain male head and mastership, but permit the wife to control her personal earnings which would remain community property as would her husband's. The attempt to give some meaning to his authority as head and master of the community under those circumstances was so obviously awkward that 4 months later the council abandoned that policy decision and frankly recognized that what they had in effect done in December was to create two community funds with two equal managers, though probably with unequal funds to manage. It is true that France still provides that the husband administers the community,[28] but rather than attempt to maintain his authority, they have so hemmed him in with restrictions that one commentator has declared: "It is clear that the idea that the husband is 'lord and master of the community' has finally been abandoned; he retains his place as head of the community, but instead of exercising a *right*, he fulfills a *function* in the interests of both husband and wife."[29]

The statutory "community of accrued gains" of West Germany, while not a system this writer recommends, would be at least better than abandonment of the community property system without common law protections. In West Germany each spouse manages his or her property independently,[30] with the limitations that consent of the other is necessary to dispose of his or her property in its entirety[31] or to dispose of items in the conjugal household.[32] At dissolution of the matrimonial regime by death, "[T]he equalization of accrued gains is achieved by increasing the statutory share in the estate of the surviving spouse by one-quarter of the estate."[33] When the matrimonial regime is terminated other than by death, "If the accrued gains of one spouse exceed the accrued gains of the

[27] C. civ. art. 1401.
[28] *Id.* art. 1421.
[29] Colomer, *The Modern French Law*, in Comparative Law of Matrimonial Property 98 (A. Kiralfy ed. 1972), *citing* Cornu, *Le régime matrimonial de droit commun: La communauté légale reduites aux acquêts*, J.C.P. 1967.I.2128, No. 117.
[30] BGB § 1364 (Forrester, Goren & Ilgen transl. 1975).
[31] *Id.* § 1365.
[32] *Id.* § 1369.
[33] *Id.* § 1371(1).

other, the other is entitled to half of the surplus as an equalization claim."[34] Spouses may contractually reject the statutory regime, which places them under a regime of separation of property[35] or they may elect community property.[36] If they choose community property and if they do not determine explicitly who manages the common property, it is managed jointly.[37] Joint management may be commercially cumbersome, but it is unquestionably equitable, and it exemplifies a goal of equality the American states have accomplished by permitting either spouse to act alone except when joint action is specially required. Germany has provided extensive code regulations governing both management agreed upon by the spouses and joint management.

Quebec, like West Germany, provides two full systems in its recently revised Civil Code: the legal regime of partnership of acquests governing consorts who have not entered into special agreements,[38] and the community of movables and acquests "established by the simple declaration made by the parties in the marriage contract of their intention that it shall exist."[39]

Louisiana's Code should be revised to provide for two schemes, a legal regime for those who have not expressly contracted to reject it, and another complete one for those who select it. The third alternative, freedom to confect a scheme of their own, should remain available to couples as at present. Provision of a well-drafted alternative to the legal regime would serve at least two desirable purposes. First, it might deter couples from simply contracting to reject the community regime without sufficient thought. Second, it would simplify the work of attorneys in drafting marriage property agreements. If the couple choose the alternative, the contract could simply so state; if they wish another, the two in the Code would serve as models.

There remains the unthinkable possibility that Louisiana, the only civilian jurisdiction in the United States, just might consider abandonment of the community property system entirely, but revise the rest of the Civil Code in true civilian

---

[34] *Id.* § 1378(1).
[35] *Id.* § 1414.
[36] *Id.* § 1415.
[37] *Id.* § 1421.
[38] Que. Civil Code art. 1260 (Y. Renaud & J. Baudouin eds. 1974).
[39] *Id.* art. 1268.

fashion. The diverse kinds of rights and protections for wives which have developed over the years in the common law states[40] are unfamiliar to Louisianians and would have an ungainly fit if attached to our traditional equality of division of community property,[41] usufruct after dissolution of the community regime by death,[42] and right of renunciation.[43] If common law protections are not statutorily added in the event that the community property system is abolished, Louisiana wives would be the most unprotected in the nation, as are those Louisiana wives who now enter into simple premarital contracts not to have a community regime without spelling out in their contracts an alternative plan.[44] The spirit of feminine independence is likely to catch some unadvised women in such a trap.

WORLDWIDE TREND TOWARD SHARING AND EQUALITY

It would be lamentably ironic were Louisiana's men to recommend separation of property at the very time when the excellence of legal recognition of mutuality of marital property interests is gaining nationwide and worldwide recognition. For example, a proposal for marital property reform in New York is based upon the authors' premise that marriage should be regarded as a partnership of coequals; a system somewhat like Germany's has been recommended.[45] Although they propose new terms, like "family assets," "to avoid any possible imputation of community property philosophy,"[46] their proposals include much of what is good in the community property regime. To avoid the uncertainty of equitable division, family assets attributable to the family partnership efforts would be jointly managed and equally divided upon divorce.

---

[40] *E.g.*, H. Clark, Law of Domestic Relations § 1.9 (1968) (scrutiny with which courts will look at prenuptial and postnuptial agreements); *id.* § 6.3; Restatement (Second) of Agency § 22 (1957) (possibility of implied agency of the wife for the husband); 1 R. Powell, The Law of Real Property ¶ 119 (1949, rev. 1973) (restrictions on husband's sale of real property); T. Atkinson, Handbook of the Law of Wills §§ 15, 32-33 (2d ed. 1953); 1 W. Page, Treatise on the Law of Wills §§ 16.5-.7 (rev. ed. W. Bowe & D. Parker 1960) (wife's succession rights, including her right of dower); 26 U. Fla. L. Rev. 221 (1974) (growing tendency of the courts to find a partnership between the spouses). *See generally* Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 Tul. L. Rev. 21, 24, 31, 33-35, 78, 81 (1974).

[41] La. Civil Code art. 2406 (1870).

[42] *Id.* art. 916, *as amended*, La. Acts 1975, No. 680.

[43] *Id.* art. 2410.

[44] *See id.* art. 2325.

[45] Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 Family L.Q. 169, 177 (1974).

[46] *Id.* at 188.

Less fearful of admitting the adoption of at least some of the community property philosophy, the authors of a similar proposal call for state legislation providing for equal sharing in the management and assets of the family. This proposed reform would treat husbands and wives not as individuals, but as a marital unit called a partnership marriage.[47]

The recently drafted Uniform Law on Marriage and Divorce contains 2 schemes, 1 for community property states and 1 for the other 42. Both schemes provide for an equitable division of marital property upon dissolution of the marriage, with recognition of factors that occurred during the marriage, such as a spouse's service as a homemaker.[48]

The Law Reform Commission of Saskatchewan has tentatively proposed legislation providing for (1) judicial discretion in the division of all property between spouses, regardless of how title may be held; (2) co-ownership of the matrimonial home; and (3) for couples married after adoption of the scheme, deferred participation in an equal share. These proposed reforms are based on the opinion that the present law is unfair and that marriage is a partnership of equals.[49]

The United Nations Declaration on the Elimination of Discrimination against Women adopted by the General Assembly on November 7, 1967, requires legislative measures that will assure for women, married or unmarried, "[t]he right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage."[50]

These are but a few examples of the worldwide awakening to the existence of sexist inequities perpetrated by marital property law. They illustrate both the trend toward equality in the ultimate division of property acquired during marriage, and the trend toward equality in the participation in management. The latter trend is a result of the recognition of the basic human dignity of each spouse, of the dependence of each upon the other for assistance, and of the need for freedom for spouses to agree without penalty on different ways of con-

---

[47] Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 Ohio St. L.J. 558, 587 (1974).

[48] Uniform Marriage & Divorce Act § 307, Alternatives A & B (Supp. 1975).

[49] Division of Matrimonial Property, Law Reform Commission of Saskatchewan, Tentative Proposals for Reform of Matrimonial Property Law, Third Working Paper (1974).

[50] G.A. Res. 2263, 22 U.N. GAOR Supp. 16, at 36, U.N. Doc. A/6880 (1967).

tributing to their family's good. This is not an appropriate time for Louisiana to take a backward step, either by abandoning the community property system or by emasculating it to such an extent that spouses treat each other like strangers during marriage, so far as property is concerned, and share their property only after they have ceased to share their lives.

POLICY

The choice among possible marital property systems, especially among possible management provisions in the system, should follow carefully formulated policy decisions. It is submitted that policies adopted as a foundation for our revision should include: (1) Recognition of spouses as equals; (2) freedom for the two of them to agree that each may serve the family in different ways without either one suffering any lesser position in relation to property as a result of a function that does not directly bring new wealth into the family; (3) a legal system that encourages each spouse to serve the family with best abilities and that encourages mutual respect for the service each performs; (4) a policy that gradually equalizes the wealth of the spouses by drawing as much as possible into their jointly owned community fund, while protecting separate property but not encouraging its increase; (5) encouragement of sharing, of investing together, of increasing interdependence; (6) discouragement of independence in handling community property; (7) creation of situations necessitating openness of information about property; (8) a high standard of fiduciary responsibility by both spouses in their management of community property; (9) encouragement of settling property matters as soon as possible rather than leaving disputes festering until dissolution of the matrimonial regime; and (10) remedies for abuse of power. The system of equal management adopted in most of the American community property states can implement these policies.

Although the present tentative policy decision of the Council of the Law Institute is not the reporter's ideal one, it is a step in the right direction. It provides for the abandonment of the male head and master system and for control by the remuneratively employed wife of that part of the community property which she has earned. Although that policy puts none of the community property in the hands of the wife who receives no pecuniary compensation for the work she per-

forms, she will perhaps benefit by some other changes being considered. It is for these few improvements and the hope that a first step will open the way to later legislative advances that this reporter continues to work with tentative policies that are less than her ideal.

COMMINGLING

Among the thorniest of the many problems is the management of commingled assets and liabilities. Already, all community property states face the problem of the mixing of community and separate property.[51] If the community is divided into two unequal funds, each spouse managing what he or she earns, there will be the additional problem of mixing separately controlled community property. In line with the policy of encouraging the sharing of information and property, this writer recommends that either spouse be permitted to alienate and control the commingled effects. An alternative would be joint management with the attendant problem of a slowdown of transactions, possibly to the disadvantage of both spouses.[52] Another alternative would be to treat each spouse as a co-owner in indivision[53] as though single, able to deal only with his or her proportional interest.[54] This would permit one spouse to sell his or her share, possibly leaving the other as a co-owner with a stranger. It would also permit judicial partition of a specific community asset during marriage.[55] Such a system does not implement the goal of encouraging sharing and interdependence. Still another system would permit only that spouse who has the greatest investment in the asset to control it.[56] It is submitted that efficiency is an insufficient justification for such an inequitable plan.

[51] Louisiana partially solves this problem by creating a rebuttable presumption "at the time of dissolution of the marriage" that all effects possessed by the husband or the wife are "common effects or gains." La. Civil Code art. 2405 (1870). Additionally, jurisprudence has extended this presumption to the time during the marriage. R.D.M. Corp. v. Patterson, 255 La. 301, 230 So. 2d 820 (1970); Schwab v. Hava, 154 La. 922, 98 So. 420 (1923). As such property is presumed to belong to the community, it is subject to management by the husband as head and master.

[52] This is the Texas solution: joint management of "mixed or combined community property." Tex. Fam. Code Ann. § 5.22(b) (1975).

[53] La. Civil Code art. 494 (1870). *Cf.* Pascal, *Updating Louisiana's Community of Gains*, 49 Tul. L. Rev. 555, 558 (1975) [hereinafter cited as Pascal].

[54] La. Civil Code art. 484 (1870).

[55] *Id.* arts. 1289, 1308.

[56] Use of the principles of accession found in Civil Code articles 499-532 has been suggested for characterization of property as separate or community, rather than for control, in conjunction with an accounting for augmented value under article 2408. Pascal, *supra* note 53, at 582. Rarely will actual materials, rather than funds be commingled; but if it should occur, principles of accession might be useful, with emphasis on natural equity and reimbursement. La. Civil Code arts. 520-21 (1870).

OWNERSHIP

For 47 years, since the Louisiana Supreme Court decision in *Phillips v. Phillips*,[57] the courts had followed the rule articulated in that case: "The title for half of the community property is vested in the wife the moment it is acquired by the community or by the spouses jointly, even though it be acquired in the name of only one of them."[58] A new concept was put forth for the first time in 1973 in *Creech v. Capitol Mack, Inc.*[59] *Phillips* was overruled or modified to the extent that it conflicted with the *Creech* opinion, which defined the wife's half interest in the community as "imperfect ownership without use" while defining the husband's interest as "perfect ownership" of his half interest and administration with power of alienation of her half; but as to third parties his interest was defined as "perfect ownership" of both halves.[60] This result placed the entire community in the husband's patrimony along with his separate property, subject to seizure by his separate creditors. Thus, the wife's only remedy was limited to a claim against him at the dissolution of the community. In effect, the *Creech* case, by process of law, divested wives of property in which they had previously been told by the highest court of this state they owned a vested interest.

Few community property jurisdictions have considered it necessary to define the kind of ownership held. At least one has; California's Civil Code declares: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests."[61]

---

[57] 160 La. 813, 107 So. 584 (1926).

[58] *Id.* at 825-26, 107 So. at 588.

[59] 287 So. 2d 497 (La. 1973). The authoritativeness of the *Creech* dicta is questionable in light of T.L. James & Co. v. Montgomery, Civil No. 56,138 (La., Dec. 8, 1975, *rehearing granted*, Jan. 16, 1976). Justice Summers, the lone dissenter in *Creech*, was the organ of the court in a 5-2 decision. The opinion did not cite *Creech*, but cited Bender v. Pfaff, 282 U.S. 127 (1930), and Succession of Wiener, 203 La. 649, 14 So. 2d 475 (1943), and quoted Messersmith v. Messersmith, 229 La. 495, 507, 86 So. 2d 169, 173 (1956):

> There is nothing more fundamental in our law than the rule of property which declares that this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired.

T.L. James & Co. v. Montgomery, *supra*. These three cases cited Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926), as authority. The *Montgomery* court concluded: "The wife's one-half interest is at all times real . . . ." T.L. James & Co. v. Montgomery, *supra*.

[60] 287 So. 2d at 508.

[61] Cal. Civ. Code § 5105 (1972).

Because of the *Creech* case, it is desirable that Louisiana include such an article. Some concern has arisen as to the tax and credit implications of an article asserting that each spouse has a vested interest, or full ownership, or an undivided half interest in each asset of the community upon its acquisition. As taxes are presently assessed on the assumption that each spouse owns one-half of the community income or of the community estate upon dissolution, there would seem to be no reason to fear any change in income or estate tax advantages presently existing. The fear that spouses' credit ratings will be reduced and based on only half the community has apparently not materialized in California.[62]

STANDARD OF RESPONSIBILITY

What standard of responsibility should be expected of a spouse who has control of property in which the other spouse has an interest, however it is defined? As head and master, the husband in Louisiana is responsible to his wife at dissolution of the community only for his fraudulent disposition of community property.[63] This is in sharp contrast with stringent limitations on husbands scattered throughout the revised French Code.[64]

It is submitted that each spouse, in managing alone any part of the community property, should hold a fiduciary relationship to the other spouse and be held to the standard of a prudent administrator. This would not prevent imprudent speculation, but would simply require that spouses act together when they wish to take chances with their co-owned property. Fraud, fault, and neglect are the words repeatedly found in the various articles setting standards for positions of responsibility toward the property of others.[65] Each spouse should be made liable for fraud, fault, or neglect in handling community interests.

WHO NEEDS PROTECTION?

Policy again should be the basis for the decision as to whose rights—those of the spouse or the third party with whom the

---

[62] *Cf.* notes 15, 23 *supra.*

[63] La. Civil Code art. 2404 (1870).

[64] *See* text at note 29 *supra.*

[65] *See* La. Civil Code arts. 567 (usufructuaries), 2298 (managing another's affairs), 2862 (partners), 2937 (depositaries), 3003 (power of attorney) (1870). *See also* La. Code Civ. P. arts. 4262 (tutors), 4269 (tutors), 4554 (curators) (1960).

other spouse deals—should be given priority. If there is to be some standard of responsibility imposed by law on the management powers of one spouse dealing with property co-owned by both spouses, what remedy should be available to the other? If, as in some jurisdictions, it is the right of the other spouse to have the improper transaction annulled,[66] what is the right of the third party who may have been in complete good faith? In other words, should there be almost a special law of sales for married people because of the ease of gaining possession of a movable and the appearance of authority to deal with things in their household? Should there be exceptions to the law of registry? Should the declaration of marital status in a record be sufficient to alert the third party to the possible rights of a spouse not present? Answers to such questions as these and arguments pro and con could be the subject of another article in itself. Briefly, the injured spouse should be empowered to seek annulment of the act performed without the required consent, but the good-faith third party could defend in the usual way by alleging apparent mandate or reliance on the public record.

Expenses of Household and Family

One of the most sensitive problems in the revision is that of responsibility for expenses of the household and family. Although present Louisiana law has elements of equality,[67] in fact, the husband is usually the only one who is held responsible to pay such bills because the wife is assumed to be acting as the husband's mandatary,[68] not intending to be personally bound. If her authority is not expressed, it is often inferred from the circumstances of their living together and from past conduct. Additionally, the husband's conduct after the fact often constitutes a ratification. Wives usually do the family shopping and should clearly indicate their position as only that of an agent, when this is true. Quebec's Code gives the wife the power to represent her husband for household and family needs unless the third person knows that the husband has withdrawn this power.[69] France makes the spouses solidarily liable to third persons for such expenses regardless of

[66] *E.g.*, Cal. Civ. Code § 5127 (Deering Supp. 1975); N.M. Stat. Ann. § 57-4A-7 (Supp. 1975); C. civ. art. 1427.

[67] La. Civil Code arts. 119, 2349, 2389, 2395, 2435 (1870).

[68] *E.g.*, Smith v. Viser, 117 So. 2d 673 (La. App. 2d Cir. 1960).

[69] Que. Civil Code art. 180 (Y. Renaud and J. Baudouin eds. 1974).

who contracted the obligation,[70] but they are responsible in proportion to their relative means with the wife able to fulfill her share by her activity in the home.[71]

The fairest method would be to hold the parties responsible for household and family expenses relative to each other and in proportion to their means. In addition, the contracting spouse (not his or her mandatary) should be fully responsible on the contract to the third party with the noncontracting spouse liable to the third party for the same proportionate share owed to the other spouse. Accordingly, the third party would have not only the usual right against the principal to whom he extended credit, but also an additional right against the other spouse for at least a fraction of the obligation owed. Although the noncontracting spouse could not avoid sharing in the cost of benefits received, he or she could not be held to the full sum. The merchant may have difficulty ascertaining the proportional liability of the noncontracting spouse, but as this would be an additional right imposed by law beyond that which he holds by contract, it would not be an undue burden should he care to exercise it. It should be decided in the Code whether or not this duty of sharing household expenses is one that can be changed by contract between the parties and, if so, whether or not such a contract can have effect on third parties and how the contract should be made known.

Separate Property

The husband's management of the wife's separate property should be abolished. At present the wife can take management control from him,[72] but unless she acts affirmatively to do so,[73] he is the statutory manager.[74] Putting the burden on her to take control from him is not only discriminatory since husbands have no such burden to attain management of their own separate property, but the provision is also hazardous to marital harmony. The husband whose wife removes this statutory power from him may very likely feel that she does not trust him, and the wife, aware of this possibility, is loath to exercise her right. Moreover, when she executes and records an authentic act declaring her intent to administer her sepa-

---

[70] C. civ. art. 220.
[71] *Id.* art. 214.
[72] La. Civil Code art. 2384 (1870).
[73] *Id.* art. 2386.
[74] *Id.* art. 2385.

rate property alone, she makes separate all future revenues of her separate property,[75] a right husbands do not have.

There will probably be little objection to the proposal that each spouse manage his or her own separate property, each having available the power to create a mandate in the other spouse or in any other person. More controversial is the policy decision to be made: Shall the revenues of all separate property be community or separate? This writer recommends that they be community. This would deprive wives of their present right to retain their revenues as separate if they administer their own property. If the revenue of both husbands' and wives' separate property is to be separate, however, the result will be that the richer spouse will get continually richer, and the disparity between their respective wealths will increase. On the other hand, if all revenues of community property and of the separate property of both spouses are community, the duration of the community will see a gradual equalizing of their respective assets as more and more is divisible between them. At the same time, the initial capital investment would be preserved for its owner. The policy decision should be made by considering what is most likely to result in marital harmony, and it is submitted that the more that is shared during the marriage, the more the marriage is likely to be harmonious.

CONTRACTS

According to a policy tentatively adopted by the Council of the Louisiana State Law Institute, contracts to reject the legal regime, to modify it, or to establish or modify one of private confection should be permitted at any time during the marriage. At present, contracts between husbands and wives are forbidden in Louisiana,[76] except in rare, specific instances.[77] One of these exceptions is that an agreement establishing a matrimonial regime other than that prescribed by law is permitted to couples who move into the state already married, but only for 1 year after their settlement here.[78] Louisiana couples may contract to reject or modify the legal regime or their own contract only before marriage.[79]

---

[75] *Id.* art. 2386.
[76] *Id.* art. 1790.
[77] *Id.* art. 2446.
[78] *Id.* art. 2329.
[79] *Id.*

Abandonment of the old principle of immutability is desirable in this day when wives are more aware of property matters than when they led more secluded lives. They have had the power to contract ever since the enactment of the so-called Married Women's Emancipation Acts,[80] and this experience has prepared them to protect themselves from coerced contracts. Supposedly, husbands also have this ability of self-preservation. While the parties, once married, are not exactly arm's-length bargainers, neither are they immediately prior to marriage—maybe less so than later. They were especially unlikely to contract a fair matrimonial agreement so long as the absence of a contract gives the prospective husband sole control, and they certainly do not enter into antenuptial negotiations from an equal bargaining position. Accordingly, they will be more able to contract under almost any revised plan than under the present one.

SUMMARY OF SOME POINTS IN THE PLAN PREFERRED BY THIS WRITER

A plan the author prefers would include provisions which can be summarized in a frankly oversimplified form, as follows: There would be no tacit contract to accept the legal regime; rather the law would impose the legal regime unless there were an express contract varying it. The agreement establishing a contractual regime of the spouses' own confection could be made or modified before or during the marriage. Two regimes should be set out in full in the Code, one to be effective by law in the absence of a contract, the other as an available optional contractual alternative. In addition, any third plan could be drafted by the spouses.

Under the legal regime, each spouse should be declared in the Code to have full ownership of an undivided one-half interest in each asset of the community. A list of what constitutes separate property should be included, with a provision that anything not so listed is community property, the burden of proof being upon anyone who asserts that something is separate property. Separate property should include that property owned at the time of marriage or received by gift or inheritance, clothing and personal effects, damages for injuries to the person, but not compensation for the loss of community

[80] La. R.S. 9:51, 101-03, 105 (1950) (originally enacted in a series of laws between 1916 and 1928).

assets. Separate property should also include property received by a spouse out of community funds to equalize use by the other spouse of community funds to pay a separate debt, or as the result of a lawsuit against the other spouse for fraud, fault, or neglect in handling the community, or as the result of enforcement of the legal mortgage over the other's property. Revenues of separate property should not be included, as they would be community property.

The community estate should be rewarded with a separate estate's increase in value attributable to an investment of community resources, whether consisting of property, the uncompensated or undercompensated energy of either spouse, or a proportional share of that increase if it is only partially attributable to that investment. If there is no increase, there should be no loss; rather, the value invested should be returned with legal interest. The same rule should apply when separate property is invested in the community estate.

Each spouse should have equal power to acquire, manage, control, or dispose of all community assets and liabilities or to bind the assets of the community. An exception should be that written consent of the other spouse should be required to acquire, encumber, alienate, or lease immovable community property or community furniture and furnishings in use by the family, and to make substantial gifts of community assets. In case consent cannot be obtained or is refused without justification, a spouse could be authorized by a judge to act alone. Acts requiring consent but undertaken without consent could be annulled at the timely demand of the other spouse. Spouses should contribute to the expenses of the household and family in proportion to their means, bearing this responsibility between themselves and in relation to third parties, with the contracting spouses being fully liable to third parties.

Each spouse should be liable to the other during the marriage for fraud, fault, or neglect in managing community interests. The usual laws of mandate and registry could be invoked by good-faith third parties in dealing with married persons.

CONCLUSION

It is time for Louisiana to join the trend toward statutory recognition of the equality of spouses in their access to prop-

erty acquired by their mutual, cooperative efforts.[81] If all that is done is to give wives control over the money they earn by work outside the home, Louisiana will be just catching up with what some other American states,[82] France,[83] and some other countries have done many decades ago. As Louisiana is presently the only state that retains automatic male head and mastership of the community,[84] replacement of that status with almost any other may satisfy some people that this state is progressing. We seek more. We seek that measure of equal protection for wives that is not only just, but also essential to the legitimate ends of marriage. Legislation, after all, must not be an irritant. To the contrary, it must create and serve a climate conducive to marital harmony, stronger family units, and, in the end, a stronger society.

---

[81] *See* notes 12-13 *supra*.

[82] *E.g.*, Idaho Code § 32-913 (1963); Nev. Rev. Stat. § 123.230 (1957); Tex. Rev. Civ. Stat. Ann. art. 4616 (1960); Wash. Rev. Code Ann. § 26.16.130 (1961). Prior and subsequent legislative histories of these acts are omitted. *See* W. de Funiak & M. Vaughn, Principles of Community Property 280 (2d ed. 1971).

[83] *See* note 2 *supra*.

[84] La. Civil Code art. 2404 (1870). New Mexico grants that presumption to husbands, but permits the wife to replace it with joint management. N.M. Stat. Ann. § 57-4A-1.1 (Supp. 1975).