PRACTICE TIPS FOR COMMUNITY PROPERTY PARTITIONS

BY Andre' Doguet, Commissioner – 15th JDC

I. La. R.S. 9:2801: PARTITION OF COMMUNITY PROPERTY AND SETTLEMENT OF CLAIMS ARISING FROM THE MATRIMONIAL REGIME AND CO-OWNERSHIP OF FORMER COMMUNITY PROPERTY.

Either spouse may file an action for a judicial partition, either incidental to the divorce action or as a separate action after termination of the matrimonial regime.

A. There is no excuse for NOT filing the Partition action simultaneously with the Divorce action. The same documents necessary for determination of child support and spousal support also provide a mountain of evidence necessary for the partition. Think financial accounts, debt obligations, community assets, proof of payments of community obligations (checking account records). Tax returns and Financial Statements provide an excellent roadmap for identifying community assets and liabilities.

B. You must properly plead a claim for the Judicial Partition. "Plaintiff hereby reserves his/her rights to seek a judicial partition" does not cut it. You may as well not put that in your pleading at all. It accomplishes nothing. The proper language asserting the claim goes something like this:

> "PLAINTIFF AND DEFENDANT ACQUIRED COMMUNITY PROPERTY DURING THEIR MARRIAGE AND PLAINTIFF/DEFENDANT IS ENTITLED TO AND DOES HEREBY SEEK A JUDICIAL PARTION PURSUANT TO LA.R.S. 9:2801 OF THE ASSETS ACQUIRED AND LIABILITIES INCURRED BY THE SPOUSES DURING THEIR MARRIAGE, TOGETHER WITH AN ADJUDICATION OF ANY AND ALL OTHER CLAIMS ARISING FROM THE FORMER REGIME OF COMMUNITY PROPERTY, INCLUDING BUT NOT LIMITED TO ANY CLAIMS FOR REIMBURSEMENTS."
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> Your prayer for relief should duplicate this language.

C. Keep in mind that some claims prescribe if not timely pled.

1. A claim for an accounting under CC Art. 2369. prescribes 3 years from the date of termination of the community property regime. Simply prove the amount of money in each financial account controlled by the other party and then sit back. If the controlling party cannot show use of funds for community obligations, you get 50% of the particular account balance on date of termination as a reimbursement.

2. CC Art. 121. Claim for contributions made during marriage for the education or training of his/her spouse that increased the earning power of the recipient spouse, to the extent that the claimant did not benefit during the marriage from the increase earning power. Claim prescribes 3 years from the date of the signing of the Judgment of Divorce. (CC Art. 124)

3. Always plead these claims in your initial petition for divorce or in your answer and reconventional demand.

D. R.S.9:2801 allows for a Motion setting a deadline for the filing of a Detailed Descriptive List. USE IT. I set up a DDL at the very beginning of each and every case. As discovery comes in, simply update your DDL. Remember, you can always modify the DDL as the case progresses. Furthermore, DO NOT be one of those people that asks ONLY the other party be ordered to file a DDL. My requests always asked the Court to order BOTH PARTIES to file their DDLS within 45 days of service of the Motion. See example Combined DDL.

E. Within 60 days of the last filed DDL, each party shall either concur or traverse the inclusion or exclusion of assets/liabilities, as well as their valuations. In the 15th, we allow for a general Traversal. (It's only 3 paragraphs). As a practical matter, the Joint DDL, which we will discuss later, provides a better traversal scheme for use at trial. File the Traversal with the filing of your own DDL. That way you know it's done and you won't wake up 3 months later on a weekend wondering if you filed that damn thing.

F. Other nuggets from 9:2801:

1. If your opponent fails to timely file a DDL, you can file a Rule to have your list deemed to constitute a judicial determination of the community assets and liabilities. Another tip: Don't file your list late and then immediately file a Rule to have your list made determinative. That will never be granted and does nothing to advance the Partition action. Instead, send a letter to the opposing party asking them to file their list within 10 days. File the Request for attorney fees thereafter for failure to timely file the DDL. Only then should you consider filing a Motion to make your DDL determinative.

2. The statute authorizes appointment of experts. Think about which type of assets need only one competent appraisal.

3. Attorney fees can be awarded if a party fails to comply with any time limit provided for by the statute.

II. CLASSIFCATION OF ASSETS. REMEMBER, PRESUMPTIONS ARE YOUR FRIEND.

A. Assets acquired during the community are presumed to be community property. (See CC Art. 2340).

B. All obligations incurred by a spouse during the community are presumed to be community obligations. (See CC Art. 2361). This presumption formed the backbone of a $284,000 reimbursement claim in the Dupree case, which will be discussed later.

C. Personal injury settlement proceeds for an accident which happened during marriage. Is this presumed to be community property because received during the marriage? NO. C.C. Art. 2344 provides that damages due to personal injuries sustained during the existence of the community property regime by a spouse are separate property. However, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or for loss of community earnings is community property. The burden of proof is on the non-injured spouse to show what portion of the settlement is community. See Sanders v. Sanders, 961 So 2d, 464 (La. App. 3d Cir. 2007)

D. What about Social Security benefits? Social Security disability benefits received during marriage: Social Security disability benefits are not community property due to the supremacy clause of the U.S. Constitution making the funds the separate property of W. See *Young v. Young*, 931 So.2d 541 (La. App. 3 Cir. 5/31/06), *Bhati v. Bhati*, 32 So.3d 1107 (La. App. 3 Cir. 3/10/10) and *Williams v. Williams*, 104 So.3d 760 (La. App. 3 Cir. 12/5/12). As such, the Social Security disability benefits received during the existence of the community of acquets and gains are the separate property of W. See Young v. Young, supra, at page 547. Under C.C. Art. 2365, W is entitled to a reimbursement of one-half (1/2) of her Social Security benefits after from H. Revised Statutes 9:2801.1 provides: When federal law or the provisions of a statutory pension or retirement plan, state or federal, preempt or preclude community classification of property that would have been classified as community property under the principles of the Civil Code, the spouse of the person entitled to such property shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property. **Nevertheless, if such property consists of a spouse's right to receive social security benefits or the benefits themselves, then the court in its discretion may allocate or assign other community property equal in value to the other spouse**. W is totally disabled. Should W get a reimbursement? The statute does not provide guidance on how its discretion is to be applied. Revised Statutes 9:2801(A)(4)(c) mandates that the Court consider certain factors in allocating or assigning community assets and liabilities such as the **nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances that the court deems relevant.** H earns $200,000.00 per year and W is permanently disabled.

III. HOW TO VALUE THE ASSETS

A. Remember that if the assets are held within an LLC, the asset is the membership interest registered in the name of an individual spouse, not the assets owned by the LLC. If the LLC holds just a piece of immovable property, the valuation is fairly simple. Practice Tip: Always request a copy of the Operating Agreements if there are LLC interests. This will assist you in making a determination of whether there are minority/marketability discounts to argue.

B. You need to read Cannon v. Bertrand, 2 So. 3d 393 (La. 2009) for guidance on this issue. "Minority discounts and other discounts, such as for lack of marketability, may have a place in our law; however, such discounts must be used sparingly and only when the facts support their use." Id at p. 396.

If you wish to argue for minority discounts, read Thomson v. Thomson, 978 So. 2d 509 (La. App. 3rd Cir. 2008)

1. If there are pension interests to value, consider an outside expert. There are many hidden benefits in a traditional pension, and they are found in the typically lengthy and hard to understand plan documents. . Better to let an expert, (think Beau Sagona) do that work and save yourself the headache and more importantly, the malpractice claim.

2. For a 401(k) or IRA, I would still use your CPA to prepare the QDRO or consider a TPA like ARC in Lafayette.

3. For houses, just let the court appoint a single expert. If you disagree strongly with the resulting appraisal, you can always hire someone to review.

IV. THE REIMBURSEMENT CLAIMS.

A. A large component of any Partition action is the potential reimbursement claims that occur during the community or accrue after termination. Such claims can add up to tens of thousands of dollars.
B. The various reimbursement claims are set forth in the Matrimonial Regime articles of the Civil Code, beginning with Art. 2364.
C. Art. 2364-Satisfaction of a Separate Obligation with community property. Think payment on Student Loans. Think payment on a separate home mortgage (although the claim is limited to the reduction of principal during the community).
D. Art. 2365-Satisfaction of Community Obligation with separate property. If your client received separate property income during the marriage, this claim is in play. If your client pays off a community credit card obligation post-termination, this claim is in play. Practice Tip: Advise your client to freeze the card and make no other charges. Will make proof of the reimbursement easier as you will not have to allocate interest payments between community and separate charges on the account.
E. Art. 2366-Use of Community Property for the benefit of separate property. Think improvements to a separate property home the parties resided in during marriage.
F. Art 2367-Use of Separate Property for the benefit of community property.
G. Art. 2367.1-Use of Separate Property for the benefit of separate property.
H. Art. 2367.3-Satisfaction of Separate Obligation with separate property.
I. Art. 2368-Increase in the value of separate property due to uncompensated labor. Typically revolves around improvements to a separate property home by a spouse more industrial than you or I.
J. Proof of reimbursement claims almost always involves checking account records. Another reason to not delay seeking these records if potential reimbursement claims are at play. Presumptions are at play in reimbursements as well. Think Dupree v. Dupree, 948 So. 2d 254 (La. App. 2nd Cir. 2006). Gotta love the facts in that case. The Wife, who received hundreds of thousands of dollars of separate property income during marriage (bank stock dividends she reserved as her own with a properly filed Declaration), maintained a separate checking account where she deposited these funds. She then spent them as she sought fit, which resulted in an increased standard of living for the parties. Think vacations, swimming pools, etc. Upon termination, the wife sought, and was granted, a reimbursement claim for the use of these same funds.

"Doris produced the community checking account deposit records and canceled checks indicating that her $284,008.32 separate property revenues were spend between March 26, 2001 and May 21, 2003. She confirmed that these expenditures were for the benefit of her family and to improve the community home, swimming pool and yard. John has admitted that the $284,008.32 deposits were her separate property. Therefore, since it has been shown that Doris' $284,008.32 separate assets were spent during the existence of the community of acquets and gains, she is entitled to the legal presumption that this money was used to satisfy community obligations under Article 2361 without any necessity to present further evidence."

NOTE

Reimbursement claims only go up as the Partition drags on. Eventually, they can eat up your client's share of the community. Do yourself and your client a favor, FINISH THE PARTITION TIMELY.

V. Judgment of Partition

A. Consent Judgments - no Judgment of Partition shall be rendered unless it is rendered in conjunction with, or subsequent to, the Judgment which has the effect of terminating the matrimonial regime. See La. C.C. Art. 2336 and R.S. 9:2802. Accordingly, it is recommended that a judgment partitioning the former community of acquets and gains contain a recitation that the community property regime has been terminated together with the date of termination. Though this is not required, attorneys/unrepresented parties should understand that if they fail to include this language in their judgment and/or stipulation, the execution of their partition judgment will be delayed since our office will have to request the file from the Clerk's Office before the judgment can be rendered. There are several ways for a stipulated judicial partition to be properly drafted. See attached Appendix for examples. The Court would also accept a separate written joint stipulation together with a partition judgment that mirrors that written stipulation. In addition, there are other ways to properly draft a partition judgment. For instance, a Community Property Partition Agreement can be attached to and made a part of a Judgment dismissing the partition action. See *Lapeyrouse v. Lapeyrouse*, 729 So. 2d 682 (La. App. 1st Cir. 1999). For an excellent discussion of the difference between an extrajudicial partition and a partition that constitutes a transaction or compromise not subject to lesion, see "When is a Partition Just a Partition and Not a Compromise?: Hoover v. Hoover", 77 Tulane Law Review 1441, June 2003.

B. The Court will not sign any judgment that "approves and homologates" or "homologates as being fair and equitable to both parties" an attached community property partition, or that in any way homologates a community property partition.

C. La. C.C. Art. 2369.8 provides that La. R.S. 9:2801 is the exclusive procedure by which the former community of acquets and gains may be partitioned. This statute was originally enacted by the Legislature in 1982, more than thirty (30) years ago, and contains no provisions concerning homologation. There is no procedure by which a community property partition can be "homologated" or accepted by the Court under R.S. 9:2801.

D. Also, the Court will not sign a judgment with an attached community property partition where the judgment merely states that "the attached community property partition is made a judgment of the Court." There must be language contained in the judgment or in the partition document stipulating that the community property partition shall be a judgment of the court. See attached Example 2.

E. Further, the Court will not sign the bottom of Community Property Partitions after the signature lines of the parties with language such as "Reviewed and Approved in Lafayette, Louisiana, on this ____ day of __________, 2004." The Court does not have the right to "review and approve" partitions. For the Court to enter a judicial partition without an actual adjudication resulting from a trial there must be a stipulation of the parties. Otherwise, the Court is issuing an advisory opinion concerning what is actually an extrajudicial partition between the parties. Courts are without jurisdiction to issue advisory opinions and may only review matters that are justiciable. See above discussion of *Reily v. State*, 864 So.2d 223 (La. App. 3 Cir. 2003). Therefore, once a matter has been amicably settled by the parties as a private, extrajudicial agreement, the Court has no authority to review and approve the community property settlement.

CONSIDER USING THE COMMISSIONER IN YOUR COMMUNITY PROPERTY CASES.

I'm free. I'm experienced. I can help you narrow the issues. I can mediate. I can try your case on your schedule with the consent of the parties.