

# MARRIAGE AND REAL ESTATE

MARRIAGE AND REAL ESTATE

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Defining a Community Property State  
Classification of Community Property  
Ownership of Community Property  
Managing Community Property  
Termination of Community Property  
Transferring Community Property

# DEFINING A COMMUNITY PROPERTY STATE

## TYPES OF MARITAL REGIMES:

### × **Community Property:**

- + Rule of law in LA
- + Default regime that exists in the absence of an agreement between spouses
  - × Applies to all spouses domiciled in LA regardless of where they were domiciled at the time of marriage or where their marriage took place
    - \* If moving to the state, you have 1 year to “opt out”
  - × All immovables situated in LA are governed by LA property law, regardless of the owners’ domicile

# DEFINING A COMMUNITY PROPERTY STATE

## TYPES OF MARITAL REGIMES:

### × Community Property

- + Each spouse owns a present undivided  $\frac{1}{2}$  interest in the community property
  - \* One spouse may not sell, lease, or encumber his undivided one half interest to a third person.
- + Policy is to prevent a third party from becoming co-owner with spouse.
- + Refers to property that has been acquired by spouses **during marriage**
- + Community property may be sold, but it must be by both spouses transferring full ownership.

# DEFINING A COMMUNITY PROPERTY STATE

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## TYPES OF MARITAL REGIMES:

### × **Common Law**

- + Property owned by either spouse is distributed according to title
- + If only one spouse is on title, only that spouse owns the thing

# DEFINING A COMMUNITY PROPERTY STATE

## TYPES OF MARITAL REGIMES:

### × Equitable Distribution:

- + Classification matters but **judge decides/divides marital property** based on several factors including the following:
  - × **Each spouse's income and property when they married and when they filed for divorce**
  - × **Duration of the marriage**
  - × **Each spouse's age and health**
  - × **The need of the parent with custody to live in the family home**
  - × **The pension, health insurance, and inheritance rights either spouse will lose as a result of the divorce, valued as of the date of the divorce**
  - × **Whether the court has awarded alimony**
  - × **Any other factor the court expressly finds to be a just and proper consideration.**

# DEFINING A COMMUNITY PROPERTY STATE

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- × ***EXAMPLE: Annie and Ben were married in Louisiana and have lived in Louisiana for their entire marriage. They bought a house in Algiers Point just after their marriage and they were both listed on the Act of Sale as buyers. If they get a divorce, who will own the Algiers Point home?***

# **DEFINING A COMMUNITY PROPERTY STATE**

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## **Origins of Community Property Law**

**<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=3293&context=lalrev>**



# CLASSIFICATION OF COMMUNITY PROPERTY

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- × Types of Community Property
- × Types of Separate Property
- × Personal Injury Damages
- × Life Insurance
- × Creditor's Rights

# CLASSIFICATION OF COMMUNITY PROPERTY

## TYPES OF COMMUNITY PROPERTY

- × Property acquired during the existence of the legal regime through the ***effort, skill or industry of either spouse***
- × Property acquired with community things or with community and separate things, unless classified as separate property under spousal agreement
- × Property donated to the spouses jointly (i.e. a check or land from an uncle made out to “Mr. and Mrs. Smith)

# CLASSIFICATION OF COMMUNITY PROPERTY

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## TYPES OF COMMUNITY PROPERTY

- × Natural and civil fruits of community property
  
- + The natural and civil fruits, minerals produced, bonuses earned, rentals, royalties of the separate property of a spouse ***are community property.***
  - × **BUT** – a spouse may reserve them as separate property by an authentic act
    - \* A copy of the declaration shall be provided to the other spouse prior to filing of the declaration.
  
  - × Effectiveness of act:
    - \* Immovables: Recorded in registry where immovable *located*
    - \* Movables: Recorded in registry where declarant is *domiciled*

# CLASSIFICATION OF COMMUNITY PROPERTY

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## TYPES OF COMMUNITY PROPERTY

- × Damages awarded for loss or injury to a thing belonging to the community
- × Disability Benefits: Payments during the community regime to one spouse under disability insurance policies have been held to be community assets
- × Retirement Benefits: Community property to the extent that they were earned during the legal regime.

# CLASSIFICATION OF COMMUNITY PROPERTY

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- × ***EXAMPLE: You are hired to dig a ditch on Monday. You and your spouse terminate your community property regime on Wednesday. You get paid for digging the ditch on Friday. Are the earnings separate or community property?***

# **CLASSIFICATION OF COMMUNITY PROPERTY**

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***Answer: Community.***

***If the work is done during the regime, the earnings are community even if the earnings are not received until after termination of the regime.***

# **CLASSIFICATION OF COMMUNITY PROPERTY**

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## **TYPES OF COMMUNITY PROPERTY**

- × Earnings are generally, considered community property
- × **All other property not classified by law as separate property**

# CLASSIFICATION OF COMMUNITY PROPERTY

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- × ***EXAMPLE: During their marriage Annie put her name in for a \$5,000 cash drawing at Rouse's. After divorcing Ben, Annie gets a call from Rouse's informing her that she has won the drawing. Is the money community or separate property?***



# CLASSIFICATION OF COMMUNITY PROPERTY

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- × *Noil v. Noil says it is community*
- × *50% to Annie and 50% to Ben*

## CLASSIFICATION OF COMMUNITY PROPERTY

- × ***EXAMPLE: During the divorce, Annie tells Ben she is keeping all of the china and gifts she received at her wedding showers prior to their wedding because the showers were really for her, individually. Who owns pre-marital shower gifts?***

# CLASSIFICATION OF COMMUNITY PROPERTY

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- × ***Community Property***
- × ***Hamilton v. Hamilton, 381 So. 2d 517 (La. App. 1<sup>st</sup> Cir. 1979), “Tupperware case”***: Where shower gifts were only manually gifted to the wife, but were obviously intended by the donor to be used by both the husband and wife jointly, the shower gifts were community property.

# CLASSIFICATION OF COMMUNITY PROPERTY

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## TYPES OF SEPARATE PROPERTY

- × The separate property of a spouse is his/her's *exclusively* and comprises...
  - + Property acquired by a spouse prior to the establishment of a community regime
  - + Property acquired with separate or separate & community things when the value of the community things is *inconsequential*
  - + Property acquired by a spouse by inheritance or donation to him individually

# CLASSIFICATION OF COMMUNITY PROPERTY

## TYPES OF SEPARATE PROPERTY

- × Damages awarded to a spouse in an action for breach of K against the other spouse or for the loss sustained as a result of fraud or bad faith in the management community property
- × Damages or other indemnity awarded to a spouse in connection with the management of separate property
- × Things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime

# CLASSIFICATION OF COMMUNITY PROPERTY

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- × ***EXAMPLE: Before Ben and Annie's marriage, Ben bought a house with his friend, Chris, and put up half of the money for it. After the marriage but before the divorce, Ben bought out Chris' half. Does this make the entire house community property?***

# CLASSIFICATION OF COMMUNITY PROPERTY

- × ***Art. 2341.1 Acquisition of undivided interest; separate and community property***
- × ***Deals with situation where prior to the formation of a community, a spouse owns a fractional interest in something, like a 1/3 interest in land, and then later during the community acquires additional 2/3 interest in the land with community funds.***
- × ***That initial fractional interest is not reclassified as community property because an additional interest is acquired***

# CLASSIFICATION OF COMMUNITY PROPERTY

## PERSONAL INJURY DAMAGES AWARDS

- × Damages due to personal injuries are *separate property*
  - + **BUT**, the portion of 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*
  
- × **IF** the community regime is terminated for any reason other than the death of the injured spouse, the portion attributable to the loss of earning that would have accrued after termination is the separate property of the injured spouse.



# CLASSIFICATION OF COMMUNITY PROPERTY

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- × ***EXAMPLE: During the marriage, Ben's mother died. Ben was the named beneficiary on her life insurance policy. Are the proceeds community or separate?***

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× ***Fowler v. Fowler:***

- + ***Life insurance proceeds received during the existence of the regime are separate property. Thus, the life insurance proceeds go to the named beneficiary in accordance with the provisions of the life insurance contract.***

# **CLASSIFICATION OF COMMUNITY PROPERTY**

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## **LIFE INSURANCE**

- × Life insurance proceeds in LA apply to the named beneficiary who gets the money free and clear of community property rights (separate property).

# CLASSIFICATION OF COMMUNITY PROPERTY

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- × *During the marriage, Annie bought a property in uptown New Orleans for \$300,000.00. Title was in her name only. Annie used only money that she earned through her job with Title Stream to purchase the property. Is Annie's uptown property community or separate property?*

# **CLASSIFICATION OF COMMUNITY PROPERTY**

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## **CREDITORS' RIGHTS**

- ✗ Even though each spouse only owns a one-half interest, the entirety of the mass of community property is liable to creditors of the satisfaction of separate as well as community obligations of the spouses!!!!

# CLASSIFICATION OF COMMUNITY PROPERTY

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- × ***EXAMPLE: During the divorce, the home they shared goes into foreclosure. Is Anne's uptown property subject to seizure by the lender on their family home?***

# CLASSIFICATION OF COMMUNITY PROPERTY

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× ***Knight v. Kaufman:***

+ ***The court ruled against her, saying, “It follows that, when title to real property acquired during marriage appears in the wife's name, it is just as much subject to seizure at the suit of community creditors as though it stood in the name of the husband ... and ... she must show by indisputable proof that it was acquired by her with separate funds under her administration.”***

× ***This is why we require an Intervention***

# **OWNERSHIP OF COMMUNITY PROPERTY**

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- × Presumption of Community Property
- × Real Subrogation
- × Interspousal Transactions
- × Commingling



# OWNERSHIP OF COMMUNITY PROPERTY

## PRESUMPTION OF COMMUNITY

- × Things in the *possession* of a spouse during the existence of a regime are presumed to be community, but ***either spouse*** may prove that they are separate property (2340)
- × The burden of proof in rebutting the presumption of community is *preponderance of the evidence*.

# **OWNERSHIP OF COMMUNITY PROPERTY**

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- × ***EXAMPLE: Annie individually bought a property in Metairie as an investment property prior to her and Ben's marriage. After their marriage, Annie used money from their joint bank account to pay the monthly note on the Metairie property. Ben's lawyer is asking for reimbursement of the money paid toward this property during the marriage. Can Ben get reimbursed?***

# **OWNERSHIP OF COMMUNITY PROPERTY**

- × ***Racca v. Estate of Breaux:***
  - × ***Property is not community when a spouse brings that property with him into the marriage, but where community funds were used to make monthly payments on the separate property during the marriage, the other spouse or his heirs are entitled to be reimbursed for 1/2 of those funds.***

# OWNERSHIP OF COMMUNITY PROPERTY

## × WHEN THERE IS A CLASSIFICATION ISSUE...

- +Always start with 2340 which creates a rebuttable presumption that the property is community
  - × The burden of proof to rebut the presumption is a PREPONDERANCE OF THE EVIDENCE
- +The time of acquisition is conclusive if it occurred before marriage, but the same is not true after marriage
  - × Because it is a rebuttable presumption
- +Property is acquired when the sale is perfected, not when the price is paid
- +Separate ownership is fixed at acquisition and subsequent actions like payment with community funds don't matter; but a spouse may have a claim for reimbursement

# **OWNERSHIP OF COMMUNITY PROPERTY**

- × ***EXAMPLE: During the marriage, Ben inherits a house from his mother's estate. He sells the house for \$200,000. Is this money community property or separate?***

# **OWNERSHIP OF COMMUNITY PROPERTY**

- × ***Moise v. Moise:***
  - + ***Ownership is fixed at the moment of acquisition and subsequent events do not effect this.***
- × ***Since the house was separate property, the money from the sale of the house is considered separate property, despite the fact the sale took place during the marriage.***

# OWNERSHIP OF COMMUNITY PROPERTY

## REAL SUBROGATION

- × Deals with situation where property is given the same classification as the property used to acquire it
  - + Unless it has been reclassified, the new thing has the same classification as the old
- × Things acquired with community things are community things (2338)
- × Separate property comprises property acquired before the marriage and property acquired with separate or separate and community things when the value of the community things is inconsequential when compared to the value of the separate things. (2341)

# **OWNERSHIP OF COMMUNITY PROPERTY**

- × ***EXAMPLE: Andrew and Tara have been married for 5 years. Andrew decided to buy his parents' house on Soniat Street. In the Act of Sale, Andrew declares the property is his separate property and purchased with his separate funds and Tara intervenes on the sale stating that she acknowledges that the property is Andrew's separate property. Is the Soniat property community or separate property?***



# **OWNERSHIP OF COMMUNITY PROPERTY**

- × ***Levatino v. Levatino:***
  - × ***A declaration in an act of acquisition, that things are acquired with separate funds as separate property of the spouse, may not be controverted by the other spouse when he concurred in act.***

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## ESTOPPEL BY DEED

- × Declaration of acquisition of separate property (i.e. an Intervention)
  - + A declaration: *in an act of sale* that property is acquired with separate funds as the separate property of a spouse
  - + May be refuted by the other spouse unless he concurred in the act.
  - + **May be** refuted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse.

# OWNERSHIP OF COMMUNITY PROPERTY

## INTERSPOUSAL TRANSACTIONS

- + **Transfer from Community to Separate:** one spouse donates his undivided interest in property to his spouse, then the entire property becomes the separate property of the receiving spouse.
- + 100% ownership instead of 50% interest.

# OWNERSHIP OF COMMUNITY PROPERTY

## INTER SPOUSAL TRANSACTIONS

- × **Transfer from Separate to Community:** transfer from one spouse to the other of a parcel of separate property, with the stipulation that it shall be part of the community, transforms property into community property.
  - + Must be in authentic Act

# **OWNERSHIP OF COMMUNITY PROPERTY**

## **COMMINGLING**

- × Property acquired with community and separate things will be separate if “the value of the community things is inconsequential in comparison with the value of the separate”

# **OWNERSHIP OF COMMUNITY PROPERTY**

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- × ***EXAMPLE: While married, Annie and Ben buy a camp in Plaquemines Parish. The couple used their savings from a joint bank account. The savings account includes inheritance monies and life insurance monies belonging to Annie separately. Is the camp community or separate property?***

# **OWNERSHIP OF COMMUNITY PROPERTY**

## **× Succession of Hyde:**

**+ Where both separate funds and community funds were used by the couple to make up the consideration paid, all of the assets thus purchased became community property unless the community funds used were inconsequential in comparison to the separate funds**

**\* BUT** community may be indebted to separate estate for amount of separate funds used in making purchase.

# **OWNERSHIP OF COMMUNITY PROPERTY**

- × ***EXAMPLE: Annie and Ben buy a camp in Plaquemines Parish during their marriage. The couple used their savings from a joint bank account and the inheritance from Annie's uncle that was kept in separate account to buy the camp. Is the camp community or separate property?***



# **OWNERSHIP OF COMMUNITY PROPERTY**

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## **× *Luffey v. Luffey:***

- + *When separate & community funds, even though distinguishable and not commingled, are used in making up the consideration paid for property acquired during the existence of the community, the property so purchased becomes community property although the community may be indebted to the separate estate for the amount of separate funds used in making the purchase.***

# MANAGING COMMUNITY PROPERTY

## PRINCIPALS OF MANAGEMENT

- × Equal management is the default rule that governs spouses.
  - + Exceptions:
    - × Concurrence
      - \* Neither spouse acting alone has the right or power to alienate
      - \* This requirement can be removed by a renunciation, judicial authorization, or intervention
    - × Exclusive management
      - \* Similar to head and master—designates one of the spouses as the sole manager of that property and deprives the other spouse of any management rights
    - × Equal management applies only if a particular piece of property or transaction is not governed by either exception.

# MANAGING COMMUNITY PROPERTY

- × ***EXAMPLE: During the marriage and without Ben's knowledge, Annie enters into a listing agreement with a real estate agent to sell the property. Is the signing of the listing agreement without Ben's consent against the law?***

# MANAGING COMMUNITY PROPERTY

No.

## x Cajun Capital v Bourque

An exclusive listing agreement is not an alienation, encumbrance or lease. The obligation to pay a commission was not a real obligation because it didn't attach to the property. Thus, the agreement was valid and had to be paid.

# MANAGING COMMUNITY PROPERTY

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× *WHO HAS TO SIGN PURCHASE AGREEMENT?*

# MANAGING COMMUNITY PROPERTY

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- × ***Separate Property Regime:*** The purchasing spouse.
- × ***Community Property Regime:*** Get BOTH Spouses to sign.
- × ***Only one spouse signs: problem***
  - + Other spouse signs the act of sale, and effectively ratifies the purchase/listing agreement. No problem.
  - + Other Spouse Refuses to sign the Sale. The non-signing spouse can't be compelled to join the sales. Signing spouse is liable for default of contract and can be sued for damages.
  - + HOWEVER: The judgment creditor that has a judgment of one spouse can attach the community property of both spouses.

# MANAGING COMMUNITY PROPERTY

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## DAMAGES FOR MANAGEMENT OF COMMUNITY

- × Damages can be awarded against one spouse for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse.

# MANAGING COMMUNITY PROPERTY

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- × ***EXAMPLE: Ben sells all of his and Annie's immovable properties to his mother without telling his wife. Ben continued to live and maintain all of the properties. Does Annie still have a right to 1/2 of the properties?***



# MANAGING COMMUNITY PROPERTY

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- × ***Thigpen v. Thigpen:***
  - + ***The supreme court found an intent to decrease the wife's community interest.***
  - + ***The court said the wife would only have an action against the husband upon the dissolution of the community (death, divorce, judicial separation).***

# MANAGING COMMUNITY PROPERTY

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- × ***EXAMPLE: Knowing that the divorce was about to happen, what if Ben decided to use all of the money in his and Annie's savings account to buy property in his mother's name?***

# MANAGING COMMUNITY PROPERTY

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- × ***Succession of Geagan:***
  - × ***Would not be allowed.***
  - × ***The court found the husband had the intent to leave the wife as little as possible at his death so wife was entitled to her 1/2 interest.***

# TERMINATION OF COMMUNITY PROPERTY

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- × Matrimonial Agreement- A Contractual Regime
- × Divorce/Partition
- × Death

# TERMINATION OF COMMUNITY PROPERTY

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## Matrimonial Agreements

- × Parties can agree to “opt out” of the community either entirely or partially
  - + I.E. Spouse is part of community regime but decides to buy house separately
- × Effect – Property will be the separate property of each spouse, even if acquired during marriage (see Separate Property below).

# TERMINATION OF COMMUNITY PROPERTY

## MATRIMONIAL AGREEMENTS

- × Pre-Nup
  - + Matrimonial Agreement entered into before marriage.
  - + Requires the consent of BOTH parties, meaning one spouse cannot unilaterally depart from the legal regime. Except:
    - × Spouse may unilaterally reserve fruits of separate property as separate property (Art 2339)
    - × Spouse may unilaterally renounce the right to concur in transactions involving community assets (Art 2348).
  - + No court approval required
  - + Requires Authentic Act

# TERMINATION OF COMMUNITY PROPERTY

## MATRIMONIAL AGREEMENT. A CONTRACTUAL REGIME

- × Post-Nup
  - + Matrimonial Agreement entered into during marriage.
  
  - + Court Approval
    - × Required if spouses domiciled in Louisiana more than a year and are altering or opting out of community property regime.
    - × Not required to alter or opt out of community property regime if agreement is entered into within one year of moving into Louisiana.
    - × Not required if spouses are agreeing to subject themselves to community property regime
  
  - + Authentic Act, and also requires consent of both spouses.

# TERMINATION OF COMMUNITY PROPERTY

- × ***EXAMPLE: A couple marries in Florida then moves back to Louisiana. Do they need court approval to opt out of the legal regime if done in their first year back?***



# TERMINATION OF COMMUNITY PROPERTY

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- × No. If the agreement is made within 1 year of the move to Louisiana, they do not need judicial approval to opt out of the community property regime.

# TERMINATION OF COMMUNITY PROPERTY

- × ***EXAMPLE: A couple marries in Louisiana, moves out of state, then moves back to Louisiana; do they need court approval to opt out of the legal regime if done in their first year back?***

# TERMINATION OF COMMUNITY PROPERTY

× **Yes!!!**

× **Price v. Wise:**

- + ***In this case, husband and wife were married in Louisiana and were therefore familiar with community property, and as such couples could not use the one year exception. As a result, their separate property agreement was ineffective for lack of judicial approval.***

# TERMINATION OF COMMUNITY PROPERTY

## MATRIMONIAL AGREEMENTS

### × Recordation

- + A matrimonial agreement is effective toward third persons as to immovable property when filed for registry in the conveyance records of the parish in which the property is situated (Art 2332).
- + Record in parish where spouses domiciled for notice to third parties as to movables.
- + In the absence of a recorded matrimonial agreement, third parties (such as creditors) are entitled to presume that spouses are in a community property regime.

# TERMINATION OF COMMUNITY PROPERTY

- × ***EXAMPLE: What if, after 3 years of marriage, Annie and Ben decide to enter into a matrimonial contract that is retroactive to the date of their marriage?***

# TERMINATION OF COMMUNITY PROPERTY

- × *It is permissible as between the spouses, but cannot be made retroactive to harm the interests of third parties.*
- × What if it's not recorded? It is still valid as between the spouses so long as it does not injure third parties.

# TERMINATION OF COMMUNITY PROPERTY

## DIVORCE / PARTITION:

- × Can be voluntary or involuntary
- × Involuntary:
  - + JUDGMENT OF SEPARATION OF PROPERTY – Judicially creates separate property regime for reason of (i) spouse who mismanages assets of the community, (ii) absentee spouse (whereabouts are unknown and cannot be ascertained by diligent effort), (iii) divorcing spouses, (iv) physically separated spouses (either spouse must show that they have lived separate and apart for 6 months).

# TERMINATION OF COMMUNITY PROPERTY

## DIVORCE / PARTITION:

- × Voluntary:
  - + During the existence of the community property regime, the spouses may, ***without court approval***, voluntarily partition the community property in whole or in part.
    - × In such a case, the things that each spouse acquires are separate property.
    - × The partition is effective toward third persons when filed for registry in the manner provided by Article 2332.
    - × A spouse may not alienate, encumber, or lease to a third person his *undivided interest* in the community or in particular things of the community prior to the termination of the regime.



# TERMINATION OF COMMUNITY PROPERTY

## DEATH

- × Spouse Dies Intestate:
  - + Community Property:
    - × Surviving Spouse retains her  $\frac{1}{2}$  interest in the property.
    - × Decedent Spouse's  $\frac{1}{2}$  interest passes to the decedent's heirs, subject to the usufruct of the surviving spouse. If no descendants, surviving spouse takes all of community property.
  - + Usufruct:
    - × The right to the use and fruits of another's property (the naked owner) for a time without damaging or diminishing the property (natural deterioration ok).
  - + Separate Property: Passes directly to the heirs.

# TERMINATION OF COMMUNITY PROPERTY

- × ***EXAMPLE: Husband and Wife have two children, and live in a shotgun double on Annunciation in the Irish Channel. Husband dies with no will. What happens to the husband's property?***

# TERMINATION OF COMMUNITY PROPERTY

- × *Wife of course retains her 1/2 of the community property.*
- × *The children are naked owners of the Husband's 1/2, subject to Wife's usufruct.*
- × *Wife gets to use and control the house until she dies or remarries, at which point her children will take possession of the house.*
- × *But Wife cannot sell or encumber the house without the consent of her children because they have an ownership interest. They would have to appear in the Act of Sale to sell out their interests.*

# TERMINATION OF COMMUNITY PROPERTY

- × Spouse Dies Testate:
  - + Both community and separate property pass pursuant to the terms of the will, subject to the limitations of Forced Heirship Laws.
    - × Forced Heirs are descendants of the first degree who, at the time of decedent's death, are 23 years or younger, or who are mentally or physically infirm to the point where they are incapable of taking care of their person or administering their estate
  - + Note: If the will does not properly dispose of ALL of the decedent's property, whatever is left passes through the laws of intestacy as described above, so community and separate property designation would come back into play.