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Retroactivity of the Repeal of the Double Declaration Rule: Wood v. Wood

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NOTES

RETROACTIVITY OF THE REPEAL OF THE DOUBLE DECLARATION RULE: *WOOD V. WOOD*

In a partition of community property, the wife sought to have several parcels of land declared community property since the husband, in the act of sale by which he acquired the property, had failed to make a "double declaration" that the property was acquired with his separate funds for his separate estate. In denying the wife's request, the district court reasoned that the property was actually acquired by the partition of a succession, and therefore a "double declaration" was not required even though the form of the partition was a sale. Affirming the judgment, the first circuit *held* that since the property was acquired by a partition of a succession, the acquisition fell within one of the judicially recognized exceptions to the "double declaration" requirement. The court further supported its decision by reasoning that the legislation repealing the "double declaration" requirement could be applied retroactively. *Wood v. Wood*, 424 So. 2d 1143 (La. App. 1st Cir. 1982).[1]

The double declaration rule evolved jurisprudentially from Civil Code articles 2334 and 2402, as they existed prior to the enactment of the new matrimonial regimes law.[2] Article 2402 established the presumption that all property acquired during the marriage was community property even if acquired in the name of only one of the parties.[3] Article 2334 provided that this presumption could be rebutted by a showing that the property was either acquired with separate funds, or by inheritance or donation to only one of the spouses.[4] The jurisprudence interpreting these two articles established the extra-codal requirement that the husband declare two things in the document of acquisition in order to avoid a conclusive presumption of community: (1) that the property was acquired with his separate funds, and (2) that he intended the property to be his separate property.[5] Although the double declaration appeared to be an evidentiary

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1. *Wood* also involved questions of application of the parol evidence rule and whether the family homestead is divisible in kind. These issues are beyond the scope of this note, which is limited to the subject of the double declaration requirement.

2. Title VI of book III of the Louisiana Civil Code of 1870, which contained articles 2325 to 2437, was repealed by Act 627 of 1978. Act 709 of 1979 also repealed title VI of book III, effective January 1, 1980, and enacted a new title VI, consisting of articles 2325 to 2376 under the heading "Matrimonial Regimes."

3. LA. CIV. CODE art. 2402 (as it appeared prior to its repeal by 1978 La. Acts, No. 627, § 6).

4. LA. CIV. CODE art. 2334 (as it appeared prior to its repeal by 1978 La. Acts, No. 627, § 6).

5. *See, e.g.*, Phillips v. Nereaux, 357 So. 2d 813 (La. App. 1st Cir. 1978); Primeaux v. Libersat, 307 So. 2d 740 (La. App. 3d Cir.), *rev'd on other grounds*, 322 So. 2d 147 (La. 1975); Thomas v. Thomas, 27 So. 2d 758 (La. App. Orl. 1946).

presumption, the jurisprudence applied it as a rule of classification of property.[6]

Two functions of the double declaration were generally recognized. The first function was to provide notice and certainty of title to third parties via public recordation since, unlike property in the wife's name, any title to property in the husband's name without a double declaration was presumed to be community property.[7] The second function of the double declaration rule was to provide counter-balancing protection for the wife under the old "head and master" regime.[8] Without the requirement, the husband's control over the community allowed him to keep good investments by subsequent declarations that the property was his separately or to burden the community by remaining silent about depreciating or debt-ridden property.[9]

Nevertheless, three exceptions to the double declaration requirement existed with regard to immovables: (1) sales made to effect a partition,[10] (2) exchanges of land owned separately by the husband in which the act of exchange showed true consideration, although no recital of separate ownership was made in the act,[11] and (3) sale/re-sale transactions which have been treated by the courts as security devices.[12] In cases in which the transaction appeared to be a sale lacking a double declaration, the courts looked beyond the form of the act to ascertain its actual nature and determine whether one of the exceptions was applicable.[13]

The *Wood* court emphasized the necessity of looking behind the form of the act in question to the substance of the acquisition in order to determine the status of the acquired property as separate or community. In holding that the property was acquired by a partition, the court examined the surrounding circumstances to determine whether the transactions in question fell within one of the three exceptions to the double declaration requirement for immovables. The court noted several characteristics which evidenced that the transactions were actually a partition of a succession between the defendant, his mother, his uncle, and his coheirs: (1) no cash

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6. Samuel, *The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality*, 39 LA. L. REV. 347, 399 (1979).

7. Primeaux v. Libersat, 307 So. 2d 740, 745 (La. App. 3d Cir.), *rev'd on other grounds*, 322 So. 2d 147 (La. 1975).

8. LA. CIV. CODE arts. 2325-2437 (as they appeared prior to their repeal by 1978 La. Acts, No. 627, § 6).

9. *See* case cited *supra* note 7.

10. Troxler v. Colley, 33 La. Ann. 425 (1881).

11. Lawson v. Ripley, 17 La. 238 (1841).

12. *E.g.*, Ruffino v. Hunt, 234 La. 91, 99 So. 2d 34 (1958); Champagne v. Eusea, 388 So. 2d 859 (La. App. 4th Cir. 1980); Cookmeyer v. Cookmeyer, 274 So. 2d 739 (La. App. 4th Cir. 1973); Lazaro v. Lazaro, 92 So. 2d 402 (La. App. Orl. 1957).

13. Huie, *Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana*, 26 TUL. L. REV. 427, 444-62 (1952).

was actually exchanged, (2) the prices were too small to be considered serious, (3) the property was obtained entirely through inheritance and donations, and (4) the acts stated that the interests in the property devolved from the succession of the defendant's father. All these facts persuaded the court that a partition to settle a succession occurred rather than a true sale; therefore, the property was the defendant-husband's separate property.[14] The court's conclusion, in this respect, is consistent with the jurisprudence in that prior courts looked to the actual nature of the transaction in question rather than to what the transaction purported to be.[15] In fact, the existence of three exceptions to the double declaration requirement makes it incumbent upon any court to examine the surrounding circumstances *first* to determine whether a double declaration was necessary. Hence, since the validity of the double declaration requirement need not be evaluated before the nature of the acquisition is examined, the court's holding may be limited to a finding that a partition occurred, thereby obviating the need for a double declaration. In any event, the *Wood* court adhered to the rationale of the exceptions to the double declaration requirement—that of looking behind the form of the act and examining its true nature.[16]

In support of its refusal to apply the double declaration requirement in *Wood*, the first circuit stated that the historical reasons for the double declaration had no rational bases and that, in any event, Civil Code article 2340, which eliminated the double declaration requirement, should be applied retroactively.[17] An analysis of the court's decision reveals that while the holding is correct, the court's reasoning is questionable. Despite the problems with the rationale of the opinion, the court's examination of the retroactivity of Civil Code article 2340 is important.

Consistent with its reasoning in *Phillips v. Nereaux*,[18] the *Wood* court rejected the rationale that the double declaration is necessary to make third-party purchasers relying on the public records aware that the property being acquired may not be community property. Since a double

14. 424 So. 2d at 1149. Once the *Wood* court found that the transaction was actually a partition, it appropriately recognized this as one of the traditional exceptions to the double declaration requirement. *See, e.g.*, Troxler v. Colley, 33 La. Ann 425 (1881); Primeaux v. Libersat, 307 So. 2d 740 (La. App. 3d Cir.), *rev'd on other grounds*, 322 So. 2d 147 (La. 1975); Succession of Miangolarra, 297 So. 2d 784 (La. App. 4th Cir. 1974).

15. *See, e.g.*, Troxler v. Colley, 33 La. Ann. 425 (1881); Succession of Miangolarra, 297 So. 2d 784 (La. App. 4th Cir. 1974); McElwee v. McElwee, 255 So. 2d 883 (La. App. 2d Cir. 1971).

16. *See* Huie, *supra* note 12, at 444-62.

17. Wood v. Wood, 424 So. 2d 1143, 1147, 1151 (La. App. 1st Cir. 1982). Civil Code article 2340 provides: "Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property."

18. 357 So. 2d 813, 815-19 (La. App. 1st Cir. 1978).

declaration does not provide a conclusive presumption that the husband owns the property separately, the third party must still determine whether the property is community, thus requiring the wife's signature.[19] Hence, a double declaration is not conclusive as to third parties relying on the public records.

The court pointed out that the second reason for the double declaration requirement, that of protecting the wife from the husband's ability to subsequently withhold good investments or "dump" bad investments at the community's expense, is also based on the erroneous assumption that a double declaration necessarily renders the property separate—an incorrect assumption since the husband must prove by a preponderance of evidence that the property is separate even if he has made a double declaration.[20] According to the court, if the husband is able to meet this burden of proof, he should prevail since former Civil Code article 2334 provided that property acquired with separate funds is owned separately. The court concluded that the only loss to the wife is the expectation that the property was community. The court also noted that with or without a double declaration, the husband could fearlessly squander, waste, or speculate with questionable investments by withholding evidence that the investment is his separate property, resulting in community liability for the investment and any debts it might accrue.[21]

The court's conclusion that without the double declaration requirement the *only* possible loss suffered by the wife would be the expectation that the property was community is misleading in that this loss can be costly for the wife in at least two situations. First, the wife's expectations of the value of the community may significantly influence her decision to sue for divorce and separation of the community. She may decide that such action would not be economically feasible if certain property is not part of the community. A similar reason for protecting the wife against the loss of this expectation of community property would occur in the event of the husband's dying intestate. The surviving wife is granted a legal usufruct only over the husband's share of the community property, not his separate property, when he dies intestate.[22] The loss of this "mere" expectation could be quite costly. Should the wife not expect the property to be part of the community, her plans for self-provision upon her husband's death would in many instances be significantly different. These two examples illustrate that the loss of an expectation of community property could likely produce an unexpected hardship. Thus, the court in *Wood* failed to recognize the true loss that may accompany the loss of a wife's

19. *Id.* at 819.

20. 424 So. 2d at 1147.

21. Primeaux v. Libersat, 307 So. 2d 740, 745 (La. App. 3d Cir.), *rev'd on other grounds*, 322 So. 2d 147 (La. 1975).

22. LA. CIV. CODE art. 890.

expectation that certain property is community. The court, however, attempted to bolster its position by stating that former Civil Code article 2334 *should* permit the husband to prevail in proving his separate ownership without a double declaration if he can prove its separate nature by a preponderance of evidence.[23] But since the jurisprudence disagrees with this interpretation and requires a double declaration, the *Wood* court's reading of former article 2334 is simply a restatement of its own position against the double declaration requirement.

Having stated its holding, the *Wood* court embarked on a discussion of the retroactive application of Civil Code article 2340, the legislative repeal of the jurisprudentially-created double declaration rule. It is unclear whether this discussion is an alternative rationale in support of the court's holding or merely dictum. Regardless of its nature, if this reasoning were accepted by the Louisiana Supreme Court, the double declaration requirement would be eliminated regardless of when the marriage began or the property was acquired.

Generally, a law can prescribe only for the future.[24] The *Wood* court noted, however, that the Louisiana Supreme Court has consistently held that this restriction does not apply to laws which are merely procedural rather than substantive.[25] Thus, the bar to retroactive application of the elimination of the double declaration rule would require a finding that article 2340 is substantive and that retroactive application would divest the wife of a vested right.[26] The court rejected the argument that retroactive application of article 2340 would divest a wife of a vested right, since vested rights can only arise from contracts, statutes, or operation of law.[27] The first circuit stated that court decisions are not law in Louisiana,[28] and that no substantive rights are created by jurisprudence.[29] Therefore, since the double declaration rule was only jurisprudentially created, retroactive application of article 2340, which eliminates the requirement, would not divest any vested right.[30]

The court in *Wood* addressed the argument that since conclusive presumptions have traditionally been considered substantive law,[31] and since the absence of a double declaration created a conclusive presumption of

23. 424 So. 2d at 1147.

24. LA. CIV. CODE art. 8.

25. Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1339 (La. 1978).

26. 424 So. 2d at 1151.

27. Pfister v. St. Bernard Cypress Co., 155 La. 575, 589, 99 So. 454, 459 (1923).

28. Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1334 (La. 1978) *cited in Wood*, 424 So. 2d at 1149; *e.g.*, Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 146, 150 So. 855, 858 (1933).

29. Pfister v. St. Bernard Cypress Co., 55 La. 575, 589, 99 So. 454, 459 (1923) *cited in Wood*, 424 So. 2d at 1151.

30. 424 So. 2d at 1151.

31. Dwyer, *Presumptions and Burden of Proof*, 21 LOY. L. REV. 377, 393 (1975).

community property, the double declaration rule was a substantive law thereby making any law which repeals it also substantive.[32] In rejecting this argument, the court pointed out that, in Louisiana, law is the solemn expression of legislative will[33] and that courts merely interpret the law.[34] Since mere "interpretations" by the courts do not create or eliminate substantive rights, the jurisprudentially-created double declaration requirement is not substantive.[35] Since article 2340 does not abrogate a substantive rule of law, it cannot be said to be a substantive law due to the nature of the law it abrogates. And since article 2340 establishes a *rebuttable* presumption of community rather than an irrebuttable presumption, it is procedural and can be applied retroactively.

The *Wood* court attached great weight to the fact that while the matrimonial regimes laws enacted in Act 627 of 1978 prohibited retroactive changes in classification of property as separate or community[36] (which is precisely what retroactive elimination of the double declaration rule would do), Act 709 of 1979, which completely repealed Act 627 and of which article 2340 is a part, did not contain such a prohibition.[37] In light of this omission, the court reasoned that "the legislation [of 1979] does not prevent a retroactive application of the elimination of the double declaration requirement."[38] Evidently, the court felt that this omission indicated a change in the intent of the legislature and implied an intention that the new law be given retroactive application. While the omission was arguably deliberate,[39] there are sound reasons for concluding that the failure to include a retroactivity provision did not represent a change in legislative intent. In *Freeman v. Freeman*,[40] the second circuit refused to give Act 709 retroactive effect, stating that without an express provision for or indicating retroactive effect, no retroactive effect could be given. Professors Katherine S. Spaht and Cynthia Samuel also contend that the omission of retroactivity provisions in Act 709 did not represent a change in legislative intent from Act 627 of 1978.[41] Professor Samuel argues forcefully that the double declaration requirement was a rule of

32. 424 So. 2d at 1150.

33. LA. CIV. CODE art. 1.

34. *See* cases cited *supra* note 27.

35. *E.g.*, Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 146, 150 So. 855, 858 (1933); Pfister v. St. Bernard Cypress Co., 155 La. 575, 589, 99 So. 454, 459 (1923).

36. 1978 La. Acts, No. 627, § 9.

37. 1979 La. Acts, No. 709.

38. 424 So. 2d at 1150.

39. Wattigny v. Wattigny, 402 So. 2d 776, 778 (La. App. 3d Cir. 1981).

40. 430 So. 2d 673 (La. App. 2d Cir. 1983), *writ denied.*

41. Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 109 (1979).

classification of marital property creating substantive rights and, therefore, according to Act 627, elimination of the requirement could not be given retroactive effect.[42] Hence, Act 709 apparently did not represent a change in legislative intent from Act 627, and the repeal of Civil Code articles 2334 and 2402 (and the legislative overruling of the jurisprudence interpreting them as requiring a double declaration) cannot be given retroactive effect. Therefore, since according to this reasoning article 2340 is substantive and no express[43] or implied[44] provision for its retroactive application was made in Act 709, no retroactive application is possible.[45]

However, two arguments support retroactive application of article 2340. First, the Louisiana Supreme Court could hold that while the double declaration doctrine has operated as a rule of classification, this was not its original purpose.[46] The court could then overrule those cases which misapplied the court-created doctrine by finding that the double declaration doctrine is merely an evidentiary rule and, as such, is procedural. Therefore, the new legislation repealing the doctrine could be given retroactive effect. The second argument for applying the provisions of Act 709 in the *Wood* case is based on the language of article 2340. Article 2340 requires the courts to permit the husband to present evidence of his separate ownership of property in all court proceedings after the statute's effective date. Hence, the courts would apply this new provision in *all* cases arising after January 1, 1980,[47] and husbands would be permitted to prove the separate nature of the property in question even though no double declaration was made at the time of acquisition. The only obstacle to such an application would be the possibility of divesting the wife of a vested right.[48] As indicated earlier,[49] the wife arguably would not lose a vested right by losing the conclusive presumption of community created by the absence of the double declaration. Thus, implementing article 2340 according to its effective date would eliminate the need to enforce the double declaration rule in most, if not all, cases. However, given the harsh consequences that may result from retroactive application of article 2340,[50] the supreme court should not adopt either of these arguments.

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42. Samuel, *supra* note 6, at 398-400.

43. 1979 La. Acts, No. 627, § 9; Freeman v. Freeman, 430 So. 2d 673 (La. App. 2d Cir. 1983), *writ denied.*

44. *See* Spaht & Samuel, *supra* note 40, at 109; Samuel, *supra* note 6, at 398-400.

45. Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1338 (La. 1978).

46. *See supra* text accompanying notes 7-8.

47. *See* 1979 La. Acts, No. 709, § 13.

48. Hargrave, *Developments in the Law, 1980-1981—Louisiana Constitutional Law*, 42 LA. L. REV. 596, 601-04 (1982).

49. *See supra* text accompanying notes 26-29.

50. *See supra* text accompanying notes 21-22.

Conclusion

If the Louisiana Supreme Court were to accept the *Wood* court's position on retroactivity, the double declaration requirement would be eliminated regardless of when the marriage began or the property was acquired. The effect of this would be to strip the wife of an expectation of community property—a loss with potentially severe repercussions to the wife. The loss of this expectation of community may significantly influence the wife's decision to sue for divorce since the division of the community would, in certain instances, result in a significantly lesser amount of property going to the wife. This reduction might make a divorce and separation of the community economically infeasible for the wife. Those women contemplating, commencing, or involved in such litigation would be adversely affected by a retroactive application of article 2340. Similar effects would be felt by those women whose husbands were to die intestate. With retroactive application of Civil Code article 2340, their expectations of economic self-sufficiency would be drastically altered by the fact that the wife does not acquire a usufruct over the husband's separate property—a potentially disastrous result for those who believed their economic resources would be sufficient upon their husbands' death.

No provision in Act 709 expressly provides for retroactivity and no strong reasons exist for implying legislative intent for retroactive application. Thus, for legal, logical, and practical reasons, the *Wood* court's rationale for retroactive application of Civil Code article 2340 should not be accepted by other Louisiana courts.

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