

16 La. Civ. L. Treatise, Matrimonial Regimes § 8:5 (5th ed.)

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Matrimonial Regimes

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Chapter 8. Matrimonial Agreements and Interspousal Contracts

## § 8:5. Matrimonial agreements—Notifying third persons

Since the legal community property regime is so pervasive, most people ordinarily deal with most married persons assuming they are under such a regime. To depart from that system, insofar as it affects third persons dealing with the spouses, one must notify them, at least constructively.<sup>1</sup> [Louisiana Civil Code Article 2332](#) provides that 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.” This is a straightforward approach which derives from the practices generally followed in dealing with transfers of land. Similarly, [Civil Code Article 2375](#), in re-establishing the community upon reconciliation after filing a petition for divorce, makes the reestablishment effective toward third persons only upon registry in the public records.<sup>2</sup>

[Civil Code Article 2332](#) similarly provides that the agreement will affect third persons “as to movables when filed for registry in the parish or parishes in which the spouses are domiciled.” Here, the mechanism is less precise. Some registered movables, as negotiable instruments, are governed by special legislation covering rights of transferees.<sup>3</sup> That legislation would prevail over the more general provisions of [Article 2332](#). Even with respect to movables, doctrines developed in the law of sales<sup>4</sup> that allow a non-owner to transfer title in some instances will come into play and protect innocent third persons, even absent the recordation contemplated in [Article 2332](#).

That the drafters were concerned primarily with dealings with immovables is shown in the use of the dichotomy between movables and immovables. Technically, this technique may be appropriate since even incorporeal rights are considered as movable or immovable.<sup>5</sup> However, the distinction is less useful when applied to debts and other obligations contracted by spouses.

Third persons will presumably treat the spouses as living under the community regime if the agreement does not appear in the public records, and, thus, the earnings of the non-contracting spouse might be considered in deciding whether to grant credit. If only the husband is employed, third persons are entitled to treat that income as community, and a creditor of the wife should be entitled to reach the husband's earnings and the accumulations from those earnings,<sup>6</sup> even though they are separate property as between the spouses. The effects of the community being the default regime apply as well to the powers of alienation. In the absence of the recorded separate property agreement, for example, a movable acquired by one spouse with earnings could still be subject to equal management as far as third persons are concerned; the other spouse could validly alienate, encumber, or lease the movable.<sup>7</sup>

With respect to movables, recordation is in “the parish or parishes in which the spouses are domiciled.”<sup>8</sup> The quoted text is somewhat ambiguous. It might be construed to mean that as spouses move to a different parish, they must record their matrimonial agreement in that new domicile.<sup>9</sup> Comment (b) to [Article 2332](#) suggests another purpose, however, stating, “When spouses are domiciled in different parishes, registration must be made in both parishes.”<sup>10</sup> Indeed, when the legislation was drafted, central statewide registry of matrimonial agreements was part of the proposal, rendering unnecessary a continuing

registration as spouses moved about the state. That proposal was defeated, however.<sup>11</sup> The result is that in a mobile society, third persons are not well-protected with respect to matrimonial agreements that were contracted when the spouses were domiciled elsewhere. In a crucial situation, a search of the records in 64 parishes would be required to ascertain with certainty that no such agreement was recorded in the state.

By the terms of [Civil Code Article 2332](#), it is clear that the matrimonial agreement affects third persons from the time of filing for registry.<sup>12</sup> As between themselves, the parties can provide for another effective date. Absent a specific date being agreed to, the contract would bind the parties as of the time of execution. Future effective dates would seem to present no problems, since no provision forbids them, and indeed might be desirable for accounting and tax simplicity. Retroactive application of the agreements as between the parties would also seem to be allowed, since they are not prohibited by a general rule, and there would seem to be no basic public policy violated here anymore than would be the case with any other contract.<sup>13</sup> In *Heyl v. Heyl*,<sup>14</sup> the court of appeal allowed a contract to apply retroactively and reclassify property acquired during the marriage. After living in community for more than three years, the parties executed an agreement under which “all property acquired by the respective spouses during the marriage and prior to the agreement was to belong to their respective separate estates.”<sup>15</sup> However, if the retroactive application involves changes in ownership of existing property, the result could be a donation, at least to the extent there was no exchange of equivalents. Such a donation would still be reducible if the forced portion of an heir were affected.<sup>16</sup>

In *O’Krepki v. O’Krepki*,<sup>17</sup> the court of appeal approved a contract that changed a matrimonial regime retroactively to the date of marriage. The spouses had contracted a separate property regime before their marriage in 1984 and then contracted in 1986 to “re-establish the community of acquets and gains constituting the legal regime ... as though they had not taken any action previous to marriage.”<sup>18</sup> The Civil Code contains no explicit requirement, as the defendant urged, that a valid transfer requires an enumeration of each specific item being donated. A close analog can be found in [Louisiana Civil Code Article 2375](#), which provides for re-establishment of a community upon reconciliation of the spouses after a petition for divorce has been filed without an itemization of the assets involved.<sup>19</sup> The interests of third persons are also not harmed, since they are not affected by the agreement until the time of recordation.

Traditionally, out of state couples moving to Louisiana were allowed a period of one year during which they could adopt a matrimonial agreement;<sup>20</sup> otherwise they were bound by the legal community. Because a matrimonial regime was immutable under the existing law, it was rational to assume that the matrimonial agreement adopted by the non-residents would relate back to the time of moving to Louisiana, except to the extent third persons might be harmed. However, since the law now allows spouses to change their matrimonial regime quite often, it also seems there should be no reason to prevent the out of state couple from choosing another effective date. The goal of an immutable property relationship during all of the marriage is no longer an important policy, so the parties should be able to contract freely in that regard. Of course, these contracts also come within the rule that third persons are not affected until filing.<sup>21</sup>

In *Price v. Wise*,<sup>22</sup> the Louisiana Court of Appeal for the First Circuit considered an attempt at a matrimonial agreement drafted by a couple who were married and domiciled in Louisiana for several years, then moved out of state, and finally moved back into the state, executing a separate property agreement within a year of their move back. The parties did not obtain judicial approval of their agreement. Husband argued that the separate property agreement was effective under the one-year exception provided to non-domiciliaries. The First Circuit disagreed, holding that “the legislature intended for the exception to apply to couples married and domiciled outside of this State, who later acquire a Louisiana domicile,” as those couples need time to familiarize themselves with the regime and make a choice. Husband and wife in the case at hand, because they were married in Louisiana, were familiar with the regime, and it was not such couples that the one-year exception was intended to protect.<sup>23</sup> As a result, their separate property agreement was ineffective for lack of judicial approval.

Under [Civil Code Article 2332](#), matrimonial agreements do not have to be recorded to be valid. It may well suit a couple to deal with third persons as though they were under the legal community regime, especially as to contracting debts and alienating assets, but to have a different regime as between them. Some persons may simply want to keep such matters private. Whatever the reason, there is nothing to require them to make such agreements public so long as third persons are not injured in the process.<sup>24</sup> Their heirs, of course, would not qualify as protected third persons because they would be successors.<sup>25</sup> It is required, however, that the agreement be in writing and that it be either “made by authentic act or by an act under private signature duly acknowledged by the spouses.”<sup>26</sup>

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### Footnotes

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- 1 See Hargrave, [Public Records & Property Rights](#), 56 La. L. Rev. 535 (1996); Baade, [Marriage Contracts in French and Spanish Louisiana: A Study in “Notarial” Jurisprudence](#), 53 Tul. L. Rev. 1 (1979).
- 2 The amendment to [La. Civ. Code art. 2375](#), providing for the recordation of a notice of reestablishment of the community, establishes a unique device. It is not an instrument or agreement that must be recorded; it is “a notice thereof” that must be filed for registry. Presumably a unilateral declaration that a reconciliation has occurred would be sufficient.
- 3 2005 La. Acts, No. 169 extensively amended, renumbered and reenacted the Louisiana Law of Registry. See e.g., [R.S. 10:3-301 to 10:3-311](#).
- 4 Comment: [Sales of Another's Movables—History, Comparative Law, and Bona Fide Purchasers](#), 29 La. L. Rev. 329, 348–359 (1969). Comment: [Transfer of Movables by a Non-Owner](#), 55 Tul. L. Rev. 145 (1980) (written before the repeal of [La. Civ. Code art. 520](#) by 1981 La. Acts, No. 125, § 1).
- 5 [C.C. arts. 448, 461, and 470](#).
- 6 [C.C. art. 2345](#).
- 7 Unless, of course, it is furniture or furnishings in the family home, in which case [La. Civ. Code art. 2347](#) requires consent of both spouses for alienation, encumbrance or lease; see §§ 5:1 et seq.
- 8 [C.C. art. 2332](#).
- 9 [Downing v. C.I.R.](#), T.C. Memo. 2003-347, T.C.M. (RIA) P 2003-347 (2003) (Tax Court rejected the government's argument that a matrimonial agreement properly recorded in the spouses' parish of domicile(s) at the time of execution need be re-recorded in their new domicile to be effective against third persons as to movables. The Tax Court concluded that the express language of [Civil Code Article 2332](#) required nothing more, and that any potential burdens on third persons “are properly within the province of Louisiana's lawmaking structure.”).
- 10 It was not until 1985 La. Acts, No. 272 that [La. Civ. Code art. 39](#) was amended to remove the reference, “A married woman has no other domicile than that of her husband.” However, that provision had long been considered ineffective because it violated the woman's equal protection rights. See Note: 53 Tul. L. Rev. 973 (1979).
- 11 Spaht and Samuel, [Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law](#), 40 La. L. Rev. 84 106; La. H.B. No. 802, 5th Reg. Sess. (1979).
- 12 [In re Pietri](#), 59 B.R. 68, 70–71 (Bankr. M.D. La. 1986), involved an attempt by a trustee to avoid as a fraudulent transfer a matrimonial agreement modifying the legal community. The agreement was executed in 1981 but not recorded until 1984, just 14 days before the husband filed a petition in bankruptcy. “As to third parties, therefore, the effects of the legal community property regime existed from the date of the marriage until April 25, 1984, and any property acquired during that period was community property, at least as to creditors; that property then became property of the estate ... . Therefore, the recordation of the matrimonial agreement did not remove any property that would have been property of the estate if the matrimonial agreement had not been recorded.”
- 13 1978 La. Acts, No. 627; [R.S. 9:2834](#), cmt. (b).
- 14 [Heyl v. Heyl](#), 445 So. 2d 88 (La. Ct. App. 2d Cir. 1984).
- 15 [Heyl](#), 445 So. 2d at 92, n.3.
- 16 [C.C. arts. 1502 to 1518](#).
- 17 [O’Krepki v. O’Krepki](#), 529 So. 2d 1317 (La. Ct. App. 5th Cir. 1988).

18 *O'Krepki*, 529 So. 2d at 1318.  
19 La. Civ. Code art. 155 provided a similar mechanism for reestablishment after a judgment of separation;  
it was repealed by 1990 La. Acts, No. 1009, § 9, when the separation from bed and board was abolished.  
20 C.C. art. 2329 (1870) (as it appeared prior to its repeal by 1979 La. Acts, No. 709); *see also* C.C. art. 2329.  
21 “With respect to the reestablishment of the community after dissolution, it is questionable, in view of the  
freedom of contract provisions of the new law, whether the requirements in Civil Code article 155 will  
continue to be applicable. Under Civil Code art. 155 the reestablishment of the community ... is limited to  
a reestablishment of the community as it previously existed without any new provisions or modifications  
being made. Under the new law, however, the spouses may contract ... at any time or times and may  
make as many modifications as they wish ... .” McClendon, Louisiana's New Matrimonial Regimes Law:  
Some Aspects of the Effect on Real Estate Practice, 39 La. L. Rev. 441, 453–454 (1979).  
Accord, *Couvillion v. Couvillion*, 886 So. 2d 474 (La. Ct. App. 1st Cir. 2004) (matrimonial agreement  
recorded five years after execution valid between the parties from time of execution).  
22 *Price v. Wise*, 2012-311 La. App. 1 Cir. 12/21/12, 2012 WL 6677881 (La. Ct. App. 1st Cir. 2012).  
23 *Price v. Wise*, 2012-311 La. App. 1 Cir. 12/21/12, 2012 WL 6677881, \*4 (La. Ct. App. 1st Cir. 2012).  
24 Comment: *Marital Property Agreements—Being Creative with the New Legislation*, 43 La. L. Rev. 159  
(1982).  
25 C.C. arts. 880 et seq., 3506(28); C.C. art. 3343 (2005) (formerly R.S. 9:2722).  
26 C.C. art. 2331.

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