

# Community Property Cannot Come into Existence After the Termination of the Community Property Regime

By Bradford H. Felder





here have been three appellate court cases that have failed to follow a fundamental tenet of community property law: once the community property regime has ended, no new community property can be created.<sup>1</sup> Part of the confusion may arise from Comment (c) to *La.Civ. Code art. 2341* which defines separate property. Comment (c) states that the concept of real subrogation is applicable to both separate and community property. However, the concept of real subrogation is completely unnecessary in analyzing community property, as opposed to separate property. *La.Civ. Code art. 2338* defines community property as follows:

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 article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

*La.Civ.Code art. 2339* classifies civil fruits of separate property as community property, unless they are reserved by a spouse as separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged, which is provided to the other spouse prior to filing same. *La.Civ.Code art. 2340* establishes a rebuttable presumption that things in the possession of a spouse during the existence of the community property regime are presumed to be community. While the inclusion of the language that community property includes “property acquired with community things”

suggests the principle of real subrogation is applicable, it is not, in fact, necessary for purposes of classification. In fact, the last clause in article *La.Civ.Code art. 2338* stating that “all ... property not classified by law as separate property” is community property is sufficient, along with the presumption of community, for the classification of property acquired during the existence of the community property regime.

The application of the principle of real subrogation may create confusion because it suggests that post-termination of the community property regime, if community property were used to acquire additional property, that newly acquired property could be classified as community property. However, that is not the case. Rather, as explained in *La.Civ.Code art. 2366*, “if community property has been used during the existence of the community property regime or former community property has been used thereafter for the acquisition ... of the separate property of a spouse, the other spouse is entitled to reimbursement for one-half of the amount or value that the community property had at the time it was used.” Therefore, property acquired after termination of the community property regime is the separate property of the spouse who acquired it, and the interests of the other spouse are protected by means of a reimbursement claim for one-half of the value of the community property used for the acquisition.

The principle of real subrogation is helpful in the context of classifying separate property because it concerns property that pre-existed the creation of the community property regime and property that is acquired during the community property regime that is defined as separate property. *La.Civ. Code art. 2341* defines separate property as follows:

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of the community property regime;

property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of the community property regime.

The article states “property acquired by a spouse with separate things” is separate property, thus invoking the principle of real subrogation. “The principle of real subrogation has long been applied to allow a spouse with separate assets to manage and to replace those assets as a patrimonial mass independent of the community.” Carroll, Felder, & Moreno, 16 *La. Civ. L. Treatise, Matrimonial Regimes*, §3:51 (5<sup>th</sup> ed.). Although the presumption of community property would apply to property acquired during the existence of the community property regime, if a spouse can demonstrate that he used separate property to acquire the new property then the property should be classified as separate property. Real subrogation is therefore a useful principle when classifying separate property that was acquired during the existence of the community property regime. In contrast, the principle of real subrogation is not necessary, and may create confusion, when applied to the classification of community property. The presumption of community along



with the catch-all phrase “all other property not classified by law as separate property” contained in *La.Civ. Code art. 2338* are sufficient, without the principle of real subrogation, to classify community property.

The most recent case to classify property acquired post-termination as community property is *Reis v. Reis*, 2024-0750 (La.App. 4 Cir. 4/3/25), 418 So.3d 79. In *Reis*, during the marriage, the parties formed a limited liability company, Outkast Environmental. After the parties divorced, the former husband created Outkast Industrial. The former husband used materials and equipment belonging to Outkast Environmental in his operation of Outkast Industrial and hired employees that worked for Outkast Environmental to work for Outkast Industrial. Following the reasoning of *Queenan v. Queenan*, 492 So.2d 902 (La.App. 3 Cir. 1986) and *Granger v. Granger*, 06-1615 (La.App. 3 Cir. 9/26/07), 967 So.2d 540, the Louisiana Fourth Circuit Court of Appeal held that Outkast Industrial is a “substitute corporation” and therefore is community property subject to partition.

*Reis*, *Queenan*, and *Granger* each incorrectly classified entities created after termination of the community property regime as community property. Louisiana’s civil code articles clearly prohibit property acquired post-termination from being classified as community property. The remedy in these cases is the application of *La.Civ. Code art 2369.3* which states:

A spouse has a duty to preserve and to manage prudently former community property under his control in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. He is answerable for any damage caused by his fault, default, or neglect.<sup>2</sup>

Comment (a) to the article provides, in pertinent part:

This Article also imposes a higher standard of care in managing and maintaining such former community property than the standard imposed during the marriage for managing community property. See C.C. Art. 2354 (rev. 1979). The reason for imposing a higher standard of care in managing former community property is that, after termination of the community property regime, the law no longer assumes that a spouse who has former community property under his control will act in the best interest of both spouses in managing it.

Comment (b) to the article provides:

This Article applies to “former community property, including a former community enterprise.” “[F]ormer community enterprise” refers to a former community business that is not a legal entity. See C.C.

Art. 2347 (rev. 1979), comment (b). Recognition of the business as a collective of things, although it has no juridical personality, continues after termination of the community regime for the purposes of this Section.

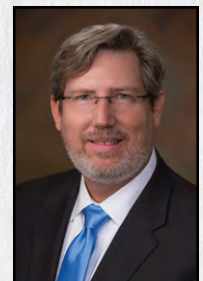
Therefore, the courts in *Reis* and *Granger* should have relied upon *La.Civ.Code art. 2369.3* to analyze the post-termination management of the community businesses, and then determine the value of the damage caused to those community businesses through the fault, default, or neglect of the operating spouse. Avoiding this analysis and simply classifying property that did not exist during the community property regime as community property distorts the matrimonial regime created by our civil code and allows for potentially significant confusion over the manner in which courts are to analyze property divisions in community property partitions. It is vitally important that courts are consistent in recognizing that “[u]pon termination of the legal regime, the community relationship ceases and nothing can then become part of it.” Carroll, Felder, & Moreno, 16 La. Civ. L. Treatise, Matrimonial Regimes, §3:50 (5<sup>th</sup> ed.).

## FOOTNOTES

1. The three cases discussed below are *Reis v. Reis*, 2024-0750 (La.App. 4 Cir. 4/3/25), 418 So.3d 79, *Queenan v. Queenan*, 492 So.2d 902 (La.App. 3 Cir. 1986), and *Granger v. Granger*, 06-1615 (La.App. 3 Cir. 9/26/07), 967 So.2d 540.

2. Civil Code article 2369.3 was enacted in 1995, after *Queenan*.

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