WAYNE J. MENDOZA, SR.	*	**NO. 2017-CA-0070**
VERSUS	*	**COURT OF APPEAL**
LISA ALLEN MENDOZA	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOBRANO, J., CONCURS IN PART; DISSENTS IN PART; AND ASSIGNS REASONS

I respectfully dissent. In this community property partition case, appellant Lisa Mendoza ("Lisa") seeks reversal of the district court's July 27, 2016 judgment classifying the Road Home funds as a grant to both Lisa and the appellee, Wayne Mendoza ("Wayne"), and denying Lisa's claim for reimbursement. I find that the district court erred by classifying the Road Home funds as co-owned and by denying Lisa's claim for reimbursement. I would affirm the portion of the judgment granting the partition itself, reverse the portion of the judgment classifying the Road Home funds as a grant to both Lisa and Wayne, reverse the portion of the judgment denying Lisa's reimbursement claim, and remand the case for a determination of the value of the property and the amount of reimbursement owed to Lisa under La. C.C. art. 496.

Because I find that the district court improperly classified the Road Home funds as a co-owned grant, the proper standard of review in this case is *de novo*. *Plaquemines Par. Gov't v. Schenck*, 2015-0127, p.4 (La.App. 4 Cir. 12/9/15), 182 So.3d 1122, 1124, *writ denied*, 2016-0046 (La. 2/26/16), 187 So. 3d 1003, and *writ denied*, 2016-0045 (La. 2/26/16), 187 So. 3d 1004; *Kevin Associates, L.L.C. v. Crawford*, 2003-0211, p. 15 (La. 1/30/04), 865 So.2d 34, 43. "In a case involving no dispute regarding material facts, but only the determination of a legal issue, a

reviewing court must apply the *de novo* standard of review, under which the [district] court's legal conclusions are not entitled to deference." *Felix v. Safeway Ins. Co.*, 2015-0701, p. 6 (La.App. 4 Cir. 12/16/15), 183 So. 3d 627, 631 (citing *TCC Contractors, Inc. v. Hosp. Serv. Dist. No. 3 of Parish of Lafourche*, 2010-0685, p. 8 (La.App. 1 Cir. 12/8/10), 52 So.3d 1103, 1108, citing *Kevin Associates, L.L.C. v. Crawford*, 2003-0211, p. 15 (La. 1/30/04), 865 So.2d 34, 43); *see also Benson v. ABC Ins. Co.*, 2012-517, p. 2 (La.App. 3 Cir. 11/7/12), 106 So.3d 143, 145, *writ denied*, 2012-2650 (La. 2/8/13), 108 So.3d 86.

Lisa assigns two related errors. First, she argues that the district court erred in adjudging the Road Home funds a "grant" to both Wayne and herself, apparently classifying the funds as a co-owned thing. Next, she argues that the district court wrongfully denied her reimbursement claim for the expenditure of those Road Home funds. Both assignments of error hinge on the district court's classification of the funds as something co-owned by Lisa and Wayne. The district court provided no reasons for its classification of the Road Home funds as a "grant" to both Lisa and Wayne.

Under Louisiana law, property is characterized as either community or separate. La. C.C. art. 2335. Things possessed by either spouse during a community regime are presumed to be community things. La. C.C. art. 2340. The classification of property as separate or community is fixed at the time the thing is acquired. *In re Succession of Allen*, 2005-0745, p. 3 (La.App. 4 Cir. 1/4/06), 921 So.2d 1030, 1032. Louisiana Civil Code art. 2369.3 provides that the general laws of co-ownership apply to what was formerly community property after a judgment of divorce and prior to partition, unless otherwise provided by law. *See also Bordenave v. Bordenave*, 2003-1534, p. 6 (La. App. 4 Cir. 2/25/04), 869 So.2d 249, 253. Although, during their marriage, Lisa and Wayne had a community

property regime,[1] Lisa acquired the Road Home funds after the community property regime terminated. Because the Road Home funds were not acquired by either spouse during marriage, they were not a community thing. Louisiana Civil Code art. 2369.3, therefore, cannot be the basis for treating the funds as co-owned. Furthermore, due to the fact that the contract was entered into after marriage, the Road Home contract cannot be said to have created a community obligation. *See* La. C.C. art. 2359 (stating that an obligation incurred by a spouse may be either community or separate).[2]

It is undisputed that the Property was co-owned by Lisa and Wayne at the time that Lisa applied for the Road Home funds. Therefore, Wayne was entitled to move for the property to be partitioned. *See* La. C.C. art. 2369.8 (providing that a former spouse has the right to demand partition of former community property at any time). Wayne argues that, due to his ownership interest in the Property, the Road Home funds would have been co-owned by Lisa and Wayne but for Lisa's omission of Wayne's name from the Road Home application. Conversely, the record indicates that Wayne did not occupy the Property at the time of Hurricane Katrina and, due to the divorce and his intermittent incarceration, could not commit to living in the Property during the three year period beginning on the date of the grant agreement with Road Home. *See, e.g., Goutierrez v. Goutierrez,* 2012-428, p. 7 (La.App. 3 Cir. 11/7/12), 102 So.3d 1047, 1053 (wherein an owner of residential property failed to qualify for Road Home funds when he did not reside at the home on the date of the hurricane that damaged it).[3] Regardless of Lisa's

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[1] *See* La. C.C. art. 2334.

[2] Both parties spend much of their briefs arguing about whether Lisa's obligation to Road Home is onerous or gratuitous in nature. Because I find that the pertinent issues are whether the obligation itself was Lisa's separate obligation and the funds her separate property, I pretermit a discussion of the onerous nature of the Road Home obligation.

[3] The Road Home recipient affidavit states in pertinent part:

omission from the application, Wayne failed to prove that the funds could have ever been a co-owned thing. Louisiana law does not permit a district court to reclassify what is obviously separate property acquired by a former spouse after a judgment of divorce on the basis of a hypothetical. Although the result may have been different had Wayne proven that the funds could have ever been able to be co-owned, that is not the case before this Court.

Wayne further argues that Lisa obligated him when she entered into the contract, and, thus, the funds should partially belong to him. He bases this argument on the fact that the Road Home grant created covenants to run with the Property. He argues that had Lisa not complied with the requirements set forth by Road Home, it could have sought return of the funds from him because he has an interest in the property.

This argument lacks merit. Wayne cites no authority for the proposition that Road Home could ever recover funds from him under this particular contract. *See* La. R.S. 9:2801(4)(c) (stating that the allocation of assets and liabilities in a community property partition in no way affects the rights of creditors).[4] He fails to explain how Lisa could have encumbered something, namely, his interest in the Property, which she does not own. *See* La. C.C. art. 1977 (stating, "[t]he party who promised that obligation or performance is liable for damages if the third person

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1. (a) At the date of Hurricane Katrina or Hurricane Rita, I/we was/were the owner-occupant(s) of the property located at [address of the Property], and it was my/our primary residence…

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3. …The Grant Agreement imposes an obligation on me/us to occupy the Property as our primary residence at some point during the 3-year period beginning on the date of the Grant Agreement. The Covenants restrict me/us from using and occupying the Property for any purpose other than as my/our primary residence for the 3-year period beginning on the date of the Covenants.

[4] *See supra* fn. 3 ("At the date of Hurricane Katrina or Hurricane Rita, I/we was/were the owner-occupant(s) of the property located at [address of the Property], and it was my/our primary residence."). It is clear from the plain language of the affidavit that the contract with Road Home binds the occupant of the Property, Lisa, alone.

does not bind himself or does not perform"); *see also* La. C.C. art. 1977 cmt. (b) (stating, "[f]or as long as the third person does not bind himself, the promisor remains the sole obligor…"). Moreover, the Road Home contract itself provides that "[t]hese Covenants are not intended to create, nor shall be interpreted or construed to create, any third-party beneficiary rights in any party not a party hereto except for the United States of America…." Additionally, Wayne has not alleged that Lisa has failed comply with the requirements set forth by Road Home or that Road Home has attempted to recover any funds from him.

Because the Road Home funds were a separate thing owned by Lisa alone, which she invested into a co-owned thing, she is entitled to reimbursement under La. C.C. art. 496.[5] Accordingly, I would affirm the portion of the judgment of the district court granting the partition itself, and reverse the portion classifying the Road Home funds as a grant to Lisa and Wayne and denying Lisa's reimbursement claim, and remand for further proceedings to determine the value of the Property and the amount of reimbursement due to Lisa.

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[5] As former community property, the Property was co-owned by Lisa and Wayne. *See* La. C.C. art. 2369.3 (providing that former community property is co-owned in indivision). La. C.C. art. 804 provides that substantial improvements generally may be undertaken only with the consent of all co-owners; but that when a co-owner makes substantial improvements consistent with the use of the property, La. C.C. art. 496 governs. La. C.C. art. 496 provides:

> When constructions, plantings, or works are made by a possessor in good faith, the owner of the immovable may not demand their demolition and removal. He is bound to keep them and at his option to pay to the possessor either the cost of the materials and of the workmanship, or their current value, or the enhanced value of the immovable.

Accordingly, Wayne is bound to reimburse Lisa one-half of either the cost of the materials and of the workmanship, or one-half of their current value, or one-half of the enhanced value of the immovable.