# *MEMO*

**To** : To members of the Puerto Rico Bankruptcy Bar Association

**From** : Sara de Jesús, U.S.B.J.

**Subject** : Official Translation of Montalván v. Rodríguez, 161 D.P.R. 411 (2004)

**Date** : July 13, 2011

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I want to acknowledge and thank the Honorable Federico Hernández Denton and the translators working for the Supreme Court of Puerto Rico for translating the attached excerpts of the captioned opinion concerning liquidation of a "comunidad de bienes pos ganacial". I hope this will be useful.

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From the desk of...
Sara de Jesús
U.S. Bankruptcy Court for the District of Puerto Rico
U.S. Post Office and Courthouse Building
300 Recinto Sur. St., 2nd Floor, Suite 238
Old SanJuan, Puerto Rico 00902
(787) 977-6029
Fax: (787) 977-6026

II

**[2]** Our legal system favors the community property regime, which is primarily governed by Puerto Rico Civil Code secs. 1295-1326 (31 L.P.R.A. §§ 3621-[3701]). The rules of articles of partnership apply suppletorily to the conjugal partnership. Civil Code sec. 1298 (31 L.P.R.A. § 3624). It is not profit-oriented, as is the case with ordinary partnerships; rather, it exists to achieve the particular aims of marriage. *Int'l Charter Mortgage Corp. v. Registrador*, 110 D.P.R. 862, 866 [10 P.R. Offic. Trans. 1126, 1131] (1981); *García v. Montero Saldaña*, 107 D.P.R. 319, 322 [7 P.R. Offic. Trans. 353] (1978).

**[3]** While the conjugal partnership exists, the spouses are co-owners and co-administrators of all the community property, without any distinction as to shares. "[T]he bulk of the community property is composed of assets and rights that are directly and immediately subject to the payment of family debts and, therefore, are *jointly owned by the spouses with no particular attribution of shares . . .*" Joaquín J. Rams Albesa, *La sociedad de gananciales* 28, Madrid, Ed. Tecnos (1992).

**[4]** On the other hand, the dissolution of a marriage triggers, ipso facto, the extinction of the conjugal partnership because the reason for this institution—the achievement of the aims of marriage—vanishes upon the breakdown of the civil ties that bind the spouses. "A divorce carries with it a complete dissolution of all matrimonial ties, and the division of all property and effects between the parties to the marriage." Civil Code sec. 105 (31 L.P.R.A. § 381). Consequently, a community of assets [joint or common ownership of property] composed of the former community property arises, and each party has a separate and alienable share in it with the corresponding right to intervene in the administration of such community and to seek its division. [4] José L. Lacruz Berdejo, *Elementos de Derecho Civil: Derecho de Familia* 353, Barcelona, J.M. Bosch Editor ([4th ed.] 1997).

**[5]** Regardless of this separation of assets and property resulting from the divorce and the emergence of a community of assets, in practice, the liquidation of the property held in common by the ex-spouses is not necessarily coetaneous to the dissolution of the marriage bond. In that respect, Manresa explains:

> [Once the conjugal partnership ceases to exist, t]he interests of the partners and those of third persons are temporarily intermingled and confused, and so are separate and common assets. *This transitory and abnormal situation will prevail until a timely liquidation is made to divide and deduct each party's share, to find out whether there is a profit, and to divide and award the assets already determined, which each interested party will exclusively own.*

9 José M. Manresa y Navarro, *Comentarios al Código Civil Español* 861, Madrid, Ed. Reus (rev. 6th ed. 1969). (Emphasis added.)

This is also recognized in our caselaw. *Calvo Mangas v. Aragonés Jiménez*, 115 D.P.R. 219, 228 [15 P.R. Offic. Trans. 294, 307] (1984); *García López v. Méndez García*, 102 D.P.R. 383, 395 [2 P.R. Offic. Trans. 481, 493] (1974); *Vega v. Tossas*, 70

P.R.R. 368, 372 (1949). Once the conjugal partnership is dissolved, an ordinary community of assets arises between the ex-spouses that, absent a contract or any special provision, is governed by the provisions of Civil Code secs. 326-340 (31 L.P.R.A. §§ 1271-1285), which deal with the concept of common ownership of property. *García López v. Méndez García*, 102 D.P.R. at 395 [2 P.R. Offic. Trans. at 493]. See also: *García v. Montero Saldaña*, 107 D.P.R. at 331-332 [7 P.R. Offic. Trans. at 363-364]; *Calvo Mangas v. Aragonés Jiménez*, 115 D.P.R. at 228 [15 P.R. Offic. Trans. at 307].

**[6]** This is an estate in liquidation that is governed by rules different from those of a conjugal partnership. 18 Manuel Albaladejo, *Comentarios al Código Civil y compilaciones forales* 458, Madrid, Ed. Edersa (1984). This post-marital or post-matrimonial community of assets exists until the [property of the former] conjugal partnership is finally liquidated; therefore, it can subsist indefinitely, inasmuch as the action to liquidate things held in common has no period of limitations. Civil Code sec. 1865 (31 L.P.R.A. § 5295). Nonetheless, it bears noting that the ex-spouses are not obliged to remain as parties to the common ownership. Civil Code sec. 334 (31 L.P.R.A. § 1279). Any of the ex-spouses may seek at any time the division of the things held in common. *Id.* Moreover, while the post-marital community of assets exists, one of the ex-spouses may even ask the court to appoint an administrator. Civil Code sec. 332 (31 L.P.R.A. § 1277). That ex-spouse could also assert his or her right to co-administer the things held in common and even file eviction and recovery actions. See *Sóto López v. Colón*, 143 D.P.R. 282, 292 [43 P.R. Offic. Trans. ___] n.7 (1997).

**[7-8]** In light of the above, when a conjugal partnership is dissolved, its assets and liabilities subsist separately pending liquidation. If such liquidation is put off, the number of assets and liabilities may vary; fruits could be produced, debts paid, losses suffered, profits made, or expenses incurred against the common estate. Consequently, the final award of each ex-spouse's share *should take into account, according to the evidence, whether one of the ex-spouses could claim against the other ex-spouse a credit for changes and transactions that took place with respect to the common estate. Likewise, pursuant to Civil Code sec. 328 (31 L.P.R.A. § 1273), any adverse effect caused by any of the ex-spouses to the common estate must also be taken into account.*[3]

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[3] Civil Code sec. 328 (31 L.P.R.A. § 1273) reads as follows:

> "Each participant may use the things held in common, provided he uses them in accordance with the purpose for which they are intended and in such a way as not to injure the interests of the common ownership, nor prevent the co-participants from utilizing them according to their rights."

According to this principle, co-owners should protect in good faith the property held in common, especially when said property is *de facto* under their exclusive control and administration, because when the division takes place, they must surrender that to which each co-owner is legally entitled. *González v. Quintana*, 145 D.P.R. 463 [45 P.R. Offic. Trans. ___] (1998); *Soto López v. [Colón]*, 143 D.P.R. 282 [43 P.R. Offic. Trans. ___] (1997). This means that if a co-owner causes harm to the property held in common, he or she will be held individually liable for the damage caused. See the cases cited above.

III

**[9]** In turn, there is joint or common ownership of property "[w]hen the ownership of a thing or of a right belongs undividedly to different persons." Civil Code sec. 326 (31 L.P.R.A. § 1271). The co-owners' participation in the administration of the things held in common, as well as their share in the assets and liabilities, shall be proportional to their respective shares, which "shall be presumed equal *until the contrary is proven.*" Civil Code sec. 327 (31 L.P.R.A. §1272). (Emphasis added.) The provisions that govern the division of inheritances may be suppletorily applied to the liquidation of the community of assets. Civil Code sec. 340 (31 L.P.R.A. §1285). In the specific case of the post-marital community of assets, this Court has held that the provisions applicable to its liquidation under the Civil Code "are the provisions in connection with the acceptance of the inheritance on behalf of the inventory and right to deliberate." *Janer Vilá v. Superior Court*, 90 P.R.R. 277, 295 (1964).

**[10]** Pursuant to Civil Code sec. 1322 (31 L.P.R.A. § [3697], the assets belonging to the post-marital community of assets at the time of dissolution of the marriage shall be divided in equal parts between the ex-spouses. This section specifically provides that after inventory and payment of the marital debts, "[t]he remainder of the partnership property shall be divided, share and share alike, between the husband and the wife, or their respective heirs." *Id.* Nonetheless, in order to abide by the provisions of the Civil Code, we must understand that the equality in shares—which stems from the equality of the spouses under the community property regime—is presumed under the community of assets regime and, therefore, may be rebutted by the pertinent evidence. Civil Code sec. 327. ("The portions belonging to the participants in the common ownership shall be presumed equal until the contrary is proven.")

When addressing the subject of the share that should finally be awarded to each ex-spouse after the division of the remainder of the post-marital community of assets, Díez-Picazo and Gullón explain that the effects of that community at the time of its liquidation may be examined from two different angles. The first approach argues that despite the divorce decree, the conjugal partnership is not extinguished until the liquidation takes place. 4 Luis Díez-Picazo and Antonio Gullón, *Sistema de Derecho Civil* 271, Madrid, Ed. Tecnos (rev. 5th ed. 1984). According to these commentators, this first scenario:

> [Provides for] a sort of continuing conjugal partnership; therefore, the same rules of the partnership still govern the parties. As a result, the income and earnings from capital and work would continue to increase the assets of the partnership, and the regime that governs its responsibilities, management and disposition would remain as before. *This argument is untenable. There is no reason for continuing to increase the common estate with the proceeds from the work and industry or the capital income that are not common, but separate; and there is no possibility of applying the rules on the management, administration, and disposition of community property, which presuppose the subsistence of the marriage . . . .*
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> *That is why it would seem more correct to consider it as a collective estate or a community of assets whose nature changes. It is an*

> *estate composed of former community property whose ownership is in the hands of the [ex-] spouses . . . .*

Díez-Picazo and Gullón, *supra*, at 271-272. (Emphasis added.)

This second approach provides, among other things, that the post-marital community of assets "is not augmented with the income from work or from capital, which, in any event, will be separate property" of the ex-spouse who generates it. Díez-Picazo and Gullón, *supra*, at 272. This implies that the inventory preceding the division of the post-marital community of assets only includes the assets and fruits of the common estate existing at the time of dissolution of the marriage. Lacruz Berdejo, *supra*, at 361. *This, however, must be subject to the proviso that the inventory must exclude "in turn, all assets not existing at the time even if they had been part of the partnership at the time of its dissolution . . . ." Id.* Following this line of reasoning, it is further clarified that the obligations contracted by any of the parties to the community after the dissolution of the marriage are chargeable to his or her separate capital. *Id.*; Manuel Rivera Fernández, *La comunidad postganancial* 85, Barcelona, J.M. Bosch Editor (1997).

Regarding the particular situation that arises when new assets are acquired during the life of the post-marital community of assets with capital from said community:

> There are two solutions. One is to strictly apply the principle of real subrogation: the asset acquired becomes part of the collective estate regardless of who acquired it, if the consideration was paid out of said estate. The second solution is to determine that the purchaser becomes a debtor to the community for the value of what he or she paid for the purchase; but that the thing acquired is his or her own.

Díez-Picazo and Gullón, *supra*, at 273.

In this respect, Manuel Rivera Fernández states in his book *La comunidad postganancial* that in cases in which one of the members of the post-marital community acquires other goods for himself or herself with common funds, this new purchase belongs exclusively to that co-owner, although this gives rise to a "credit in favor of the post-marital community for the updated value of the common funds employed." Rivera Fernández, *supra*, at 82. The application of the real subrogation doctrine is thus rejected when the conjugal partnership no longer exists. *Id.* at 83. "[T]he person who availed himself or herself of common assets or proceeds must simply return them, but need not do more, and may retain possession of what he or she acquired." *Id.* at 79-80. The commentator further explains:

> [R]eal subrogation is contingent on the existence of a conjugal partnership . . . this sounds logical when we consider that that this type of estate has a specific aim: the payment of marital expenses and the spouses' share in the benefits derived from the partnership. But there are no legal grounds for affirming its effectiveness once the conjugal partnership is dissolved. Consequently, we believe that a formal ownership should prevail unless a rule imposes real subrogation. Thus, the good acquired must be considered separate property at all times, and the party who acquired it will always

> have the obligation to return—in that case, with interest—what he or she took, aside from any liability incurred in taking such funds, without consideration for the others, from a community of which he or she was only one of the participants.

Rivera Fernández, *supra*, at 83.

In light of the foregoing, the division of property acquired during the marriage under the community property regime and its corresponding fruits is relatively simple to carry out immediately after the dissolution of the marriage. However, if the existence of the post-marital community of assets is prolonged, calculating the shares becomes increasingly complicated—particularly if only one of the ex-spouses devotes his or her efforts and work to the maintenance and increase of the common estate. Rivera Fernández, *supra*, at 9 and 111.

**[11]** When the community property is liquidated after the marriage bond is dissolved, both ex-spouses are entitled to an equal share. Now then, if the community of assets is kept undivided, that share may vary, either because of an increase in the value of the assets included in the original inventory or in the proceeds derived therefrom, or because of new acquisitions.

**[12]** In the latter case—in which the community property is not liquidated immediately after the marriage ends—each ex-spouse's share shall be determined by comparing the value of the assets existing at the time the conjugal partnership was dissolved *vis-à-vis* its value at the time of liquidation. We must then examine the change—increase or decrease—that occurred in the value of the assets at the time of liquidation as a result of the mere passage of time, or in the nature of the things held in common and the increase in the value of these assets, or the increase in the fruits derived therefrom as a result of the exclusive management of only one of the ex-spouses.

**[13]** In the event of a disparity in the contributions or administration by each of the ex-spouses, the presumption of equal shares in the post-marital community may be rebutted through evidence that some or all the *fruits* of the assets held in common, or the *increase in the value* of the things held in common, are per se the product of the sole work of one of the ex-spouses, or of one above the other. In these circumstances, the rise in value of the assets or in the proceeds therefrom shall be apportioned according to the management and work contributions of each ex-spouse to the things held in common. On the other hand, the increase in the value of the common estate, or the increase in the level of proceeds derived therefrom subsequent to the dissolution of the marriage and that can be attributed to the mere passage of time, shall be shared equally by both co-owners.

**[14]** This rule addresses the fact that once the marriage is dissolved, the income produced by an ex-spouse through his or her effort and work are not community property. Once the conjugal partnership is terminated, the existing assets form an ordinary partnership or community that is not governed by conjugal partnership rules. Thus, the assets produced thenceforth by each ex-spouse are separate property. See: *Soto López v. Colón*; 1 Raúl Serrano Geyls, *Derecho de Familia de Puerto Rico y legislación*

*comparada* 457, San Juan, Ed. U.I. (1997). From this we can infer that once the conjugal partnership is dissolved, the fruits derived from the separate assets and the income from the work or industry of the ex-spouses cease to be community property. Albaladejo, *supra*, at 457. It logically follows, moreover, that the presumption of community property provided in Civil Code sec. 1307 (31 L.P.R.A. § 3647)[4] also ends. Albaladejo, *supra*. *Consequently, if after the marriage is dissolved there is a rise in the value of the assets held in common or an increase in the proceeds derived therefrom as a result of the exclusive endeavors of one of the ex-spouses, that increase cannot be awarded* automatically as part of the property held in common. This share belongs entirely and separately to the ex-spouse who generated it as a result of his or her individual work.

Professor Fraticelli Torres further elaborates on this point:

> The division of the partnership property in equal shares, as a mandatory rule, *shall apply to the inventoried assets at the time of the dissolution of the conjugal partnership; but if the liquidation is not done quickly enough, this may not necessarily be the proportion in which the fruits derived from those assets after the assessment—either as a result of new acquisitions or because of an increase in the value of the originally inventoried assets—are to be apportioned.* The importance of this distinction resides in the fact that the distribution of the excess or increase under a community property regime is not necessarily the same as under an ordinary community of assets regime. *The equality of share in the assets generated by the community is presumed, and any of the participants may produce evidence to show that the rise in value was due to an unequal participation and effort of the co-owners in the administration of the assets after the dissolution.*

Migdalia Fraticelli Torres, *Un nuevo acercamiento a los regímenes económicos en el matrimonio: la sociedad legal de gananciales en el Derecho puertorriqueño*, 29 (2) Rev. Jur. U.I. 413, 506-507 (1995). (Emphasis added.)

Professor Rams Albesa speaks in like terms, further suggesting that conflicts about the valuation of the work done in favor of the community of assets and the award of the fruits derived therefrom should be left to the trial courts.

> This [post-marital] community of assets is formed by the assets that constituted the bulk of the community property at the time of the dissolution of the conjugal partnership—which coincides with the birth of this particular type of community—and, as a result of the net proceeds of these assets, the subrogated assets resulting from their commerce shall be consequently included therein.
>
> In any event, the point is to keep the contents as static as possible, though without impeding in any manner the natural development of economic activity; thus, the pending operations shall continue their course.
>
> *Notwithstanding the above, it is very difficult to determine to whom and in what proportion shall the results of those operations and works that were ongoing at the time of the dissolution be awarded; consequently, in those few instances in which a conflict may arise between the co-*

[4] This section provides: "All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife." 31 L.P.R.A. § 3647.

> *participants, the trial judge must be afforded ample discretion in the weighing of the evidence and of the arguments submitted for and against the opposing parties.*
>
> The debts shall also comprise all community debts existing at the time of dissolution as well as the debts generated—as in any other partnership—by the administration of the assets and rights that constitute said community; *in this sense, it is generally accepted that the administrator has an assertable right to be compensated for his or her work.*

Rams Albesa, *supra*, at 418-419. (Emphasis added.)

**[15-16]** It goes without saying that the work of each ex-spouse is the best example of private property and should be valued as such. Deciding otherwise would undercut the intrinsic value of human labor, of the toil and sweat that warrant equal if not greater consideration than the impersonal economic contribution.[5]

The contribution made by an ex-spouse to the administration and development of the post-marital community through his or her work and endeavors must be distinguished from the co-participants' obligation to contribute to the preservation of the things held in common. See Civil Code sec. 329 (31 L.P.R.A. § 1274). No co-owner has the obligation to develop the things held in common so that they may bear fruits in excess of what they would generate by the mere passage of time. In fact, if he or she would choose to do so, that co-owner would be individually liable for any harm caused to the things held in common. Civil Code sec. 328 (31 L.P.R.A. § 1273); *González v. Quintana*, 145 D.P.R. 463 [45 P.R. Offic. Trans. ___] (1998); *Soto López v. [Colón]*. Therefore, if an ex-spouse should increase the post-marital community of assets through his or her own endeavors and work, his or her personal effort should be considered to be aimed at benefitting his or her private assets in the share of the estate to which he or she is entitled.

In sum, the shares of the ex-spouses in the post-marital community of assets—prior to the inventory of assets and liabilities, the computation of the possible credits that one or the other ex-spouse may have against the community, the identification of any separate debt incurred during the marriage, etc.—are presumed equal at the time of the dissolution of the conjugal partnership. This presumption is rebuttable in the situations mentioned above, *and also in the case of all debts and expenses incurred, efforts made, or legitimate credit produced during the transitory life of the post-marital community.* The proper course of action would then be to assess the increase or decrease of the post-marital estate, as the case may be, that would correspond to the actual contribution or endeavor of each of the ex-spouses in order to then determine the change, if any, in the proportionality of the share of each co-owner.

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[5] Likewise, in child support cases we have held "that the personal work of a spouse who, upon managing the child support, turns and devotes it to all things indispensable for maintenance, housing, clothing, and medical care of his or her children (art. 142 of the Civil Code), should be considered a discharge of his or her own obligation to support, and constitutes an element to be weighed by the trier upon settling a credit claim between solidary child-support providers." *Mundo v. Cervoni*, 115 D.P.R. 422, 424 [15 P.R. Offic. Trans. 555, 559] (1984).