STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0347

RADCLIFFE 10, L.L.C.

VERSUS

RONALD G. BURGER AND LYNDA O. BURGER

Judgment Rendered: MAR 28 2016

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2007-12232

Honorable Scott Gardner, Judge Presiding

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Craig J. Robichaux Mandeville, LA	Counsel for Plaintiff/Appellee, Radcliffe 10, L.L.C.
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WRC by JMC

Chutz, J. Concurs for Reasons Assigned by Judge McClendon.

Holdridge, J. dissents with Reasons.

Theriot, J. concurs for Reasons Assigned by J. Pettigrew

McClendon, J. Concurs and Assigns Reasons.

McDonald, J. concurs for the reasons assigned by J. McClendon

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BEFORE: WHIPPLE, C.J., PETTIGREW, McDONALD, McCLENDON, WELCH, HIGGINBOTHAM, THERIOT, DRAKE, HOLDRIDGE, AND CHUTZ, JJ.

Whipple, C.J. concurs in part and dissents in part, for

JJ Welch, J. ~~concurs~~ assigned concurs in part and dissents in part, for reasons assigned by C.J.

Pettigrew, J concurs and assigns reasons.

DRAKE, J concurs in part and dissents in part for reasons assigned by J. Whipple.

Higginbotham, J. concurs in part and dissents in part for the reasons assigned by C.J. Whipple, except I would assess costs evenly between appellants and appellee.

PER CURIAM.

In this suit by plaintiff to revoke a judgment approving a separation of property agreement entered into by defendants during their marriage and, thus, terminating the legal matrimonial regime existing between the defendants, defendants appeal the trial court's judgment, revoking the previous judgment terminating their community of acquets and gains as void *ab initio* for failure to follow the procedural requirements of LSA-C.C. art. 2329 and further ordering that plaintiff has the right to have any recordation of that judgment cancelled. This court, sitting *en banc*, has considered the merits of defendants' appeal. Ten of the twelve judges of this court have participated, but we are unable to render a decree reflecting a majority judgment on each issue presented in this case. Because there is no majority consensus on the dispositive issue of whether the underlying separation of property agreement and the subsequent judgment approving the agreement and terminating the community of acquets and gains were void *ab initio* or, instead, a relative nullity subject to ratification, there is no executable majority judgment, and the effect of this court's vote is that the trial court's judgment stands.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Radcliffe 10, L.L.C., ("Radcliffe 10") is a judgment creditor of defendant Ronald G. Burger. On April 24, 2007, Radcliffe 10 filed a "Petition to Revoke Judgment Terminating Legal Matrimonial Regime, Establishing Separation of Property Regime and Separation of Property Agreement," seeking to revoke and annul a judgment that had approved a "Separation of Property Agreement After Marriage" executed by the defendants Ronald and Lynda Burger, as well as to annul the agreement itself. The background facts leading up to this suit are as follows.

Radcliffe 10 and Ronald Burger had previously been involved in litigation in the matter of Radcliffe 10, L.L.C. v. Zip Tube Systems of Louisiana, Inc., No. 2003-14116 c/w 2003-14973, in the Twenty-second Judicial District Court in St. Tammany Parish ("the Zip Tube litigation"), in which Radcliffe 10 alleged: (1) that Ronald Burger and other named defendants therein had engaged in unfair trade practices, in violation of LSA-R.S. 51:1401, related to Radcliffe 10's purchase of Zip Tube Systems of Louisiana, Inc., a corporation of which Ronald Burger was secretary and Lynda Burger was president; and (2) that Ronald Burger had breached his employment contract with Radcliffe 10 executed as part of the sale of Zip Tube.[1]

Following trial in the Zip Tube litigation, the trial court issued written reasons for judgment on June 24, 2005, finding that Ronald Burger had breached fiduciary duties owed to Radcliffe 10 and had engaged in unfair trade practices and that Radcliffe 10 was entitled to judgment in its favor against Ronald Burger and the remaining defendants in the amount of $3,428,000.00. However, a judgment in the Zip Tube litigation was not signed until almost two years later on March 23, 2007,[2] and an amended judgment in conformity with the written reasons for judgment was ultimately signed on March 29, 2007, in favor of Radcliffe 10 and against Ronald Burger and the other defendants, *in solido*, awarding damages in the

[1]The named defendants in the Zip Tube litigation were: Zip Tube Systems of Louisiana, Inc.; Burger Engineering, L.L.C.; Ronald Burger; and Bryan Burger.

[2]Although the judgment itself reflects that it was signed March 23, 2006, the parties do not dispute that it was actually signed in 2007.

total amount of $3,428,000.00.[3]

In the meantime, on March 20, 2006, after the trial court's issuance of its written reasons for judgment in the Zip Tube litigation, but before the ultimate signing of a judgment awarding Radcliffe 10 damages, Ronald Burger filed a "Petition to Terminate Legal Matrimonial Regime and Enter into Separation of Property Agreement," naming Lynda Burger as defendant ("the Separation of Property proceeding"). In the petition, Ronald Burger averred that he had "no outstanding debts other than the usual monthly utility and rent bills," that he "desire[d] to terminate the legal matrimonial regime of community property and enter into a regime of separation of property," and that he "believe[d] that this action is in the best interests of both parties...."

On May 8, 2006, the trial court in the Separation of Property proceeding signed the judgment that Radcliffe 10 has sought to have nullified in the instant proceedings, i.e., a judgment approving a Separation of Property Agreement signed by Ronald and Lynda Burger on May 3, 2006, terminating the legal matrimonial regime that existed between the parties and establishing a separation of property regime. The Separation of Property Agreement, in addition to providing that Ronald and Lynda were terminating the legal regime and entering into a separation of property regime, also partitioned property of the Burgers classified as community

[3]This court affirmed the damage award on appeal, subject to an offset of $850,000.00, and the Louisiana Supreme Court denied writs. Radcliffe 10, L.L.C. v. Zip Tube Systems of Louisiana, Inc., 2007-1801, 2007-1802 (La. App. 1st Cir. 8/29/08), 998 So. 2d 107, 119, amended on rehearing, 2007-1801, 2007-1802 (La. App. 1st Cir. 12/3/08), 22 So. 3d 178, writs denied, 2009-0011, 2009-0024 (La. 3/13/09), 5 So. 3d 119, 120. Ronald Burger also filed in the trial court a petition to declare the March 29, 2007 amended judgment an absolute nullity. The trial court ultimately rendered judgment, denying the relief and instead declaring the judgment was not a nullity. This court likewise affirmed that judgment decreeing that the March 29, 2007 judgment was not a nullity. Radcliffe 10, L.L.C. v. Zip Tube Systems of Louisiana, Inc., 2009-0417, 2009-0418 (La. App. 1st Cir. 12/29/09), 30 So. 3d 825, 832, writ denied, 2010-0244 (La. 4/9/10), 31 So. 3d 394.

under their previous regime by allocating to Lynda Burger $251,247.00 in liquid assets, together with "[a]ll future [i]ncome from any source" and allocating to Ronald Burger "[a]ll future [i]ncome from any source."

In its "Petition to Revoke Judgment Terminating Legal Matrimonial Regime, Establishing Separation of Property Regime and Separation of Property Agreement" in the instant matter, Radcliffe 10 averred that Ronald Burger's petition to terminate the legal matrimonial regime existing between him and Lynda was filed in violation of LSA-C.C. art. 2036, et seq., and was, therefore, subject to a revocatory action.[4] Thus, it averred that "the acts of terminating the legal community of acquets and gains, establishing a separation of property regime, and the separation of property agreement after marriage must be annulled."

In a later-filed motion for summary judgment on January 16, 2012, Radcliffe 10 also advanced an additional theory in support of its claim to have the Separation of Property Agreement annulled, i.e., that the Separation of Property Agreement signed by the Burgers was void *ab initio* for failure of the parties to "follow strictly the requirements of [LSA-C.C.] Article 2329."[5] Specifically, Radcliffe 10 argued that LSA-C.C. art. 2329 provides that spouses may terminate the matrimonial regime during marriage "**only** upon joint petition," but that in this particular case, Ronald Burger filed the petition individually, naming Lynda as a defendant. Thus, Radcliffe 10 argued that the failure to adhere to the required procedure set forth in LSA-

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[4]Louisiana Civil Code article 2036, contained in Chapter 12, Section 1 of the Civil Code, entitled "Revocatory Action," provides an obligee with a procedure to annul an act of the obligor that "causes or increases the obligor's insolvency."

[5]In opposition to the motion for summary judgment, the Burgers argued that the motion should be denied because Radcliffe 10 in its petition did not allege any facts to show that the May 8, 2006 judgment should be annulled for failure to comply with the requirements of LSA-C.C. art. 2329.

C.C. art. 2329 rendered the Separation of Property Agreement, which was "made the judgment of the court on May 8, 2006" in the Separation of Property proceeding, void *ab initio*.

Although Radcliffe 10's motion for summary judgment was ultimately denied, it continued to advance this theory in support of its claim to annul the May 8, 2006 judgment and underlying Separation of Property Agreement. Radcliffe 10's claim to annul the May 8, 2006 judgment approving a Separation of Property Agreement was submitted to the trial court below on briefs in lieu of a trial. In its trial brief filed on October 24, 2013, Radcliffe 10 again advanced the argument that the May 8, 2006 judgment terminating the Burgers' legal community property regime was an absolute nullity for failure of the Burgers to comply with the formalities of LSA-C.C. art. 2329, noting that this theory was "[p]erhaps the simplest way to dispose of this case."[6]

By judgment dated October 30, 2013, the trial court ordered that there be judgment in favor of Radcliffe 10 and against Ronald and Lynda Burger, "revoking the previous judgment terminating their community of acquets and gains ... ab initio for failure to follow the procedural requirements for obtaining such a judgment under [LSA-C.C. art. 2329]. That judgment is hereby declared to be null and of no legal effect at any time." The October

[6]Radcliffe 10 also included a one-sentence argument in support of its theory for annulment or revocation of the May 8, 2006 judgment pursuant to LSA-C.C. art. 2036.

Notably, in their trial briefs, Ronald Burger and Lynda Burger again objected to the trial court's consideration of Radcliffe 10's claim for nullity on the theory that the Burgers failed to adhere to the strict requirements of LSA-C.C. art. 2329, arguing that this theory was not properly before the trial court because Radcliffe 10's petition did not include this ground for nullification.

30, 2013 judgment further provided that Radcliff 10 "shall have the right to have any recordation of that judgment in any parish or county cancelled upon payment by plaintiff of the costs related thereto."

From this judgment, Ronald and Lynda Burger appeal, contending that the trial court committed legal error in annulling, as void *ab initio*, either the May 3, 2006 Separation of Property Agreement between them or the May 8, 2006 final judgment rendered in the Separation of Property proceeding that had approved the matrimonial agreement and terminated the community property regime between the Burgers "solely because the action to terminate the legal regime was not initiated by a 'joint petition.'" The issues they present for review to this court are:

> (1) Was non-compliance with the requirements of Article 2329 properly before the district court, when the petition asserted only one cause of action for nullity, based on the Revocatory Action under Civil Code Article 2036?
>
> (2) When a husband and wife, represented by separate counsel, agree to terminate their community property regime and execute, in an authentic act, a matrimonial agreement that establishes a separate property regime, and that matrimonial agreement is approved in a final judgment issued by a court of competent jurisdiction, after a judicial hearing at which the court determines that both parties understand the rules and principles governing matrimonial agreements and that the matrimonial agreement is in the parties' best interest, pursuant to Civil Code Article 2329, [are] the matrimonial agreement and the final judgment void *ab initio* solely because the action to terminate the legal regime and approve the matrimonial agreement was not initiated by a "joint petition"?
>
> (3) Does the record contain any facts or evidence sufficient to annul the matrimonial agreement under the Revocatory Action provided in Civil Code Article 2036?

DISCUSSION

As to the first issue presented, the Burgers contend that the trial court erred in revoking the May 8, 2006 judgment of the Twenty-second Judicial District Court that had terminated their community of acquets and gains as

void *ab initio* for failure to follow the procedural requirements of LSA-C.C. art. 2329, because the only cause of action pleaded in the petition was the revocatory action under Civil Code article 2036. They contend that because this basis for nullifying the May 8, 2006 judgment was not asserted in the petition, and in light of their objections to Radcliffe 10 receiving relief on this basis, the issue of compliance with LSA-C.C. art. 2329 was not properly before the trial court.

Louisiana Code of Civil Procedure article 891(A) requires that a petition "contain a short, clear, and concise statement of all causes of action arising out of, and of the material facts of, the transaction or occurrence that is the subject matter of the litigation." It is well recognized that the Louisiana Code of Civil Procedure sets forth a system of fact pleading. As long as the facts constituting a claim are alleged, the party may be granted any relief to which he is entitled under the pleadings and the evidence. The "theory of the case" doctrine, under which a party must select a theory of his case and adhere to it throughout the litigation, has been abolished. Brown v. Adolph, 96-1257 (La. App. 1st Cir. 3/27/97), 691 So. 2d 1321, 1325. The defendants are not prejudiced if the petition fairly informs them of the nature of the plaintiff's claims and the plaintiff acts consistently therewith. Brown, 691 So. 2d at 1326.

In the instant case, Radcliffe 10's petition clearly alerts the Burgers that it seeks to annul the judgment approving their separation of property agreement and the underlying agreement itself. Furthermore, Radcliffe 10's petition specifically alleged the fact that **Ronald Burger** (and not Ronald and Lynda Burger jointly) filed the petition to terminate the legal matrimonial regime existing between him and his wife. And in its subsequent motion for summary judgment (which was ultimately denied),

filed more than one and one-half years before this matter was submitted to the trial court for decision on briefs, Radcliffe 10 specifically raised the theory that the matrimonial agreement was void *ab initio* as not in conformity with the strict mandates of LSA-C.C. art. 2329. This theory was again asserted by Radcliffe in its trial brief submitted in lieu of trial on the merits.

Thus, the Burgers were aware of the facts supporting Radcliffe 10's cause of action for nullifying the previous judgment approving their separation of property agreement for over one and one-half years before trial of this matter by briefs. Under these circumstances, we find no prejudice to them, as we conclude that Radcliffe 10's petition fairly informed the Burgers of the nature of the claims against them, i.e., claims to annul the Separation of Property Agreement and the May 8, 2006 judgment approving it. See Brown, 691 So. 2d at 1326.

However, as to the second and third issues presented by the Burgers, specifically, the legal effect that failure to initiate the action to approve the Separation of Property Agreement by the filing of a "joint petition" has upon both the agreement itself and the final judgment approving it and terminating the legal regime, and the ultimate disposition of the revocatory action provided in LSA-C.C. art. 2036, this court cannot reach a majority consensus on these issues.

Louisiana Constitution Article V, § 8(B) requires that "[a] majority of the judges sitting in a case must concur to render judgment." In the instant case, five of the ten judges would reverse the trial court's judgment revoking the previous judgment that terminated the community of acquets and gains "ab initio" and declaring that previous judgment to be null and of no legal effect at any time. Of those five judges, four judges would also remand the

matter to the trial court for further proceedings to determine whether the Separation of Property Agreement should be revoked pursuant to LSA-C.C. art. 2036, as an act that increased the insolvency of Ronald Burger. The remaining five judges would affirm the trial court's judgment on the basis that the failure to adhere to the procedural requirements of LSA. C.C. art. 2329 results in an absolute nullity. Accordingly, there is no executable majority judgment, and the effect is that the decision of the trial court stands. Parfait v. Transocean Offshore, Inc., 2007-1915 (La. 3/14/08), 980 So. 2d 634, 639.

CONCLUSION

For the above and foregoing reasons, the trial court judgment of October 30, 2013 stands and appeal costs are assessed equally against Ronald G. Burger and Lynda O. Burger.

TRIAL COURT JUDGMENT STANDS.

RADCLIFFE 10, L.L.C. **STATE OF LOUISIANA**

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

RONALD G. BURGER AND LYNDA O. BURGER **NUMBER 2014 CA 0347**

Whipple, C.J., concurring in part and dissenting in part.

I am constrained to agree with the per curiam opinion herein that because there is no executable majority, we are unable to render judgment in this case. However, as to the merits of the Burgers' appeal, for the reasons which follow, I would find merit to their contention that the trial court erred in finding that the judgment approving the Separation of Property Agreement they executed during their marriage was void *ab initio* and would further remand this matter for further proceedings on the revocatory action brought pursuant to LSA-C.C. art. 2036.

Stated as succinctly as possible, the essential issue to be resolved is this: Was the trial court correct in concluding that the matrimonial agreement executed during marriage and the final judgment approving it were void *ab initio* solely because the action to terminate the legal regime and approve the matrimonial agreement was not initiated by a "joint petition"?

The Burgers contend that the trial court erred in annulling as void *ab initio* the May 8, 2006 judgment on the basis that the proceedings in the Separation of Property proceeding did not "technically comply" with the requirements of LSA-C.C. art. 2329, asserting that: (1) the requirement of "a 'joint' petition merely signals that the parties are in agreement and consent to the change in the regime," and "[t]here is no serious dispute that Ron and Lynda Burger agreed to the termination of the legal regime in favor of a separate property regime"; (2) "[r]egardless of how the action commenced, Mr. and Mrs. Burger achieved a 'joint' resolution of the action by mutually consenting to the termination of the

community regime in favor of a separate property regime, as reflected in a 'jointly' executed matrimonial agreement by authentic act, which [the trial court] judicially approved"; and (3) if the Separation of Property Agreement and the May 8, 2006 judgment approving it are nullities, they are only **relative** nullities (not **absolute** nullities), such that the relatively null Separation of Property Agreement is subject to confirmation or ratification and the relatively null judgment confirming the agreement can be nullified under LSA-C.C.P. art 2004 **only** upon a showing of fraud or ill practices.

"A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons." LSA-C.C. art. 2325. A matrimonial regime may be legal, contractual, or partly legal and partly contractual, but, unless excluded by matrimonial agreement, the legal, or community property, regime governs the ownership and management of the property of married persons. LSA-C.C. art. 2326; LSA-C.C. art. 2327 and comment (a) of the 1979 Revision Comments.

Louisiana Civil Code article 2329 sets forth the method for spouses to enter into a matrimonial agreement to terminate the legal regime *during marriage*, providing, in pertinent part, as follows:

> Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage **only upon joint petition** and a finding by the court that this serves their best interests and that they understand the governing principles and rules. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval.

(Emphasis added).

Clearly, LSA-C.C. art. 2329 imposes certain procedural limitations on the spouse's ability to implement a contract for the termination of the legal regime during their marriage. It permits spouses to modify or terminate the legal regime

during marriage only upon joint petition and approval by the trial court after making certain findings. See In Re Succession of Faget, 10-0188 (La. 11/30/10), 53 So. 3d 414, 419. The trial court must be satisfied that the spouses both agree to the change, that the spouses understand the rules and principles underlying a change in the matrimonial regime, and that the agreement appears to serve the best interest of the spouses. In the Matter of Boyer, 616 So. 2d 730, 732 (La. App. 1st Cir.), writ denied, 620 So. 2d 882 (La. 1993).

The goal of the limitations appears to be the legislature's attempt to protect the less worldly spouse and to prevent that spouse from entering into disadvantageous agreements that the spouse did not fully understand. In the Matter of Boyer, 616 So. 2d at 732 (citing Spaht and Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 La. L. Rev. 83, 90-91 (1979)). Thus, to complete the process, article 2329 requires a joint petition and court approval of the submitted contract or matrimonial agreement before the parties can enter into it or, in other words, implement or participate in the agreement. In the Matter of Boyer, 616 So. 2d at 732.

In support of its contention that the Burgers' Separation of Property Agreement was **absolutely** null due to their failure to file a joint petition, Radcliffe 10, both in the trial court and on appeal, has relied on the Louisiana Fifth Circuit Court of Appeal case of Muller v. Muller, 10-540 (La. App. 5th Cir. 6/29/11), 72 So. 3d 364. In Muller, the parties entered into a matrimonial agreement before they were married, but they did not follow the formalities for an authentic act.[1] Nonetheless, because the spouses in open court admitted to their signatures on the document, the trial court concluded that the matrimonial agreement was valid as an

[1]Louisiana Civil Code article 2331 requires that a matrimonial agreement "shall be made by authentic act or by an act under private signature duly acknowledged by the spouses."

act under private signature, duly acknowledged by the parties. Muller, 72 So. 3d at 366.

However, on appeal, the Fifth Circuit concluded that because the parties did not duly acknowledge the agreement before they married, the premarital matrimonial agreement was not valid for failure to comply with all the formalities of LSA-C.C. art. 2331. The court further concluded that a post-nuptial acknowledgement could not vitiate the mandate of LSA-C.C. art. 2329 that any matrimonial agreement entered into during the marriage to modify or terminate the legal regime must be by joint petition and after a finding by the court that the agreement serves the best interests of the parties. Thus, the court declared the premarital matrimonial agreement to be null and void *ab initio*. Muller, 72 So. 3d at 368.

In rendering judgment revoking as void *ab initio* the May 8, 2006 judgment that had approved the Burgers' Separation of Property Agreement, the trial court herein clearly concluded that a judgment approving a matrimonial agreement that was rendered without compliance with the requirements of LSA-C.C. art. 2329 is an **absolute** nullity. However, contrary to the position taken by the Fifth Circuit in Muller, the First Circuit has held that a failure to strictly adhere to the procedures set forth in LSA-C.C.P. art. 2329 creates a **relative** nullity subject to ratification by the parties. See Williams v. Williams, 2006-0358, p. 18 (La. App. 1st Cir. 2/9/07), 2007 WL 441360, *9 (unpublished) ("[T]his court clearly determined that agreements between husband and wife which alter the matrimonial regime during the marriage without following the proper requirements of LSA-C.C. art. 2329 are relative nullities, subject to confirmation or ratification."); In the Matter of Boyer, 616 So. 2d at 733 ("Even assuming, for the sake of Mrs. Boyer's nullity argument, that the pre-approval signing created, at best, a relative nullity, the agreement was ratified by the parties after the approval was granted and the parties filed the

documents in the public record."); and Clay v. Clay, 358 So. 2d 649, 651 (La. App. 1st Cir. 1978) (Agreements between husband and wife that violate the provisions of LSA-C.C. art. 2329, which at the time prohibited alteration of the matrimonial regime during marriage, "although null, may be ratified by the parties subsequent to divorce."); but see Rush v. Rush, 2012-1502 (La. App. 1st Cir. 3/25/13), 115 So. 3d 508, 512, writ denied, 2013-0911 (La. 5/31/13), 118 So. 3d 398 (wherein another panel of this court cited a Third Circuit opinion for the proposition that the formalities of LSA-C.C. art. 2329 must be construed *stricti juris* and, thus, concluded that the failure of the parties to comply with the requirements of LSA-C.C. art. 2329 rendered the matrimonial agreement invalid as to form).[2]

As this court noted in Williams, an **absolutely** null contract is one which violates a rule of public order, as when the object of the contract is illicit or immoral, and, as such, cannot be confirmed. LSA-C.C. art. 2030. A **relatively** null contract, on the other hand, violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time a contract is made. LSA-C.C. art. 2031. A relatively null contract, as

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[2]Notably Rush is factually distinguishable from the present case. Similar to the factual scenario in Muller, in Rush, the parties executed the matrimonial agreement prior to marriage, but it was not in authentic form due to the absence of signatures of witnesses. However, the parties later acknowledged the agreement during their marriage. This court concluded that because the parties failed to comply with the requirements of LSA-C.C. art. 2331 prior to marriage, no valid matrimonial agreement existed at the time they entered into marriage. Rush, 115 So. 3d at 512. Moreover, the court further held that mere acknowledgement of the private act during marriage could not validate the matrimonial agreement, because LSA-C.C. art. 2329, which it held must be strictly construed, mandated that spouses could modify or terminate the legal regime *during marriage* by filing a joint petition and obtaining court approval. No such joint petition was filed or court approval obtained therein. Rush, 115 So. 3d at 512. Given the lack of any petition or court approval, the result in Rush was supported by Poirier v. Poirier, 626 So. 2d 868, 870 (La. App. 3rd Cir. 1993), writ denied, 94-0161 (La. 3/11/94), 634 So. 2d 389, the Third Circuit case cited therein. In Poirier, while the parties stipulated to the terms of an agreement in open court, they filed no joint petition, and there was no finding by the court that the agreement served the best interest of the parties. The Third Circuit noted, "Obviously, the [l]egislature found many spouses possessed such inferior bargaining positions, that the law could not allow them to give up their community rights **without judicial supervision**," and thus found the requirements of LSA-C.C. art. 2329 to be *stricti juris*. Poirier, 626 So. 2d at 870 (emphasis added).

However, unlike Muller, Rush, or Poirier, in the instant case, a petition was filed, and court approval was obtained. The only requirement of LSA-C.C. art. 2329 not adhered to herein was the filing of the petition **jointly** by the parties.

opposed to an absolutely null contract, may be confirmed. LSA-C.C. art. 2031; Williams, 2006-0358 at p. 18, 2007 WL 441360 at *9. Given that the goal of the procedural requirements of LSA-C.C. art. 2329 appears to be the legislature's attempt to protect the less worldly spouse and to prevent that spouse from entering into disadvantageous agreements that the spouse did not fully understand, In the Matter of Boyer, 616 So. 2d at 732, it follows that a failure to adhere to those requirements renders the underlying matrimonial agreement and judgment approving it relative nullities.[3] See Williams, 2006-0358 at p. 18, 2007 WL 441360 at *9. Moreover, a "[r]elative nullity may be invoked only by those persons for whose interest the ground for nullity was established," LSA-C.C. art. 2031, and, as such, in my view, cannot be invoked by Radcliffe 10 herein.

Accordingly, I would conclude that the trial court erred in ruling that the May 8, 2006 judgment approving the Separation of Property Agreement and the agreement itself were void *ab initio*. Thus, I would reverse the trial court's October 30, 2013 judgment now before us on appeal, which annulled the May 8, 2006 judgment and underlying matrimonial agreement on this technical basis.

The secondary issue in this case is: Does the record contain any facts or evidence sufficient to annul the matrimonial agreement under the Revocatory Action provided in Civil Code Article 2036?

The Burgers contend that while Radcliffe 10 initiated this proceeding as a revocatory action pursuant to LSA-C.C. art. 2036, it presented no proof to the trial

[3]The matrimonial agreement cannot be separated from the court approval because there can be no valid matrimonial agreement without court approval. Boyer v. Boyer, 96-0346 (La. App. 1st Cir. 1/23/97), 691 So. 2d 1234, 1244, writ denied, 97-1415 (La. 9/26/97), 701 So. 2d 984.

court to warrant annulment of the matrimonial agreement on that ground.[4] While Radcliffe 10 asserts on appeal that it is unnecessary for this court to reach this issue because the trial court based its ruling on LSA-C.C. art. 2329, it nonetheless argues, apparently as an alternative basis for affirming the trial court's judgment herein, that "[i]t is clear that the [May 8, 2006 judgment approving the Separation of Property Agreement] is one-sided and provides no values" and that "[a]s such, it cannot be said to provide a level of solvency to support paying the creditors' claims."[5]

Louisiana Civil Code article 2036 provides an obligee with a procedure to annul an act of its obligor that causes or increases the obligor's insolvency, specifically providing as follows:

> An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency.

Thus, in order for an obligee to annul an act of the obligor, he must show: (1) an act (or failure to act) of the obligor that causes or increases the obligor's insolvency; and (2) that the act occurred after the obligor's rights arose. Additionally, the jurisprudence requires that the obligee must prove prejudice, injury, or damage to the obligee as a result of the act. Parish National Bank v. Wilks, 2004-1439 (La. App. 1st Cir. 8/3/05), 923 So. 2d 8, 15.

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[4]The Burgers also assert on appeal that Radcliffe 10 abandoned its claim under LSA-C.C. art. 2036 in the trial court. However, as noted in footnote 5, supra, in its trial brief below, Radcliffe 10 did assert the revocatory action under article 2036 as an additional basis for nullifying the matrimonial agreement, albeit in a very abbreviated manner.

As stated above, the trial court's October 30, 2013 judgment herein revoked the May 8, 2006 judgment that had approved the Separation of Property Agreement on the basis that it was void *ab initio* for failure to follow the procedural requirements of LSA-C.C. art. 2329. It was silent as to Radcliffe 10's alternative theory that the judgment and underlying matrimonial agreement should be revoked pursuant to LSA-C.C. art. 2037, as increasing Ronald Burger's indebtedness. When a judgment is silent as to a claim or demand, it is presumed that the trier of fact denied the relief sought. Parish National Bank v. Wilks, 2004-1439 (La. App. 1st Cir. 8/3/05), 923 So. 2d 8, 11 n.4.

[5]This abbreviated argument is also the entirety of its argument on this issue in its trial brief below.

In the instant case, there is no dispute that the act, i.e., the filing of the petition to terminate the legal regime resulting in the Separation of Property Agreement and the May 8, 2006 judgment approving the agreement that, in part, transferred $251,247.00 in liquid community assets to Lynda Burger, occurred after Radcliffe 10's claims arose. The Zip Tube litigation resulting in the March 29, 2007 judgment awarding Radcliffe 10 $3,428,000.00 in damages was based upon actions by Ronald Burger and others that occurred in 2002 and 2003, well before Ronald Burger's March 20, 2006 filing of the petition to terminate the legal regime and subsequent signing of the Separation of Property Agreement.[6] See Radcliffe 10, L.L.C., 998 So. 2d at 111.

Thus, the remaining questions are whether the act of the obligor caused or increased the obligor's insolvency and whether there was prejudice, injury, or damage to the obligee as a result of the act. Louisiana Civil Code article 2037 provides that "[a]n obligor is insolvent when the total of his liabilities exceeds the total of his fairly appraised assets." A determination of insolvency or increased insolvency is necessarily a factual determination. See Forterra Capital, L.L.C. v. Mamal, Inc., 2010-0798 (La. App. 4th Cir. 1/13/11), 55 So. 3d 963, 966 (comparing balance sheets of the obligor's assets and liabilities before and after the transfer at issue), and Louisiana Lift & Equipment, Inc. v. Eizel, 33,747 (La. App. 2nd Cir. 11/1/00), 770 So. 2d 859, 864-865 (noting the absence of evidence of the obligee's assets or debts in finding no authority for the trial court to nullify the sale of an asset). Likewise, the test for determining prejudice or injury is also a factual one. Parish National Bank, 923 So. 2d at 15-16.

In his trial brief submitted to the trial court below in lieu of trial on the merits, Ronald Burger specifically acknowledged that the sum owed to Radcliffe

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[6]A creditor's claim does not have to be liquidated to judgment to be considered an anterior debt, i.e., a debt that arose before an obligor's act that caused or increased his insolvency. Lewis v. Hood, 97-2118 (La. App. 1st Cir. 11/6/98), 721 So. 2d 1078, 1080.

10 as a result of the March 29, 2007 amended judgment in the Zip Tube litigation was "an astronomical amount of money that [he] cannot possibly pay." Moreover, the Separation of Property Agreement itself provides that the sum of $251,247.00 in liquid assets of the Burgers classified as community under their previous legal regime was allocated to Lynda Burger, thus making this money unavailable to Ronald Burger's obligees. Any diminution of Ronald Burger's property which could have been used to satisfy the debt he owed to Radcliffe 10 was an injury to the creditor. See Thomassie v. Savoie, 581 So. 2d 1031, 1035 (La. App. 1st Cir.), writ denied, 589 So. 2d 493 (La. 1991).

Accordingly, in this particular case, even though Radcliffe 10 offered no specific evidence that Ronald Burger's actions in entering into the Separation of Property caused or increased his insolvency, in light of Ronald Burger's references to his inability to pay the debt he owes to Radcliffe 10, see generally Thomassie, 581 So. 2d at 1035 (noting that although the plaintiff in the revocatory action introduced no evidence of the value of donated property, references in the testimony to the obligee's dire financial circumstances established his insolvency), I find that the interests of justice require a remand of this matter for further proceedings below to determine whether the Separation of Property Agreement entered into by the Burgers should be revoked pursuant to LSA-C.C. art. 2036. See LSA-C.C.P. art. 2164 ("The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal.").

For these reasons, I would reverse the trial court's October 30, 2013 judgment, which revoked as void *ab initio* the May 8, 2006 judgment in the Separation of Property proceeding that approved the underlying Separation of Property Agreement entered into by Ronald and Lynda Burger, and would remand this matter to the trial court for further proceedings on the revocatory action brought pursuant to LSA-C.C. art. 2036. Accordingly, I respectfully dissent.

RADCLIFFE 10, L.L.C.

VERSUS

RONALD G. BURGER AND LYNDA O. BURGER

NUMBER 2014 CA 0347

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: WHIPPLE, C.J., PETTIGREW, McDONALD, McCLENDON, WELCH, HIGGINBOTHAM, THERIOT, DRAKE, HOLDRIDGE, AND CHUTZ, JJ.

PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

I concur with the per curiam; however, I would have affirmed the trial court's judgment.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0347

RADCLIFFE 10, LLC

VERSUS

RONALD G. BURGER AND LYNDA O. BURGER

****

McClendon, J., concurring.

I concur in the result reached in the *per curiam*, which maintains the trial court's judgment. Additionally, I write separately to note that I would affirm the trial court's ruling on the merits.

The trial court held that the Burgers' matrimonial agreement executed during marriage and the judgment approving it were void "ab initio for failure to follow the procedural requirement for obtaining such a judgment under La. C.C. art. 2329." More specifically, the trial court concluded that the agreement was "null and void and of no legal effect at any time" because it was not instituted by joint petition.

Louisiana Civil Code article 2329 allows spouses to enter into matrimonial agreements during marriage "only upon joint petition **and** a finding by the court that this serves [the parties'] best interests and that they understand the governing principles and rules."[1] (Emphasis added.) The article requires both a joint petition and two specific court determinations, i.e. that the parties understand the law and that it is in their best interests to terminate the matrimonial regime. When the words chosen by the legislature have clear meaning, it is not the role of the judiciary to search for "feasible arguments" regarding legislative intent.

I must respectfully disagree with some of my colleagues to the extent that they manipulate the language of LSA-C.C. art. 2329 to remove the requirement of instituting

[1] The legislature allows for only two exceptions to the above requirements for modifying the matrimonial regime during marriage. Specifically, LSA-C.C. art. 2329 permits modification without court approval when (1) the parties "*subject themselves to* the legal regime," i.e., when they go from a matrimonial regime other than the community property regime to the community property regime, and (2) "[d]uring the first year after moving into and acquiring a domicile in this state." Neither of these exceptions apply.

an action by joint petition.[2] When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. LSA-C.C. art. 9. Further, the words of a law must be given their generally prevailing meaning. LSA-C.C. art. 11. It is presumed that every word, sentence, or provision in the law was intended to serve some useful purpose; that some effect is to be given to each such provision; and that no unnecessary words or provisions were used. **Cleco Evangeline, LLC v. Louisiana Tax Com'n**, 01-0561 (La.App. 1 Cir. 6/22/01), 808 So.2d 740, 744, affirmed by 01-2162 (La. 4/3/02), 813 So.2d 351. The meaning of a statute is to be interpreted by looking to all the sections taken together so that no section, clause, sentence or word becomes superfluous or meaningless. **Id.** In essence, if court approval is the only requirement, the phrase "joint petition" becomes superfluous and is rendered meaningless.

Even were we to consider intent, the procedural requirements set forth in LSA-C.C. art. 2329 have been recognized as the legislature's attempt to protect the less worldly spouse from undue influence and to prevent that spouse from entering into disadvantageous agreements that the spouse did not fully understand. See **In the Matter of Boyer**, 616 So.2d 730, 732, writ denied, 620 So.2d 882 (La. 1993). Further, by requiring a joint petition, Article 2329 prevents a spouse, especially a less worldly spouse and less financially secure spouse, from being forced into an adversarial position with the other spouse.[3] Had the legislature intended to require spouses to simply obtain court approval for the modification of their matrimonial agreement, without the additional requirement of a joint petition, it could have used the less specific term "petition" rather than "joint petition." Additionally, the legislature clearly

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[2] It is undisputed that this matter was not instituted by a joint petition, but rather by Mr. Burger's petition including a rule to show cause, which the code of civil procedure recognizes as "a contradictory motion." LSA-C.C.P. art. 963. Even if we could interpret the rule to show cause as a joint petition, as suggested by one of my colleagues, Mrs. Burger did not "join" in petitioning the court. Rather, the only action taken by Ms. Burger was a waiver of service of process in which she requested a notice of any trial date. Irrespective of what Ms. Burger may have later agreed to, she never jointly petitioned the court for the termination of the community regime. Further, requiring a joint petition does not add an "unwaivable and uncurable" pleading requirement to Article 2329, as suggested by one of the dissents. Clearly, the parties can cure this defect by initiating a new action by joint petition.

[3] A failure to require a joint petition would allow one spouse to institute proceedings against the other spouse with no prior agreement between the spouses. Arguably, this would be detrimental to the harmony of the marriage.

intended to promote the community regime by making it more difficult to confect matrimonial agreements terminating the community regime during marriage. 16 La. Civ. L. Treatise, Matrimonial Regimes § 8:6 (4th ed.).

In **Rush v. Rush**, 12-1502 (La.App. 1 Cir. 3/25/13), 115 So.3d 508, 512, writ denied, 13-0911 (La. 5/31/13), 118 So.3d 398, this court stated that "the mere acknowledgement of the private act during the marriage [could not] validate the matrimonial agreement, since article 2329, which must be strictly construed, mandates that spouses can only modify or terminate a matrimonial regime during marriage by filing a joint petition and obtaining court approval." While I note that **Rush** involved a prenuptial agreement, the reasoning set forth therein is equally applicable to agreements made during the marriage.

Therefore, I find that the legislative dictates set forth in Article 2329 must be strictly construed. The words of Article 2329 are clear and unambiguous. Applying these words in their usual context, it is clear that both a joint petition and judicial approval are imperative. It is not our role to determine the wisdom of the words chosen by the legislature.

Further, the failure to comply with the strict requirements of LSA-C.C. art. 2329 renders the act absolutely null such that it cannot be confirmed. Absolute nullities result from violations of rules of public order, while relative nullities result from rules intended for the protection of private parties. LSA-C.C. arts. 2030 and 2031. While marriage is a contract between private parties, it is not clear that a change in the matrimonial regime affects exclusively private parties. A marital property system has been recognized as a "part of a larger picture of personhood, civil status, property, and succession, and the principles and rules of a community property regime penetrate the institutions of family, alimentary obligation, gift, inheritance, and ownership." Michael McAuley, *The Wanting of Community Property*, 20 Tul. Eur. & Civ. L.F. 57, 60 (2005). As has been recognized, modification of the legal community by a matrimonial agreement would result in many non-working spouses having little or no ownership interest in assets that would form part of the community under the legal regime. This would lead to a substantial weakening of the community concept. 16 La. Civ. L.

Treatise, Matrimonial Regimes § 8:6 (4th ed.). These policy concerns strengthen the argument that the failure to follow the requirements of Article 2329 violates public policy. Clearly, the strict requirements for opting out of the community property regime after marriage were meant to protect a larger class of persons and institutions.

In **Muller v. Muller**, 10-540 (La.App. 5 Cir. 6/29/11), 72 So.3d 364, 368, my brethren of the Fifth Circuit explained that a matrimonial agreement that did not meet the requirements for a prenuptial agreement, because it was not in authentic form, was void *ab initio* such that it could not be acknowledged during the marriage. They recognized with regard to the requirements of article 2329 that the factual circumstances of any case "*cannot act to vitiate its requirements.*" ***Id.*** at 367.

Specifically, the **Muller** court indicated:

> The dictates of La. C.C. art. 2329 are not mere policy concerns, *but a mandate made part of a statutory enactment that casts a suspicious eye on the establishment of a separation of property regime effected during marriage. The codal requirement* that any party entering into an agreement that modified or terminates the matrimonial regime after marriage must do so by joint petition and a finding by a court that the modification is in the best interest of both parties, *is without exception.*
>
> ***
>
> We hold that a post-nuptial acknowledgement cannot vitiate the *mandate of La. C.C. art. 2329 that any matrimonial agreement entered into during the marriage to modify or terminate a matrimonial regime must be by joint petition, and after a finding by the court that the agreement serves the best interests of the parties.* For these reasons, the ruling of the trial court is reversed, and the premarital matrimonial agreement between these parties is declared to be *null and void ab initio.* [Emphasis added.]

Muller, 72 So.3d at 367-68.

In light of the considerations set forth herein, I conclude that the failure to comply with the formal solemnities of Article 2329 results in an absolute nullity, not subject to confirmation. To the extent that they hold otherwise, I would overrule **Williams v. Williams**, 06-0358 (La.App. 1 Cir. 2/9/07), 2007 WL 441360 (unpublished), **In the Matter of Boyer**, 616 So.2d 730, writ denied, 620 So.2d 882 (La. 1993), and **Clay v. Clay**, 358 So.2d 649 (La.App. 1 Cir. 1978).

RADCLIFFE 10, L.L.C.

VERSUS

RONALD G. BURGER AND LYNDA O. BURGER

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0347

Holdridge, J., dissenting.

I respectfully dissent from the per curiam opinion allowing the trial court's judgment to stand. The trial court's ruling, which effectively permits a creditor of Mrs. Burger's husband to seize her separate property, was clearly erroneous and without basis in the law or jurisprudence. Like the trial court, this court now fails to properly interpret and apply La. C.C. art. 2329 to the facts of this case.[1] This error is compounded by the concurring opinion's conclusion that the prior judicial finding regarding the Burgers' separation of property agreement is an absolute nullity. Paradoxically, the combination of these errors results in a judgment that ultimately hurts the very spouse everyone agrees La. C.C. art. 2329 was intended to protect.

There is no dispute that the Burgers' matrimonial agreement meets the form requirements of La. C.C. art. 2331. Nor is there any dispute that the Burgers obtained the necessary judicial finding required by La. C.C. art. 2329. The sole issue herein pertains to the sufficiency of the pleading utilized to obtain that finding.

Specifically, La. C.C. art. 2329 allows spouses to enter into a matrimonial agreement terminating the legal regime "only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing

[1] A finding that the requisites of La. C.C. art. 2329 were satisfied in this matter is necessarily rooted in the specific facts and circumstances of this case.

principles and rules." While purporting to strictly construe this article, the concurring opinions conclude, at least implicitly, that a judicial finding rendered pursuant to La. C.C. art. 2329 is valid **if, and only if**, both spouses **initiated** the action by **filing a joint written petition**. However, strict construction of Article 2329's text does not compel such a conclusion.[2] On the contrary, the concurring opinions implicitly adopt prior jurisprudential gloss that Article 2329 mandates an initial joint "filing,"[3] and expand upon it to essentially add to the article an unwaivable and uncurable pleading requirement, that further precludes a spouse from voluntarily acquiescing in any subsequently rendered judgment or order. This unduly expansive yet simultaneously procedurally-rigid interpretation is both unreasonable and unwarranted.

Other than the requirement that it be "joint," no other provisions regarding the petition are provided for in Article 2329. For example, Article 2329 does not require either spouse to sign the petition or verify the petition, nor does it require that any particular allegations be pled or that a copy of the spouses' proposed matrimonial agreement be attached. Indeed, in enacting Article 2329, the legislature failed to even provide a venue for filing the petition. Arguably, given the enormous void, the general provisions of the code of civil procedure were intended to apply to the required petition.[4]

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[2] Indeed, La. C.C. art. 2329 expressly provides that spouses may enter into an agreement to terminate a regime "upon joint petition," not "upon the **filing** of a joint **written** petition." Article 2329 neither defines nor elaborates on the term "joint petition." Consequently, a feasible argument could be made that the Burgers jointly 'petitioned' (i.e. requested) the court to render the necessary finding by virtue of their collaborative representations and request for approval of their agreement at the hearing. See La. C.C. art. 1853 and La. C.C.P. art. 2085. (Responses by counsel or a party to questions posed by the court, as well stipulations by the parties in open court may constitute judicial admissions or confessions. See Catalanotto v. Catalanotto, 2014-0708 (La.App. 1 Cir. 12/10/14), 168 So.3d 463; Compensation Specialties, L.L.C. v. New England Mut. Life Ins. Co., 08-1549, (La.App. 1 Cir. 2/13/09), 6 So.3d 275, 281, writ denied, 09–575 (La. 4/24/09), 7 So.3d 1200; Wilkerson v. Wilkerson, 42,324 (La.App. 2 Cir. 8/15/07), 962 So.2d 1137, 1142). Nevertheless, construing the term "petition" in Article 2329 more narrowly to be a written petition as provided for in the Louisiana Code of Civil Procedure, the concurring opinions still fail to strictly construe and apply La. C.C. art. 2329.

[3] See Stogner v. Stogner, 98-3044, (La.7/7/99), 739 So.2d 762, 769, (where Supreme Court found that appellate courts had improperly added the word "substantial" to the pertinent statutory language and that this "jurisprudential gloss" unduly heightened the burden of proof).

[4] In this respect, it should be noted that La. C.C.P. art. 2329 differs significantly from other statutory and codal provisions which mandate very precise, and detailed requirements that conflict with more general provisions. See Trahan v. Coca Cola Bottling Co. United, Inc., 2004-0100 (La. 3/2/05), 894 So.2d 1096, 1104.

Pursuant to one such provision, La. C.C.P. art. 926, any objections regarding the sufficiency of the petition, in terms of either its form or substance, or to a party's procedural capacity, are waived unless timely raised in a dilatory exception.[5] See also La. C.C.P. art. 2593. Yet another provision, La. C.C.P. art. 1154, provides that a petition may be expanded to conform to the evidence and/or admissions and stipulations made by the parties in the trial court. In fact, a petition may be amended accordingly even after judgment has been rendered, although there is no requirement to do so.[6] Notwithstanding these provisions, it is well-settled that a party may confess judgment in the proceedings in the trial court or may voluntarily and unconditionally acquiesce in a judgment that has been rendered. See La. C.C.P. art 2085. They may even acquiesce in an absolutely null judgment. La. C.C.P. arts. 2003. Therefore, in light of the foregoing, I believe the concurring opinions err in implicitly finding that any deficiencies in the initial petition cannot be waived or cured by the spouses' consent, or that the spouses may not voluntarily acquiesce in the resulting judgment or order evidencing the required judicial finding.

Indeed, a 'rigid' interpretation conflicts with the obvious 'flexibility' inherent in Article 2329. In addition to the dearth of provisions regarding the petition previously noted, the article provides no procedural instruction as to how the trial court should ascertain the best interests of the parties or their knowledge of governing principles and rules. Article 2329 does not require the trial court to hold

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[5] Such objections are personal to the defendant. Frank L. Maraist, 1 Louisiana Civil Law Treatise, Civil Procedure § 6:6 (2d ed.) Therefore, had Radcliffe intervened in the Burgers' Article 2329 proceeding, see La. C.C. art. 2376, it would not have been entitled to raise an objection regarding the sufficiency of the petition. Rather interestingly, it has been able to successfully do so in the instant matter.

[6] In this case, Mrs. Burger did not object to the petition, and thus, any objections regarding the sufficiency of the petition were waived. More significantly, the parties appeared at a hearing where they jointly sought the court's approval of their agreement, and indicated their consent to the agreement, that they understood the governing rules, and that it served their best interests. Hence, any defect was waived or cured.

It is worthy of note that the petition filed by Mr. Burger, which incorporated the Burgers' joint separation of property agreement, see La. C.C.P. art. 853, clearly alleged that both spouses jointly desired and agreed to the separation of property agreement and further alleged that the agreement was in the interest of both spouses. As previously noted, there was no requirement for either spouse to sign or verify the petition.

a hearing, nor does it require that the spouses even appear before the judge. There is no requirement in Article 2329 that the spouses be represented by separate counsel or by any counsel. Article 2329 makes no mention regarding proof or whether the spouses must execute the matrimonial agreement before or after obtaining the required judicial finding. In fact, the article does not specify any particular form for the order or judgment memorializing that finding. "Indeed, the dispositive event is not the court's order or judgment. At bottom is the contract of the parties. That contract is the juridical act that changes the regime. The court's finding simply supplies the formality that allows the contract to produce its effects." Lee Hargrave, *Matrimonial Regimes*, 54 La. L. Rev. 733, 741-42 (1994). See also La. C.C. art. 2329, In Matter of Boyer, 616 So.2d 730, 733 (La.App. 1 Cir.), writ denied, 620 So.2d 882 (La. 1993); Benedetto v. Benedetto, 15-373 (La.App. 5 Cir. 12/9/15), ___ So.3d ___, ___; Andrea Carroll & Richard D. Moreno, 16 Louisiana Civil Law Treatise, Matrimonial Regimes § 8.6 (4th ed.).

Regardless of the purpose for requiring a joint petition, it must be remembered that a pleading, including the petition required by Article 2329, is not an end, in and of itself, but is merely the means to an end, that being to implement the substantive law. La. C.C.P. art. 865, comment (a); Teachers' Retirement System v. Louisiana State Employees' Retirement System, 456 So.2d 594, 596 (La. 1984). In other words: "Pleading is the 'handmaid rather than the mistress' of justice." Erath Sugar Company v. Broussard, 240 La. 949, 125 So.2d 776, 777 (1961). Consequently, every pleading must be construed to arrive at the truth and do substantial justice for the parties, i.e. the Burgers.[7] La. C.C.P. art. 865; Smith v. Knight, 39,781 (La.App. 2 Cir. 6/29/05), 907 So.2d 831, 836.

[7] The pleading must be construed to do justice for the Burgers, who were the parties to the action. Indeed, it is difficult to conceive how Radcliffe, a non-party, could have been prejudiced by any technical deficiencies in the petition.

In this case, justice precludes a finding that the Burgers' undisputed agreement expressed to the trial judge in open court and in their actual matrimonial agreement (a copy of which was attached to, and incorporated in, the petition), as well as the trial court's subsequent Article 2329 judicial finding, are utterly meaningless simply because the initial written petition did not name both spouses as petitioners. This is particularly so when neither spouse was prejudiced, and any objections or deficiencies were obviously and voluntarily waived, cured, or acquiesced in.

As this court stated in Matter of Boyer, 616 So.2d 730, 732 (La.App. 1 Cir. 1993) writ denied, 620 So.2d 882 (La. 1993), to comply with La. C.C. art. 2329, the trial court "must be satisfied that the spouses both agree to the change, that the spouses understand the rules and principles underlying a change in the matrimonial regime, and that the agreement appears to serve the best interest of the spouses."

In this case, the spouses, represented by separate counsel, appeared at a hearing and indicated their agreement to terminate the legal regime and establish a separation of property regime in accordance with their joint matrimonial agreement. After questioning both spouses, the trial court approved their agreement, expressly finding that they understood the governing rules and principles and that it served their best interests. Hence, the requisites of La. C.C. art. 2329 were arguably satisfied. In fact, in initiating a hearing and having separate representation, the Burgers actually exceeded the requirements of Article 2329.[8]

II. ABSOLUTELY OR RELATIVE NULLITY

Even if one could argue that the Burgers failed to satisfy Article 2329's requirement of a joint petition, that failure would not render the subsequent judicial

[8] The law does not prohibit their use of these additional safeguards. See Weinstein v. Weinstein, 2010-1083 (La.App. 3 Cir. 4/13/11) 62 So.3d 878, 884.

finding an absolute nullity.[9] At most, it would be a relative nullity.[10] Consequently, the trial court's erroneous finding of an absolute nullity is the gravamen for reversal in this case.

Absolute nullities are so called because their effect is absolute and they operate similarly with respect to all members of society, not just the parties to the transaction. The purpose of this effect is obvious; because an absolute nullity is one that violates a rule of public order, it should have no effect with respect to anyone. Ronald J. Scalise Jr., *Rethinking the Doctrine of Nullity*, 74 La. L. Rev. 663, 671-72 (2014). Relative nullities, on the other hand, exist for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. These nullities are relative in the sense that their effects are relative only to the members of the transaction and, even more specifically, only relative to the person in whose interest it is designed to protect. *Id.* For instance, La. C.C. art. 1919 was enacted to protect unemancipated minors and interdicts from entering into contracts. This law was not established for reasons of public policy, but for the protection of minors and interdicts. Consequently, a contract in violation of La. C.C. art. 1919 is a relative nullity. See also La. C.C. art. 2031. Moreover, it can only be rescinded at the request of the minor or interdict or their legal representative.

Similarly, in this case, it is undisputed that the purpose of La. C.C. art. 2329 is to protect a less worldly, economically vulnerable spouse from entering into a potentially disadvantageous agreement with an overreaching spouse. See Matter of

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[9] Louisiana Civil Code art. 2030 provides:

> A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed. Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.

[10] Louisiana Civil Code art. 2031 provides:

> A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A contract that is only relatively null may be confirmed. Relative nullity may be invoked only by those persons for whose interest the ground for nullity was established, and may not be declared by the court on its own initiative.

Boyer, 616 So.2d 730, 732 (La.App. 1 Cir.), writ denied, 620 So.2d 882 (La. 1993). Thus, Article 2329 is clearly a "rule for the protection of private parties" and not a "rule of public order." See La. C.C. arts. 2030 and 2031. As such, any violation of it is only a relative nullity. Consequently, only the spouse it was intended to protect can invoke its nullity, or, alternatively, confirm it.[11]

This conclusion is in accord with prior jurisprudence of this court. See Williams v. Williams, 2006-0358 (La.App. 1 Cir. 2/9/07) (unpublished); Clay v. Clay, 358 So.2d 649, 651 (La.App. 1 Cir. 1978). See also dictum in Matter of Boyer, 616 So.2d 730, 733 (La. Ct. App. 1993) writ denied, 620 So.2d 882 (La. 1993).[12]

It is also in accord with analogous codal provisions. For example, pursuant to La. C.C. art. 230 and La. C.C.P. art. 4501,[13] in certain circumstances, parents wishing to: alienate, encumber, or lease the property of their minor child; compromise a claim of the child; or incur an obligation of the minor child, must first jointly petition for court approval. Comment (a) to La. C.C. art. 230 provides that the procedure for obtaining prior court approval is intended to protect the minor child, and further states that the if the parents **fail to obtain the required court approval for a transaction, that transaction is relatively null**. (Emphasis added.)

Similarly, La. C.C. art. 2353 provides:

> When the concurrence of the spouses is required by law, the alienation, encumbrance, or lease of community property by a spouse is relatively null unless the other spouse has renounced the right to concur. Also, the alienation, encumbrance, or lease of the assets of a community enterprise by the non-manager spouse is a relative nullity.

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[11] As expected, the jurisprudence concerning La. C.C. art. 2329 only reflects nullity claims asserted on behalf of a spouse. Apparently, there are no cases wherein it has been invoked by an unrelated, third party creditor.

[12] The case of Muller v. Muller, 10-540 (La.App. 5 Cir. 6/29/11), 72 So.3d 364, 368, which is factually and legally distinguishable from the instant matter, is not controlling on this court and, in fact, conflicts with decisions rendered by this court. Significantly, the Muller court's conclusion that a violation is La. C.C. art. 2329 is an absolute nullity is not traceable to any legislative directive. See Christopher Kirt Ulfers, *Is A Postmarital Agreement in Your Best Interest? Why Louisiana Civil Code Article 2329 Should Let You Decide*, 75 La. L. Rev. 1399, 1423 (2015).

[13] These provisions were only recently enacted; nevertheless, they do serve a useful analogy.

Thus, if a spouse alienates a substantial portion of the community property without the required agreement of the other spouse, the transaction is only **relatively null**. If that is so, it can hardly be argued that, despite both spouses agreeing to terminate the community property regime and a court judicially approving that agreement, the mere failure to name both spouses as petitioners in the initial petition unequivocally results in an absolutely nullity.

Despite acknowledging that the purpose of La. C.C. art. 2329 is to protect a less worldly spouse from entering into a disadvantageous agreement (i.e. to protect a private party to a transaction), the concurring opinion nonetheless goes on to conclude: "Clearly the strict requirements for opting out of the community property regime after marriage were meant to protect a larger class of persons and institutions as opposed to merely regulating individual contractual rights."

However, a conclusion that Article 2329 was intended to protect anyone other than the spouses entering into the agreement is simply not supported by either the language or the legislative history of La. C.C. art. 2329. Indeed, the plain, unambiguous language of Article 2329 makes clear that the required judicial finding is concerned exclusively with the spouses' "best interests" and understanding of the governing rules. Likewise, the legislative history confirms that the required judicial finding was intended to serve as procedural safeguard to protect an economically vulnerable spouse against overreaching by the other spouse. In Katherine S. Spaht and Cynthia Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 La. L. Rev. 83, 91-92 (1979),[14] the basis of requirement was explained as follows:

> The motion [to add the requirement of a judicial finding to Article 2329] made clear that the concern in allowing spouses to enter into matrimonial agreements was solely for the welfare of the spouse

[14] In the article, the authors, who served as members of the legislative advisory committee regarding the legislation's enactment, detail their personal involvement.

whose contributions to the marriage were largely non-economic, **and not for the interest of creditors or forced heirs.** [Emphasis added.]

Clearly, there is no public policy reason for La. C.C. art. 2329 to afford protection to groups such as forced heirs or creditors because they are already protected in other areas of the law. See *Id.* at 97-98. For example, creditors have available to them the same remedies they have against any contract of the debtor, in particular the revocatory action, an action for the declaration of simulation, and the oblique action. *Id.* at 98.

To further illustrate the fact that Article 2329's requirements were not enacted for the benefit of creditors, such as Radcliffe, it should be noted that the legislation enacting La. C.C. art. 2329 also enacted La. C.C. art. 2376, which is a specific provision addressing the rights of creditors. Article 2376 only allows creditors to intervene in a proceeding to modify a regime to "object" that the action is in "fraud of their rights." See Pan Am. Imp. Co., Inc. v. Buck, 452 So.2d 1167, 1170 (La. 1984) (holding that, under La. C.C. art. 2376, a creditor had no right to object because the separation of property was not done "in fraud" of the creditor's rights). Article 2376 further provides that creditors have one year to sue to annul a "judgment of separation of property." Whether this right to annul a "judgment of separation of property" applies to the judicial "finding" required by Article 2329 as well as a "judgment decreeing separation of property" rendered under La. C.C. art. 2374 could be debated. Nevertheless, after a judgment has been executed, a creditor may only sue to annul the judgment to the extent it has been "prejudiced." Thus, in La. C.C. art. 2376, the legislature expressly limited creditors from interfering in such spousal actions unless they can demonstrate "fraud" or "prejudice." Since the legislature has provided a specific provision pertaining to creditors, there is no plausible public policy reason to extend the ambit of Article

2329 to encompass them. Nor is there a basis for extending it to any other groups or institutions beyond the spouses themselves.

Further mitigating against a finding that La. C.C. art. 2329 is a rule of public order are the notable exceptions to its rule.[15] See 16 La. Civ. L. Treatise, Matrimonial Regimes § 8:6 (4th ed.) ("A coherent rationale for the requirement [in La. C.C. art. 2329] is difficult to find, especially considering the exceptions."). The exceptions, particularly when combined with the previously noted lack of implementing procedures provided by the legislature for Article 2329, belie a finding that Article 2329's import is a matter of public order.

Finally, it is of no small significance that La. C.C. art. 2329 lacks any express legislative directive or commentary stating that a violation of its provisions results in an absolute nullity. Such statements are plainly provided for in other articles, such as those pertaining to the required formalities for donations or testaments. See e.g. La. C.C. arts. 1541 and 1573. (Examples of other such provisions, just within the Civil Code, include: La. C.C. arts. 94, 213, 1751, 3140, and 3174.) Indeed, commentators from as long ago as 1982 to as recently as 2015 have questioned whether Article 2329 is even mandatory, given the lack of an express legislative directive.[16] Clearly, La. C.C. art. 2329's enacting legislation made such expressions with regard to some of its other provisions, but failed to do so for Article 2329. See 1979 La. Acts No. 709, § 1, eff. Jan. 1, 1980; La. C.C. art.

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[15] As a general matter, rules of public order are not to be derogated from. La. C.C. art. 7. Yet, the not inconsiderable exceptions to La. C.C. art. 2329's required judicial finding include: premarital agreements; spouses who enter into a post-marital agreement within one year of acquiring domicile in Louisiana; spouses who enter into a post-marital agreement for a legal regime; spouses who elected to enter into an agreement during the enacting legislation's transitional period, and spouses who file for divorce, but reconcile and, prior to reconciling, execute a matrimonial agreement rejecting their community regime. La. C.C. art. 2375(B). Thus, pursuant to La. C.C. art. 2375(B), spouses can potentially forego La. C.C. art. 2329's required judicial finding by filing for divorce and then adopting a separation of property regime (without court approval) before reconciling. Additionally, it has also been noted that other matrimonial regime provisions enacted by the legislature have the potential of being used by an overreaching spouse to harm a less worldly spouse's interest in the community; nevertheless, they too are exempt from any judicial oversight. See Spaht and Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 La L. Rev 83, 92-93 (1979).

[16] See Laura Schofield Bailey, *Marital Property Agreements-Being Creative with the New Legislation*, 43 La. L. Rev. 159, 166-68 (1982); Christopher Kirt Ulfers, *Is A Postmarital Agreement in Your Best Interest? Why Louisiana Civil Code Article 2329 Should Let You Decide*, 75 La. L. Rev. 1399, 1422-423 (2015).

2330, comment (d) (expressly noting that its provisions are a matter of "strong public policy"); and La. C.C. art. 2337, comment (b) (noting that failure to comply with the article results in an absolute nullity). Even subsequently enacted matrimonial regime articles include such express directives within their text. See La. C.C. art. 2369.8. Yet, with respect to La. C.C. art. 2329, the legislature declined to make such an expression.

Thus, for this and all of the reasons previously noted, I believe the concurring opinion errs in finding that La. C.C. art. 2329 is a rule of public order, the violation of which results in an absolute nullity.

III. OTHER GROUNDS

Although the per curiam maintains the trial court judgment declaring the prior judicial finding approving the Burgers' matrimonial agreement to be an absolute nullity, it should be made clear that the trial court judgment merely allows Radcliffe to cancel the prior judicial finding from the public records. It does not permit Radcliffe to cancel the Burgers' agreement from the public record.

Significantly, the Burgers' agreement also effected an extrajudicial partition of community property. Spouses are permitted to voluntarily partition property without terminating their regime. See La. C.C. arts. 2336 and 2341. Specifically, La. C.C. art. 2336, provides, in pertinent part:

> [S]pouses may, **without court approval**, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property. The partition is effective toward third persons when filed for registry in the manner provided by Article 2332. [Emphasis added.]

The Burgers' partition of community property did not require court approval and thus, any failure to satisfy the requisites of La. C.C. art. 2329 has no bearing on the validity of the partition. Moreover, the Burgers were entitled to record their partition in accordance with La. C.C. art. 2332.

The mere fact that the partition was incorporated into the agreement to terminate the legal regime does not affect its validity.[17] See 16 La. Civ. L. Treatise, Matrimonial Regimes § 8:12 (4th ed.). Thus, even if the Burgers had two objectives in their agreement—to terminate the regime, as well as partition existing assets—a holding that the agreement did not terminate the community (i.e. did not impact future property) should not upset that part of the agreement effectuating the partition of existing assets. See La. C.C. art. 2034. See also *Id.* Moreover, because the community regime was not terminated, it would appear that the community assets that were partitioned and became Mrs. Burger's separate property as a result may not be available to satisfy Mr. Burger's debts. See La. C.C. art. 2345 and La. C.C. art. 2357 (which, by its terms, is only applicable "after termination of the regime"). See also 16 La. Civ. L. Treatise, Matrimonial Regimes § 8:12 (4th ed.).

Lastly, I do not believe that Radcliffe was entitled to judgment in its favor with respect to its revocatory action or a comparable claim under La. C.C. art. 2376. In addressing the necessary showing for a revocatory action, this court, in Parish National Bank v. Wilks, 2004-1439 (La.App. 1 Cir. 8/3/05), 923 So.2d 8, 15-16, stated:

> In accordance with the clear language of La. C.C. art. 2036, in order for an obligee to annul an act of the obligor, he must show (1) an act (or failure to act) of the obligor that causes or increases the obligor's insolvency; and (2) the act must occur after the obligee's rights arose. Additionally, the jurisprudence requires that the obligee must prove prejudice, injury, or damage to the obligee as a result of the act. The test for determining prejudice or injury is factual, based on the value of the property and the ranking of the indebtedness. If preferred claims against the property exceed its value, the [act] should not be revoked because it does not injure or prejudice an unsecured creditor. [Internal citations omitted.]

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[17] See 16 La. Civ. L. Treatise, Matrimonial Regimes § 8:6 (4th ed.):
> It may well be that the document establishing a matrimonial regime may also incorporate other provisions dealing with donations of existing property and partition of existing property. Those aspects, though, could be separate contracts not requiring judicial approval, and the inclusion of them in one document for convenience should not require those aspects of the agreement to be subject to the court's finding of understanding and best interests.

Hence, not every act or contract of the debtor which diminishes his estate prejudices the creditor. See Spaht and Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 La L. Rev 83, 99 (1979). Moreover, if an obligee establishes his right to annul his obligor's act, that act shall be annulled only to the extent that it affects the obligee's right. La. C.C. art. 2043. Similarly, under La. C.C. art. 2376, upon execution of the judgment approving the modification or termination of a regime, a creditor is only entitled to assert the nullity of that judgment to the extent that it was prejudiced.

As the plaintiff in this matter, Radcliffe bore the burden of presenting sufficient evidence **in the trial court** to establish its claims by a preponderance of the evidence; however, it failed to do so. Remanding this matter to the trial court to allow Radcliffe a "second bite of the apple" in meeting its burden of proof, when it clearly failed to do so the first time, would be inherently unfair and an unnecessary waste of judicial time and resources. Therefore, for this reason, and for all the reasons set forth herein, I believe the trial court's judgment should be reversed and Radcliffe's claims dismissed with prejudice.