#D-312 1/9/80

Memorandum 80-3

Subject: Study D-312 - Creditors' Remedies (Community Property--Consultant's Study)

Attached to this memorandum is a copy of the Commission's consultant's (Professor William A. Reppy, Jr., Duke Law School) study relating to debt collection from married persons in California. You should read the study with care. It takes the following form:

Introduction
Part One: The "Managerial" System Of Creditors' Rights As Applied In California
- A. California Follows the Majority Rule Most Favorable to Creditors
  - 1. The community versus separate debt system
    - a. Community vs. separate classification in California tort debt collection
    - b. Community vs. separate classification at dissolution for reimbursement purposes.
  - 2. The partitionable community system of debt liability
    - a. Partitionable community under California debt liability law
  - 3. The managerial system of debt liability
    - a. Exceptions to the managerial system increasing creditors' rights
      - (1) instant agency
      - (2) the "necessaries" doctrine
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        - (b) problems arising from reference to quasi-community property
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        - (e) problems arising when spouses are separated
      - (3) one-spouse community bank accounts
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    - b. Nonliability exceptions to California's managerial system of debt liability
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- B. Debt Liability When Spouses Live Separate and Apart
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- D. Debt Liability and Property of Unmarried Persons Living Together as if Married
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Part Two: Joint Tenancies And Tenancies In Common: Problems of Transmutation
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- A. Family-Unit Versus Individual-Debtors Theories Underlying Exemption Statutes
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- C. Personal Exemptions in California: Uncertainty as to Extent of Individual-Debtor Theory in Use
- D. The Exemption Process and Separated Spouses
- E. Who Should Assert the Exemption When the Family-Unit Approach Applies?
- F. The Interaction of Nonliability and Exemption Provisions
  1. Community property not liable
  2. Separate property not liable

We plan at the meeting to go systematically through the issues raised by Professor Reppy's study and to make the basic policy decisions that will shape the drafting of the marital property aspects of the creditors' remedies project. For your convenience, Exhibit 1 contains the major statutory provisions referred to in Professor Reppy's study, along with a few other provisions of interest.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

CIVIL CODE

§ 199. [Obligation of parents to support child.] The obligation of a father and mother to support their natural child under this chapter, including but not limited to Sections 196 and 206, shall extend only to, and may be satisfied only from, the total earnings, or the assets acquired therefrom, and separate property of each, if there has been a dissolution of their marriage as specified by Section 4350. [1973 ch 987 § 1, operative January 1, 1975; 1979 ch 1030 § 1.] *Cal Jur 3d Family Law § 314.*

§ 682. Ownership of several persons. The ownership of property by several persons is either:

1. Of joint interests;
2. Of partnership interests;
3. Of interests in common;
4. Of community interest of husband and wife. [1872.] *Cal Jur 3d Estates § 6, Family Law § 397; Witkin Summary (8th ed) pp 1627, 1632, 1937, 4278.*

§ 5103. [Property transactions between spouses or with other person: Rules governing confidential relations.] Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3. [1969 ch 1608 § 8.] *Cal Jur 3d Cancellation and Reformation of Instruments § 15, Contracts § 34, Deeds § 45, Family Law §§ 492, 56, Partnership § 13; Witkin Summary (8th ed) p 1775, 4874, 4876, 4877, 5059.*

§ 5104. [Joint ownership or community property.] A husband and wife may hold property as joint tenants, tenants in common, or as community property. [1969 ch 1608 § 8.] *Cal Jur 3d Family Law § 394, Partition § 43; Witkin Summary (8th ed) p 4874.*

§ 5105. [Interests in community property.] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property. [1969 ch 1608 § 8; 1973 ch 987 § 4, operative January 1, 1975.] *Cal Jur 3d Decedents' Estates § 16, Family Law §§ 396, 418, 457, 474; Witkin Summary (8th ed) pp 4188, 4213, 5144, 5145, 5149.*

§ 5107. [Wife's separate property, and conveyance thereof.] All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property. [1969 ch 1608 § 8.] *Cal Jur 3d Deeds § 45, Family Law §§ 407, 410–412, 452; Witkin Summary (8th ed) pp 4874, 5096, 5097, 5102, 5103.*

§ 5108. [Husband's separate property, and conveyance thereof.] All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. The husband may, without the consent of his wife, convey his separate property. [1969 ch 1608 § 8.] *Cal Jur 3d Deeds § 45, Family Law §§ 407, 410–412, 452; Witkin Summary (8th ed) pp 5096, 5097, 5102, 5103.*

§ 5114. [Inventory of separate personal property: Execution and recordation.] A full and complete inventory of the separate personal property of either spouse may be made out and signed by such spouse, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property, and recorded in the office of the recorder of the county in which the parties reside. [1969 ch 1608 § 8.] *Cal Jur 3d Acknowledgments §§ 3–6, Family Law § 453; Cal Jur 2d Recds § 41; Witkin Summary (8th ed) p 5097.*

§ 5115. [Same: Filing as notice and evidence of title.] The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the party filing such inventory. [1969 ch 1608 § 8.] *Cal Jur 3d Family Law § 453; Witkin Summary (8th ed) p 5097.*

§ 5116. [Liability of community property for contracts]. The property of the community is liable for the contracts of either spouse which are made after marriage and prior to or on or after January 1, 1975. [1969 ch 1608 § 8; 1973 ch 999 § 3, operative January 1, 1975; 1974 ch 1206 § 2.] *Note*—Stats 1974 ch 1206 also provides: § 7. This act shall not apply to or affect any act or transaction which occurred prior to January 1, 1975. *Cal Jur 3d Family Law §§ 472, 473; Witkin Summary (8th ed) pp 5175–5178.*

§ 5118. [Earnings and accumulations constituting separate property: Income of spouse and children living separate from other spouse.] The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while separate and apart from the other spouse, are the separate property of the spouse. [1969 ch 1608 § 8; 1971 ch 1966 § 1.] *Cal Jur 3d Family Law §§ 198, 417, Income Taxes § 41; Witkin Summary (8th ed) pp 4623, 5100, 5101, 5103.*

§ 5120. [Exemption of separate property and earnings from liability for premarital debts of other spouse.] Neither the separate property of a spouse nor the earnings of the spouse after marriage is liable for the debts of the other spouse contracted before the marriage. [1969 ch 1608 § 8; 1973 ch 987 § 9, operative January 1, 1975.] *Cal Jur 3d Family Law §§ 471, 473; Witkin Procedure 2d, p 2090; Summary (8th ed) pp 5170, 5171, 5175, 5178.*

§ 5121. [Liability for spouse's separate property for premarital debts.] The separate property of a spouse is liable for the debts of the spouse contracted before or after the marriage of the spouse, but is not liable for the debts of the other spouse contracted after marriage; provided, that the separate property of the spouse is liable for the payment of debts contracted by either spouse for the necessaries of life pursuant to Section 5132. [1969 ch 1608 § 8; 1973 ch 987 § 10, operative January 1, 1975.] *Cal Jur 3d Family Law §§ 285, 471, 472; Cal Practice § 140:1; Witkin Summary (8th ed) pp 4882, 5170–5172.*

§ 5122. [Married person's liability for spouse's torts: Satisfaction of liability from separate and community property.] (a) A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefor if the marriage did not exist.

(b) The liability of a married person for death or injury to person or property shall be satisfied as follows:

(1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community property and second from the separate property of the married person.

(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community property. [1969 ch 1608 § 8; 1973 ch 987 § 11, operative January 1, 1975.] *Cal Jur 3d Assault and Other Wilful Torts § 22, Family Law §§ 474, 556; Witkin Summary (8th ed) pp 2316, 4874, 5179, 5180.*

§ 5123. [Liability of wife's separate property for obligations secured by mortgage, etc., of community property.] (a) The separate property of the wife is not liable for any debt or obligation secured by a mortgage, deed of trust or other hypothecation of the community property which is executed prior to January 1, 1975, unless the wife expressly assents in writing to the liability of her separate property for such debt or obligation.

(b) The separate property of a spouse is not liable for any debt or obligation secured by a mortgage, deed of trust, or other hypothecation of the community property which is executed on or after January 1, 1975, unless the spouse expressly assents in writing to the liability of the separate property for the debt or obligation. [1969 ch 1608 § 8; 1973 ch 987 § 12, operative January 1, 1975.] *Cal Jur 3d Family Law § 471; Witkin Summary (8th ed) pp 5170, 5171.*

§ 5125. [Management and control of community personal property.] (a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing

apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property. [1969 ch 1608 § 8; 1969 ch 1609 § 24; 1973 ch 987 § 14, operative January 1, 1975; 1974 ch 546 § 14, ch 1206 § 4; 1977 ch 692 § 1.] *Cal Jur 3d Contracts § 34, Decedents' Estates § 19, Family Law §§ 418, 454–458, 463, 468, 500; Cal Jur 2d Wareh § 39; Witkin Summary (8th ed) pp 5118, 5144–5149, 5151, 5156, 5165, 5167.*

§ 5127. [Management and control of community real property. Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and that the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior

to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect. [1969 ch 1608 § 8; 1969 ch 1609 § 25; 1973 ch 987 § 15, operative January 1, 1975; 1974 ch 1206 § 5.] *Cal Jur 3d Contracts § 34, Decedents' Estates § 19, Deeds of Trust § 8, Family Law §§ 454, 455, 459, 468; Witkin Procedure 2d, p 1108; Summary (8th ed) pp 5118, 5146–5148, 5157–5159, 5165, 5168, 5169.*

§ 5127.5. [Wife's right to control her share of community property for child support: Liability of wife's interest and of husband's earnings: Action by wife.] Notwithstanding the provisions of Section 5125 or 5127 granting the husband the management and control of the community property, to the extent necessary to fulfill a duty of a wife to support her children, the wife is entitled to the management and control of her share of the community property.

The wife's interest in the community property, including the earnings of her husband, is liable for the support of her children to whom the duty to support is owed, provided that for the purposes of this section, prior support liability of her husband plus three hundred dollars ($300) gross monthly income shall first be excluded in determining the wife's interest in the community property earnings of her husband.

The wife may bring an action in the superior court to enforce such right provided that such action is not brought under influence of fraud or duress by any individual, corporation or governmental agency.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed by this section and such contribution shall reduce the liability to which the interest of the wife in the community property is subject. [1971 ch 578 § 8.6; effective August 3, 1971.] *Cal Jur 3d Family Law § Witkin Summary (8th ed) p 5146.*

§ 5127.6. [Community property interest of parent in income of spouse available for care and support of child residing with parent married to spouse.] Notwithstanding Section 5127.5, the community property interest of a natural or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any child who resides with the child's natural or adoptive parent who is married to such spouse. The amount arising from such duty to care for and support shall be reduced by the amount of any existing

previously court ordered child support obligations of such spouse.

Any contribution for care and support provided by a spouse who is not a natural or adoptive parent of the child shall not be considered a change in circumstances that would affect a court ordered support obligation of a natural or adoptive parent for that child. [1979 ch 1170 § 2.]

§ 5131. [Same: Spouses living separate by agreement.] A spouse is not liable for the support of the other spouse when the other spouse is living separate from the spouse by agreement unless such support is stipulated in the agreement. [1969 ch 1608 § 8; 1973 ch 987 § 16, operative January 1, 1975.] *Cal Jur 3d Family Law § 283; Cal Practice §§ 140:1, 140:3, 140:13; Witkin Summary (8th ed) pp 4637, 4880, 5101.*

§ 5132. [Obligation to support spouse.] A spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms by Sections 4803 and 4804. [1969 ch 1608 § 8; 1973 ch 987 § 17, operative January 1, 1975.] *Cal Jur 3d Family Law §§ 283, 285; Witkin Summary (8th ed) pp 4637, 4881, 4882, 5173, 5219, 5221.*

§ 5133. [When property rights governed by this title.] The property rights of husband and wife are governed by this title, unless there is a marriage settlement containing stipulations contrary thereto. [1969 ch 1608 § 8.] *Cal Jur 3d Family Law § 394; Witkin Summary (8th ed) pp 5160, 5537.*

§ 5134. [Contracts for marriage settlements: Writing, and execution.] All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved. [1969 ch 1608 § 8.] *Cal Jur 3d Acknowledgments §§ 3–6, Family Law § 487, Frauds, Statute of § 52; Cal Practice §§ 138:4, 142:7, 144:11; Witkin Summary (8th ed) pp 4878, 5160.*

§ 5135. **[Same: Where recorded.]** When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which real estate may be situated which is granted or affected by such contract. [1969 ch 1608 § 8.] *Cal Jur 3d Acknowledgments §§ 4–6, Family Law § 487; Whitken Summary (8th ed) p 5160.*

§ 5136. **[Same: Effect of recording or nonrecording.]** The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property. [1969 ch 1608 § 8.] *Cal Jur 3d Family Law § 487; Cal Jur 2d Recds § 58; Cal Practice §§ 138:4, 142:7, 144:11.*

§ 5137. **[Same: Minor's contracting capacity.]** A minor capable of contracting marriage may make a valid marriage settlement. [1969 ch 1608 § 8.] *Cal Jur 3d Family Law § 490.*

PROBATE CODE

§ 980. **Community property administration: Petition for allocation of responsibility for debts: Notice for hearing: Court order of allocation.** (a) Whenever it appears that debts payable by the estate are also payable, in whole or in part, by the surviving spouse, the personal representative or any person interested in the estate may file a petition for an order to allocate the responsibility for the debts at any time prior to the filing of a petition for final distribution. If any interest in the community property is administered in the estate of a deceased spouse which, under the laws of this state, was liable for a debt of the surviving spouse which was not also the debt of the deceased spouse, the owner of the debt shall be deemed to be a person interested in the estate.

(b) The petition shall (1) identify all of the debts known to the petitioner that are asserted to be subject to allocation, (2) state the reason why the debts should be allocated, and (3) set forth the allocation and the basis for allocation asserted by the petitioner.

(c) If if appears from the petition that (1) allocation would be affected by the value of the separate property of the surviving spouse and any community property not administered in the estate and (2) an inventory of the property and the value of the property has not been furnished by the surviving

spouse, the court shall issue an order to show cause why the information should not be furnished.

(d) Notice of the hearing of the petition and the order to show cause shall be given for the period and in the manner prescribed by Section 1200 and a copy of the petition and the order shall be served not less than 10 days prior to the time set for the hearing upon the surviving spouse and, if the petitioner is not the personal representative of the estate, the personal representative.

(e) The personal representative of the estate and the surviving spouse may provide for allocation by agreement, and, upon a determination by the court that the agreement substantially protects the rights of persons interested in the estate, the allocation provided for in the agreement shall be ordered by the court. In the absence of an agreement, each debt shall be apportioned to all of the property of the spouses liable for the debt, as determined by the laws of this state, in the proportion determined by the value of the property less any liens and encumbrances at the date of death, and the responsibility to pay the debt shall be allocated accordingly.

(f) Upon making a determination as provided in this section, the court shall make an order (1) directing the personal representative to charge the amounts allocated to the surviving spouse against any property or interests of the surviving spouse which are in the possession of the representative, (2) summarily directing the surviving spouse to make payment of the allocation to the personal representative to the extent that property or interests of the surviving spouse which are in the possession of the personal representative are insufficient to satisfy the allocation, and (3) directing the personal representative to make payment of the amounts allocated to the estate. [1975 ch 173 § 12, effective June 30, 1975.] *25 Cal Jur 3d Decedents' Estates § 694.*

#D-312 1/7/80

DEBT COLLECTION FROM MARRIED PERSONS IN CALIFORNIA*

*This study was prepared for the California Law Revision Commission by Professor William A. Reppy, Jr. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

TO: CALIFORNIA LAW REVISION COMMISSION

FROM: PROFESSOR WILLIAM A. REPPY, JR., DUKE LAW SCHOOL

DATE: JANUARY 7, 1980

TOPIC: DEBT COLLECTION FROM MARRIED PERSONS IN CALIFORNIA

Introduction

This paper is divided into five parts. The first considers the general theory in California for determining liability of marital property (i.e., both separate and community property) to creditors plus an exception to the general rules, the "necessaries" doctrine. Part two covers "nonliability" exceptions to the general rules under which entire classes of property are not liable for certain types of debts (without any dollar limitation). Part three explores application of the exemption statutes -- Cal. Code Civ. Proc. sections 690.1 et seq. -- to married debtors, with study given as to the effect on exemptions of the creditor's judgment running against both spouses or just one. Part four considers special problems arising when liability is determined and the debt collected after separation of the spouses or after divorce. Finally, the fifth part considers creditors' rights vis a vis persons not lawfully married but who live together as if they were married.

A companion paper submitted by the writer has considered the operation of California's sole trader act. That paper additionally addresses the problem of how transmutation agreements affect creditors. The present study concludes with some additional thoughts on the transmutation problem.

PART ONE: THE "MANAGERIAL" SYSTEM OF CREDITORS' RIGHTS AS APPLIED IN CALIFORNIA

A. CALIFORNIA FOLLOWS THE MAJORITY RULE MOST FAVORABLE TO CREDITORS

When one or both of husband (H) and wife (W) become indebted the legal systems that determine which properties they own individually or jointly are liable to the creditor could, theoretically, range from a total liability system where every asset owned by either or both is liable regardless of which spouse is the debtor to a zero liability system where everything they owned was exempt. The latter is politically and commercially absurd; the former or total liability system is not, but contemporary attitudes towards creditors' rights would brand it far too harsh on H and W, as a creditor could leave them penniless.

The eight community property jurisdictions in the United States have developed three distinct systems for determining the extent to which the spouses (and their children indirectly) will be protected by rules of law departing from a total liability system.[1]

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1. The three systems are described in Reppy & de Funiak, Community Property in the United States 361-298 (1975).

1. The community versus separate debt system.

Developed in Washington and Arizona, the community versus separate debt system is the least favorable to creditors of the three approaches. In some instances it actually achieves zero liability.2/ Using a benefit test similar to that in Cal. Civ. Code section 5122, the debt is classified as a community or separate debt. If it is community, the creditor can reach all the community property and the debtor's separate property; if it is a separate debt, however, the community property is not liable -- only the debtor's separate property.3/ It is in the latter situation that the creditor sometimes finds he cannot successfully levy on any property.

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2. See, e.g., Aichlmayr v. Lynch, 6 Wash. App. 434, 493 P.2d 1026 (1972) (H committed separate torts of alienation of affection and criminal conversation but it is obvious from court's opinion H had no separate property); Edmonds v. Ashe, 13 Wash. App. 690, 537 P.2d 812 (1975) (H committed separate tort of battery but fortunately for creditor H promptly died, thereby converting community property into half H's separate property reachable by creditor).

3. E.g., Babcock v. Tam, 156 F.2d 116 (9th Cir. 1946) (Arizona law); de Funiak & Vaughn, Principles of Community Property 374, 376 (2d ed. 1971); Marsh, California Family Law -- A Review, 42 Calif. L. Rev. 368 (1954) (criticizing the Arizona-Washington system).

The Arizona and Washington system places a burden on contract creditors of H or W alone during marriage who fear they may be "separate" contract creditors.4/

In order to reach their debtor's community earnings they must obtain the agreement of the other spouse waiving his or her rights to insist on community non-liability. The Washington-Arizona system is quite unfair to tort creditors who almost always will not be in a position before liability arises to obtain an agreement making community property liable in the event of a "separate" tort. The tort victims usually have no control at all over whether a spouse commits a separate or community tort on them because the test is whether the spouse was acting to improve or protect the community estate. Sympathy for creditors has caused courts in Washington and Arizona to greatly expand the concept of community benefit to avoid "separate tort" characterizations.5/

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4. For example, one who contracts with W to grade and pave a road on W's separately-owned land is almost certainly her separate contract creditor unable to reach W's earnings for payment. He may find his debt uncollectable if the separate land is heavily mortgaged.

5. See, e.g., Moffit v. Krueger, 11 Wash. 2d 658, 120 P.2d 512 (1941), where W was on a beer-drinking binge with a man who obviously was her boy friend. She let him drive the community-owned car, and he struck plaintiff. In Washington and Arizona, recreational activity is a community endeavor and torts incurred while engaged in recreation during marriage and cohabitation are community torts. E.g., Reckart v. Arva Valley Air, Inc., 19 Ariz. App. 538, 509 P.2d 231 (1973) (H crashed airplane while taking flying lessons for pleasure). In Moffit the court found W's recreation with the boyfriend a community activity!

In its pure form the community vs. separate debt system was also grossly unfair to antenuptial contract (as well as tort) creditors. An antenuptial debt was per se a separate debt under the system. All an unmarried debtor had to do to protect his future earnings from his creditors was to marry. This state of the law was termed "marital bankruptcy,"[6] and was so unsatisfactory that in the last ten years both Arizona and Washington had to alter it by legislation that to a considerable extent in Arizona[7] but only a limited extent in Washington,[8] allows antenuptial creditors to reach some community property.

a. Community vs. separate classification in California tort debt collection.

The process of classifying a debt as community or separate under California law will never reduce the amount of property a creditor of H or W can reach. Rather, such classifications affect the rights of the spouses inter se.

Civil Code section 5122(b) provides for determining whether a tort occurred while the spouse was "performing an activity for the benefit of the community" for the purpose of establishing a priority. If the

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6. Note, Community Property -- Antenuptial Debts -- Eliminating Immunity of Earnings and Accumulations of Debtor Spouse, 45 Wash. L. Rev. 191, 192 (1970).

7. Arizona Rev. Stat. § 25-215(B), analyzed in Comment, Community Assets and Separate Debts: Increased Community Vulnerability in Arizona, 1975 Ariz. St. L.J. 797.

8. Rev. Code Wash. § 26.16.200, strictly construed in Watters v. Doud, ____ Wash. App. 2d _____, 596 P.2d 280 (1979).

tort was a separate tort, the tortfeasor's separate property is primarily liable. But the statute is clear that once nonexempt separate property is exhausted the tort creditor can turn to community property to obtain satisfaction of his judgment.9/ When H's separate tort creditor does turn to community assets, undoubtedly the seizure of them gives W a right of reimbursement on behalf of the community, at dissolution10/ of the marriage, although section 5122 says nothing about reimbursement.11/

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9. See Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977, 1037 n. 185 (1975), for a discussion of why California in classifying torts as separate or community under section 5122 should be cautious in applying precedents from Arizona and Washington (as well as New Mexico).

10. In marital property law the term "dissolution" is generic, including dissolution of marriage by both divorce and death of a spouse. Although the Family Law Act of 1970 attempted to eliminate the word divorce from the legal lexicon and substitute dissolution (see Cal. Civ. Code § 4350), it is impossible for legal writers to follow the new terminology without becoming extremely cumbersome in distinguishing between dissolution of marriage in the generic sense and dissolution meaning divorce. This paper uses the word divorce to refer to divorce and uses the term dissolution generically.

11. W would invoke the reimbursement right developed by case-law. See note 15 infra and accompanying text.

There is no reported case of the community obtaining reimbursement from the other spouse's separate estate prior to dissolution. The "black letter" law has always been that dissolution is the proper time of reimbursement. See Provost v. Provost, 102 Cal. App. 775, 283 P. 842, 844 (19). Prior to 1975 and the adoption of equal management it made little difference when the reimbursement occurred. If H's community earnings had been used to pay a separate tort obligation of H's and H later inherited great wealth, immediate restitution to the community would not have benefited W, for she would not have had any management power over the newly constituted community assets. That is

Any revision of the California statutes concerning debt collection should clarify an uncertainty created by section 5122 with respect to the procedures to follow in implementing it. Should a court rendering a tort judgment classify the tort as separate or community if asked to do so by a spouse, or is the classification to be done in ancillary enforcement proceedings? If it can be done in the tort victim's suit, the spouse of the tortfeasor -- the one of the parties protected by section 5122[12] -- must be given the right to intervene. (The tort-

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not true now. When a separate tort creditor under abiding by section 5122 has exhausted the tortfeasor's separate property and then has seized some community property and the tortfeasor subsequently inherits separate wealth, an immediate reimbursement of the community would be most beneficial to the spouse of the tortfeasor and her creditors. Hopefully the courts will realize that the older cases delaying reimbursement until dissolution of marriage are not compatible with the present equal management system in effect in California since 1975. In particular, creditors of the spouse having the right to claim reimbursement ought not to have to wait until dissolution to reach the inchoate community property. Under pre-1975 law it was fairly clear in California the creditors could not in such a situation benefit from the existing reimbursement claim. Peck v. Brummagim, 31 Cal. 441 (1866). Even before equal management creditors in Washington were treated more favorably in such a case. See Conley v. Moe, 7 Wash. 2d 355, 110 P.2d 172 (1941). It is not clear in Conley whether the creditor, permitted to levy on the community-owned reimbursement claim, would be allowed to immediately assert it and reduce it to cash by bringing the cause of action against the separate estate or whether the creditor had to wait until dissolution to bring the cause of action he had garnished.

12. The nature of the protection is this: the present preserving of community property subject to equal management by the nontortfeasor spouse under Calif. Civ. Code sections 5125 and 5127, is obviously preferable in the eyes of that spouse (and particularly his or her creditors) to the loss of such property (while tortfeasor's separate assets remain) and its replacement with a community reimbursement claim not assertable until dissolution.

feasor himself is a protected party when the tort can be labeled community for section 5122 enables the tortfeasor to shield his separate property if sufficient community property exists to pay the tort judgment creditor.13/)

If the tort litigation does not result in classification of the debt as separate or community, there must be an opportunity to obtain such a classification in separate proceedings. A new statute is needed authorizing the debtor or his spouse to seek an order directing the creditor to levy on properties of the spouses in an order to be determined. Both spouses and the creditor are obviously necessary parties to such a proceeding and must be given notice. The hearing preceding such an order would necessarily be an occasion for characterizing assets as separate or commuity as well as classifying the debt. The statute should provide for charging the costs of the proceeding to the tortfeasor or conceivably to the tortfeasor's spouse if he or she initiates the proceeding.

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13. Note that the spouse (say H) having committed a community tort will not always be able to engage in self help in this situation. The community assets may be in a bank account in W's name (see Calif. Fin. Code § 851 and discussion in notes _____ and accompanying text, infra) so that H cannot withdraw the funds to pay his tort victim. If W is not going to cooperate in enabling H to protect his separate property as he is entitled to under California Civil Code section 5122(b)(2), H has got to arrange for the tort victim to obtain a judgment and then H must take appropriate steps to assure that W's bank account is levied on.

A creditor needs statutory assurance that his levy of execution will not be upset under section 5122 after it has been accomplished. Therefore, the statutory scheme should invite the creditor to give notice to the spouse of the tortfeasor (the tortfeasor himself as a party to the tort suit is well aware that a levy of execution is imminent) that he or she has so many days to file with the creditor a list of properties claimed to be primarily and secondarily liable under section 5122. (Any hearing held in court would controvert the accuracy of the priority list.) If no action were taken by the notified spouse, a levy of execution conducted after the specified period of time would be immune from an attack based on section 5122. Until a statutory procedure is enacted the spouse seeking to invoke section 5122 apparently must utilize whatever equitable procedures are generally appropriate to restrain a levy of execution. (I am unaware of any existing basis for shifting the costs of such a proceeding to the tortfeasor when it is initiated by his spouse.)

Any legislative attention to section 5122 should consider the following additional problems. First, shouldn't the statute authorize characterization of a tort debt as part community and part separate in specific fractions?14/

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14. Reppy, Community Property in California p. _____ (1980) (now in galley stage) has a hypothetical where the victim was walking by a structure when a wall collapsed on him. The structure was owned fifty percent by H's separate estate, fifty percent by the community (or 60-40 or whatever). As section 5122 is now written a literal interpretation could lead to the conclusion that any community benefit from the activity causing the tort (here maintenance of the building) renders the entire debt community. The case law relating to reimbursement at divorce arising from payment of community or separate debts with funds of a different classification than the debt recognizing partition of the debt into its community and separate components. Weinberg v. Weinberg, 67 Cal. 2d 557, 63 Cal. Rptr. 13, 432 P.2d 709 (1967). But see note _____, infra, criticizing the court for the approach it took in making such a partition.

Secondly, the statute now applies only when the tort involves "death or injury to person or property." Was this language intentionally chosen to be narrower than all tort liability, and if so what torts are excluded? (For example, is invasion of privacy an injury to the person?)[15/] Thirdly, should provision be added to allow one spouse to enjoin the other from paying the tort debt with funds that are secondarily liable under section 5122. This problem is likely to arise when the spouses are living separate and apart and jockeying for property advantages. Suppose X has a personal injury judgment against H. If it is classifiable as separate, H would like to use community funds under his management to voluntarily pay off the creditor.[16/] If the debt were community and W had access to a joint bank account that included a large amount of H's separate property, W might want to exercise her power to withdraw funds from this account to pay X.

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15. The present statutory language is useful in making clear that it is the fact of injury caused to person or property that triggers section 5122. If the injured victim waived the tort to sue in assumpsit (implied agreement to repair or pay restitution, for example), the courts will hold section 5122 implicated despite the fact that technical the action was ex contractu rather than ex delicto.

16. This would eliminate, during the period of living separate and apart, property in which H had an interest but which was liable to W's ordinary creditors (i.e., not "necessaries" creditors).

b. Community vs. Separate Classifications at Dissolution for Reimbursement Purposes.

California also characterizes obligations as community or separate at divorce. For example, unpaid outstanding debts must be so characterized in order to make the equal division of the community property mandated by California Civil Code section 4800.17/ That is, each spouse will be ordered to pay his own outstanding separate debts and the community debts outstanding will be allocated so that the sum obtained by deducting assigned community debts from community property awarded the spouse is the same for H and W. (As discussed subsequently, the allocation of debts is not binding on creditors but merely adjusts property rights between the spouses.18/)

At both divorce and dissolution by death of a spouse debts are also classified as separate or community for purposes of determining rights to reimbursement.19/ A spouse who used community funds to pay

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17. See Marriage of Epstein, 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165 (1979); Marriage of Eastis, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (1975).

18. See notes _____ and accompanying text.

19. Mariage of Walter, 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1976); Marriage of Somps, 250 Cal. App. 2d 328, 58 Cal. Rptr. 34 (1967); see generally, Gutierrez, Apportionment of Debts, in California Continuing Education of the Bar, Handling Disputes in Probate, p. 11 (1976).

his separate debts will owe reimbursement to the community for the amount "borrowed,"[20] which usually means the other spouse gets half the sum at issue. (That payee spouse as a creditor of the "borrower" spouse can under basic principles of marital property liability reach

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20. The writer is unaware of a single case granting reimbursement with interest. It appears that no-interest rule was borrowed from early Texas and Louisiana cases. (For a useful survey of reimbursement cases in all community property jurisdictions see Bartke, Yours, Mine and Ours -- Separate Title and Community Funds, 44 Wash. L. Rev. 379 (1959); see also Comment, The Husband's Use of Community Funds to Improve His Separate Property, 50 Calif. L. Rev. 844 (1962).) But in those states income from a spouse's separate property during marriage was community owned; thus the community often benefited by keeping a spouse's separate estate in financial good health by the payment of some separate debts. It is suggested that the no-interest rule is a trade-off for the special community benefit in Texas and Louisiana of ownership of rents and profits of the separate estate. Reppy, Community and Separate Interests in Pensions and Social Security Benefits after Marriage of Brown and ERISA, 25 U.C.L.A. L. Rev. 417, 466-467 n. 178 (1978). Thus, the reason for the no-interest precedent in the civil law jurisdictions does not obtain in California, where Civil Code sections 5107 and 5108 make the rents and profits from separate property also separate.

It seems unfair to let one spouse build up his separate estate by way of an interest free loan. Whatever the actual intent of the spouse using community funds to pay separate debts, that is the likely result. Whether or not the court finds a breach of the statute requiring management of the community in good faith, Cal. Civ. Code § 5125(e), at least simple interest should be given in a situation where there was no community benefit in paying the separate debt with community funds. Compound interest would seem appropriate where bad faith is shown.

for payment both the debtor spouse's separate property and his half of the community property. Whether a separate proceeding apart from the divorce or probate proceeding must be brought is unsettled.21/)

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21. The only thing that is clear is that the divorce court can invade the obligor spouse's half of the community property if the reimbursement claim arises because the obligor "deliberately misappropriated" the community property. Calif. Civ. Code § 4800(b)(2). Legislative history indicates this statute envisions a serious, almost fraudulent squandering of the community property. See Grant, How Much of a Partnership Is Marriage?, 23 Hastings L.J. 249, 253-254 (1971). The negative implications of section 4800(b)(2) are that if H, for example, used community funds in good faith to pay his separate creditor because he was temporarily out of separate funds, the reimbursement claim of W could not be handled as part of the division of the marital property.

This writer considers it senseless to require that a separate action be brought for reimbursement based on the culpability of the obligor's conduct (or based on whether the claimant needs to reach the obligor's separate property to be fully compensated). The cases such as those cited in note 19, supra, suggest that some obligor spouses have not raised jurisdictional objections. Yet the problem plainly exists. Statutory amendments are in order to specifically provide that the divorce court and probate court have jurisdiction to adjudicate all reimbursement claims arising between the spouses out of expenditures of community and separate property and that a judgment ordering reimbursement can be satisfied out of all of the property owned by the debtor or, if he is dead, by his estate.

If legislation is to be enacted to clarify the rights and procedures of one spouse as a creditor of the other at divorce it should also specifically abrogate an illogical departure from the caselaw that ordinarily allows reimbursement where a separate debt has been paid with community funds. Following Weinberg v. Weinberg, 22/ the recent decision of Marriage of Smaltz23/ classified alimony obligations owed by H to his first wife and paid during marriage to his second wife as community debts! Although H used community funds to make the payments, reimbursement was denied at dissolution of the second marriage. The benefit test was not used. Rather, the debt was found community because the existence of community funds during the second marriage (i.e., ability of H to pay) prevented H from having his alimony obligation modified.24/ The court in Smaltz also stressed that H acted in good faith, since he had no separate funds with which to pay the alimony.

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22. 67 Cal. 2d 557, 63 Cal. Rptr. 13, 432 P.2d 709 (1967).

23. 82 Cal. App. 3d 568, 147 Cal. Rptr. 154 (1978).

24. In Weinberg, unlike Smaltz, H had both community property of the second marriage and separate property to use to pay alimony and child support and the debts were apportioned as part separate and part community based on the amount of each estate on hand when the payments were made.

Under the appropriate community- or separate-benefit test used to determine reimbursement rights good faith is irrelevant. If W is to be an equal owner along with H of the community[25] under a scheme of equal management, her ownership rights are lost if H's use of community funds for his separate purposes does not convert W's community interest from a share of specific assets into a reimbursement claim.[26] The approach to reimbursement taken in Weinberg and Smaltz is illogical[27] and fails to protect each spouse's community interest.

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25. Cal. Civ. Code § 5105.

26. See McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949), where before there was California precedent for reimbursement at dissolution in cases where H used community funds to pay separate debts, the New Mexico court, not anticipating that such a remedy would be developed in California, accused Calfornia of failing to recognize W as a co-owner of community property notwithstanding the 1927 legislation declaring that she was. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

27. Suppose before marriage H maliciously battered P while trying to remove P from H's separate property. After marriage H earns great wealth. In P's tort suit where punitive damages are sought, undoubtedly the jury will be advised as to the amount of community wealth in deciding the appropriate measure of punitive damages. And under Cal. Civ. Code § 5122(b) the community property can be reached to pay such damages once H's separate estate is exhausted. Under the Weinberg approach to debt classification at dissolution the obligation to pay punitive damages would be at least partly a community debt (entirely so if at the time the damages were assessed H no longer had any separate property) because the amount of damages depended on the amount of community property.

Or consider a case where H before marriage settles a tort suit by agreeing to pay his victim five percent of all of H's future earnings so long as they both shall live. Under Weinberg the obligation after H's marriage should be a community debt!

While divorce courts are clearly required to classify outstanding debts as community or separate in dividing the community property, the statutes are unclear as to whether the same approach is to be taken by a probate court with respect to outstanding debts when death dissolves the community. California Probate Code section 980(e) says that if the parties before a probate court (e.g., surviving spouse and decedent's personal representative) cannot agree on how outstanding debts should be paid, "each debt shall be apportioned to all of the property of the spouses liable for the debt, as determined by the laws of this state, in the proportion determined by the value of the property less any liens and encumbrances at the date of death, and the responsibility to pay the debt shall be allocated accordingly." Since, as shall be shown, community property is liable to creditors of H to pay most of his separate debts, literally applied section 980(e) turns what would be a separate debt at divorce into a partly community debt at dissolution by death. For example, suppose H before marriage defaulted on a contrat with P and P obtained a judgment for $100,000. H then marries and earns considerable community property. The marriage is dissolved when there is on hand $300,000 of H's separate property and $300,000 community property (all H's earnings). If dissolution is by divorce, the court will order H to pay the debt and disregard it (as a separate debt) in dividing the $300,000 of community funds. If dissolution is by death of W with a will naming

Mother her universal legatee, section 980(e) appears to order reduction of the community estate (half of which is subject to W's testamentary power) by $50,000, taken to pay P even though the obligation to P was H's separate debt.[28] Possibly the injustice can be avoided by allowing W's estate a creditor's claim against H for $50,000 after P has been paid, perhaps in a collateral proceeding. But a strong argument can be made that the legislature would not have wanted such circular proceedings and would have provided for payment of separate debts at death with separate funds if that was considered appropriate.

San Francisco attorney Max Gutierrez,[29] has proposed a non-literal interpretation of section 980(e) to avoid the injustices caused by literal interpretation. He contends the words "as determined by the laws of this state" makes reference to the case-law doctrine that, ultimately, a sposue's separate estate should be responsible for his separate debts as well as to such statutory provisions as California Civil Code section 5116, allowing a separate creditor of H to levy on community property. The writer of this article

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28. If H's death had dissolved the community with a will leaving all to his mother, section 980(e) would apparently reduce by $25,000 the half of the community property owned by W (see Cal. Prob. Code § 201).

29. Supra note 19.

hopes that probate courts will follow Mr. Gutierrez' interpretation of section 980(e). Literally, however, the phrase "as determined by the laws of this state" refers to property that is liable on a debt and not to the reimbursement process. Thus, amendment of section 980(e) is urgently needed to make clear that the apportionment called for is to be used only when an outstanding debt cannot be classified as community or separate (or a specific mixture of both determined under the benefit test).

2. The partitionable community system of debt liability.

The second system of determining how much marital property can be reached by the creditors of a spouse is called the partitionable community system. In the case of separate creditors, it is more favorable than the Washington-Arizona approach but less than the managerial system used in most community property states.

The partitionable-community system was developed in New Mexico case law[30] and codified in 1973 when New Mexico reformed its community property legislation while adopting equal management.[31] Under it debts are classified as separate or community under what is essentially a benefit test and separate property is primarily liable for the owner spouse's separate debts, community property for community debts. The unique feature of the system arises when the separate property of the spouse who has incurred a separate debt is exhausted.

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30. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

31. Now codified as New Mex. Stat. Ann. §§ 40-3-9 through 40-3-11.

The creditor then can reach the debtor's half interest in the community property. The statute does not say what happens to the remaining half of the community property.32/ One would think it should be converted into the nondebtor spouse's separate property, but the New Mexico Supreme Court has implied that instead it remains community property with the community also having a reimbursement claim against the debtor's separate estate.33/

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32. Under the supremacy clause of the U.S. constitution, the federal government has compelled Washington and Arizona to use the partitionable community system when the separate creditor of the spouse is the Internal Revenue Service collecting a separate (e.g., prenuptial) tax debt, since this system provides more property the I.R.S. can levy on. United States v. Overman, 424 F.2d 1142 (9th Cir. 1970) (Washington property); In re Ackerman, 424 F.2d 1148 (9th Cir. 1970) (Arizona property). Neither decision even suggests what happens to the remaining half of the community property.

33. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990, ____ (1949): "Proper charges and credits may be made, as in cases where community funds are used to improve the separate property of one of the spouses." But query if the remaining half is to be treated like ordinary community property. If so, the debtor spouse's separate creditors could levy again on the remaining half and reduce it to one fourth, etc., etc. Perhaps the court suggests that for management and control purposes the property remains community (i.e., if realty, the nondebtor spouse cannot alone convey it), although it will be recognized when appropriate that the original debtor spouse has no ownership interest in it. The writer of this article proposes that if and when California faces the question of what happens to the remaining half of the property after its partition to pay a creditor (see text accompanying notes 34-37, infra), it simplify matters by holding the partition converts the remaining half into the nondebtor spouse's separate property.

a. Partitionable community under California debt liability law

Although the California Supreme Court once stated that an act of one spouse could not result in a partition of the community other than at its dissolution,[34] two statutes seem to call for such an approach where the creditor seeking payment is a child of one spouse alone to whom child support is owed. Enacted in 1979, California Civil Code section 5127.6 provides that "the community property interest [i.e., one half] of a natural[35] or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any child who resides with the child's natural or adoptive parent who is married to such spouse."[36] A companion statute, California Civil Code section 2157.5 provides that "[t]he wife's

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34. Britton v. Hammell, 4 Cal. 2d 690, 52 P.2d 221, 222 (1935).

35. Apparently meaning simply there is a blood relation rather than referring to legitimate or illegitimate birth. But cf. the use of the same word in Cal. Civ. Code § 199, discussed in note 38, infra, and accompanying text.

36. The statute excludes "from such duty to care for and support" existing child support obligations of the parent's spouse.

interest in the community property, including the earnings of her husband, is liable for the support of her children . . . ."[37/] Read in

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37. The statute goes on to exclude $300 per month "in determining the wife's interest in the community earnings of her husband." Section 5127 was originally enacted in 1971 when W had no management power over H's earnings. It apparently was retained when the legislature reformed the community property laws effective 1975 as an exception to new Civil Code section 199, see text accompanying note ____, infra, which otherwise would have insulated all of H's earnings from liability to W's children for support. Or perhaps section 5127.5 was simply overlooked during the 1973-74 legislative sessions when the four bills comprising the reform package were drafted, debated, and enacted. See generally Reppy, supra note 9. A strong argument that section 5127.5 was impliedly repealed in 1975 when section 199 became effective existed until 1979 when the legislature enacted section 5127.6, quoted in part at text accompanying note 36, supra. The new statute begins with these words: "Notwithstanding Section 5127.5." Thus the legislature clearly considered the latter statute to be still in effect.

The writer of this article considers section 5127.5 patently unconstitutional because of sex discrimination against men.

In a case where H's children are not living with H and his wife, her salary is not liable at all for child support owed by H to the children because of the effect of section 199. But where W's children are not living with W and her husband and she owes child support, H's salary over $300 per month is liable.

Under a strict scrutiny approach to the constitutionality of sex discrimination under the California equal protection clause, Arp v. Workers' Comp. Appeal Bd., 19 Cal. 3d 935, 138 Cal. Rptr. 293, 563 P.2d 849 (197_) (involving anti-male discrimination), this discrimination cannot possibly be held. Even under the watered down version of strict scrutiny now applied by the California Supreme Court, Michael M. v. Superior Court, ____ Cal. 3d ____, 159 Cal. Rptr. 340, 601 P.2d 572 (1979), and the "middle tier" test under the federal constitution's fourteenth amendment equal protection clause, e.g., Craig v. Boren, 429 U.S. 190 (1976), the discrimination seems indefensible. True, the legislature could take note that the incomes of working women are lower generally than those of men doing equivalent work, and this might make some different treatment for W and H permissible (such as a $500 per month exemption for W vis a vis the $300 for H), but the chosen remedy wholly protects large earnings of wealthy wives whose husbands owe child support and thus seems not sufficiently tailored to advance a legislative purpose of redressing economic discrimination. But cf. Kahn v. Shevin, 416 U.S. 351 (1974) (exemption for all widows, including the wealthy, upheld).

It is reasonable to assume that section 5127.5 is unconstitutional on its face and that the "cure" is to apply it to wives whose husbands owe child support as well as to husbands.

conjunction with section 5127.6, this provision applies only when the child[ren] of W do not reside with her. When they do, the more specific section 5127.6 applies.

Apparently, both sections 5127.5 and 5127.6 are intended to be exceptions to California Civil Code section 199. It says the obligation of H or W to support a "natural" child "may be satisfied only from, the total earnings or the assets acquired therefrom, and separate property" of the parent.38/ Obviously, the words "satisfied

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38. Section 199 was ruled unconstitutional in 59 Ops. Cal. Atty. Gen. 15 (1976), because of discrimination in favor of bastards and against legitimate children. The attorney general construed "natural" to mean legitimate. This meant that a bastard could reach all his father's wife's earnings under Civil Code section 5116 while a legitimate child could reach none. It now appears due to the use of the word "natural" in section 5127.6, enacted in 1979, note 35 supra and accompanying text, that the legislature intends the word to mean a child related by blood rather than adopted. Section 199 seems still to be unconstitutional in discriminating in favor of adopted children not living with their father. They can reach for support all of the earnings of their father's wife, while similarly situated nonadopted children can reach none. The "cure" seems to be to remove the special benefit for adopteds by applying section 199 to them too. Legislation amending section 199 to make it apply to adopteds as well as "natural" is in order. Moreover, since natural normally means bastard when applied to a child, Black's Law Dicitionary 303 (4th ed. 1951), the reform legislation should substitute the term blood-related for natural in both sections 199 and 5127.5.

only from" in section 199 make it conflict directly with sections 5127.5 and 5127.6. Clarifying legislation would be advisable, perhaps by adding to the beginning of section 199 the following: "Except as provided in sections 5127.5 and 5127.6."

Legislation is certainly needed to specifically state that when a child owed support proceeds under either section 5127.5 or 5127.6 to partition a part of the community property by seizing his parent's half interest therein, the remaining half becomes the nonparent spouse's separate property.

3. The Managerial System of Debt Liability

California and four other community property states generally determine the liability of community and separate property for a spouse's debt on the basis of whether the debtor has management and control over the property. If so, even if that management is shared with the other, nondebtor spouse, the property is liable.39/ The adoption of this system followed almost inevitably from California's

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39. E.g., Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941); McClain v. Tufts, 83 Cal. App. 2d 140, 187 P.2d 818 (1947).
One policy behind this approach is that if a debtor spouse has the power to voluntarily exercise his control over property to pay a debt the creditor should be able to compel the spouse to exercise that power. However, the position of the creditor is somewhat stronger than this policy would require. A spouse has management power over community realty under California Civil Code section 5127 and acting alone can grant licenses to use such realty, lease it for less than a year, and alienate the profits. The statute does not authorize a spouse to convey community realty without the written joinder of the other. Thus, one spouse cannot use community realty to pay a creditor, but under the managerial system of creditors' rights the creditor can levy on community realty.

rejection until 1927 of a true community of property system in which the spouses were equal owners.40/ Since so-called community property was held to be owned entirely by H with W having no more than the expectancy of an heir apparent,41/ it was not surprising that the property was also treated as solely owned by H (rather than by some marital partnership) when it came to the question of what creditors could reach the property. And, since the California Supreme Court had rejected the civil law concept of shared ownership,42/ and had even construed the marital property provision of the 1849 constitution as adopting English common law concepts despite its reference to community property,43/ it is not surprising that English common law influenced the development of the case-law respecting rights of creditors to reach marital property.

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40. See generally Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 3-36; Reppy, supra note 9, at 1055-59.

41. Van Maren v. Johnson, 15 Cal. 308 (1860).

42. See, e.g., Creech v. Capitol Mack, Inc., 287 So.2d 497 (La. 1973), reviewing Spanish authorities.

43. See George v. Ransom, 15 Cal. 322 (1860), holding unconstitutional under the provision assuring the right of married women to own separate property the civil law rule that the rents and profits accruing during marriage from separate property (including W's) were community-owned. It is abundantly clear from the debates of the 1849 constitutional convention that the marital property provision adopted was to retain the Spanish-Mexican community property system then in effect in California rather than to convert to a modified form of English common law. See J. Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October 1849 at 257-269 (1850).

When, in 1927, California finally by statute accepted a true community of property theory by recognizing W's co-equal ownership,[44] the legislation did not indicate any intention of changing the previously developed developed system of determining creditors' rights,[45] as by shifting to Washington and Arizona's community versus separate debt system. Other community property jurisdictions had found the managerial system of creditors' rights consistent with the shared-ownership concept,[46] and although one leading treatise disagrees,[47] the Louisiana Supreme Court in a scholarly

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44. See the present Civil Code section 5105.

45. See the discussion in Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941).

46. For example, both Idaho and Texas long recognized the shared-ownership principle while allowing a managing spouse's "separate" creditor to reach community property. See Kohny v. Dunbar, 21 Idaho 258, 121 P. 544 (1912) (W is equal owner); W. Brockelbank, The Community Property Law of Idaho 270 (1962); Holt v. Empey, 32 Idaho 106, 178 P. 703 (1919) (community property liable for all of H's debts); Wright v. Hays' Administrator, 10 Tex. 130 (1853) (H and W are equal owners); 1 Oakes, Speer's Marital Rights in Texas § 375 (1962); Tex. Fam. Code § 5.61(c); Moody v. Smoot, 78 Tex. 119, 125 S.W. 981 (1890); Taylor v. Murphy, 50 Tex. 291 (1878).

47. de Funiak and Vaughn, Principles of Community Property 372-73, 380-82 (2d ed. 1971), asserting that at Spanish law a separate creditor of a spouse could not reach community property.

opinion has concluded that the managerial system is the approach utilized in Spanish civil law of community property.48/

In 1973 and 1974 when California community property statutes were closely re-examined as part of the equal management reform the question of creditors' rights again arose and the legislature chose to adhere generally to the managerial system. A preamble to one of the reform packages states in pertinent part:

> The Legislature finds and declares that . . . the liability of community property for the debts of the spouses has been coextensive with the right to manage and control community property and should remain so 49/

The statutory foundation for the managerial system consists of Civil Code section 5121, making a spouse's separate property liable for all of the spouse's debts and section 5116 which provides:

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48. Creech v. Capitol Mack, Inc., 287 So.2d 497 (La. 1973).

49. 1974 Cal. Stats. ch. 1206, § 1, p. 2609. As observed in Comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Cal. L. Rev. 1610, 1629 (1975), the context of this declaration was creating a legislative history that would bolster the case for constitutionality of retroactive application of the rights of W's creditors to reach community property formerly managed solely by H and H's creditors to reach community property formerly managed solely by W. The desired holding was forthcoming in Robertson v. Willis, 77 Cal. App. 3d 358, 143 Cal. Rptr. 523 (1978).

> The property of the community is liable for the contracts of either spouse which are made after marriage and prior to or on or after January 1, 1975.

a. Exceptions to the Managerial System Increasing Creditors' Rights

California law recognizes four situations where a creditor of one spouse can reach marital property not subject to the debtor's management.

(1) Instant Agency.

Before a wife had management and control of community property, if she carried on a trade or profession but had not qualified as a "sole trader"[50] community property would not, under basic creditors' rights theories, be liable on her contract even though she entered into it in carrying on a trade or business that produced community profits. This situation was so unfair to creditors that the courts unreasonably stretched the law of agency to give them relief. In the flimsiest of proof the court would find that W had made the contract as agent of H. Thus, in Hulsman v. Ireland,[51] W and a friend began operating a restaurant as joint venturers. They hired H as an employee fo the restaurant. W purchased food on credit and when W did not pay the creditor sued both her and H. The court found W was

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50. Cal. Code Civ. Proc. §§ 1811-1821; see Reppy, Considerations Respecting Repeal of the "Sole Trader Act" (1979), prepared for the California Law Revision Commission.

51. 205 Cal. 345, 270 P. 948 (1928).

acting as H's agent in operating the restaurant because he approved of her doing so and permitted her to earn community property. This was a "clear case of ratification of the acts of the wife." It mattered not that the creditor was unaware of such agency; H could be liable as an undisclosed principal.

The upshot was that not only were the community assets of such a business liable to W's creditor but so was H's separate property for the theory used made her contract his.

Would the separate property of a husband be liable today for W's business contract on the same theory if H approved of W being in business and benefit from her earning community income? Hopefully not. Cases like Hulsman were erroneous application of agency principles when decided and ought to be overruled. But they can be distinguished. In Hulsman H at least had the legal power to forbid W from using community property in her business. Under present equal management,52/ H does not have that power. There is nothing for him to paprove or disapprove (unless W's business requires a conveyance of community realty). Accordingly, before H's separate property is liable for W's business debts an actual agency should have to be

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52. Cal. Civ. Code § 5125. Indeed, under subsection (d) W today can prevent H from interfering with her own community business.

proved today. Hulsman is so obviously out-of-step with contemporary equal management that no legislation abrogating its rule of law seems required.

(2) The "Necessaries" Doctrine.

Under the "necessaries" doctrine the separate property of one spouse may be liable for obligations incurred by the other and probably even for contracts and quasi-contracts to which neither spouse is a party. The doctrine is based on three statutes, all of which were redrafted in 1973-1974 as part of the equal management reform legislation to be gender neutral. (Previously the statutes imposed much heavier burdens on H's separate property than on W's.)

Civil Code section 5121 provides:

> The separate property of a spouse is liable for the debts of the spouse contracted before or after marriage of the spouse but is not liable for the debts of the other spouse contracted after marriage; provided that the separate property of the spouse is liable for the payment of debts contracted by either spouse for the necessaries of life pursuant to section 2132.

Section 5132 in turn reads as follows:

> A spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property . . . .[53/]

The third relevant statute cuts back on the necessaries doctrine -- Civil Code section 5131, providing:

> A spouse is not liable for the support of the other spouse when the other spouse is living separate from the spouse by agreement unless such support is stipulated in the agreement.

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53. The statute refers to California Civil Code section 4803 for the definition of quasi-community property. In brief, that is property acquired during marriage by a spouse while domiciled in another state which would have been community on the facts had the spouse been a California domicile. Probably the legislators had in mind domicile in a non-community property state, but section 4803 is more broadly drafted. It classifies as quasi-community property H's earnings while the couple were domiciled in Nevada, Idaho, Arizona, etc., before moving to California. It is suggested that section 4800 be amended so that its wording does not make such out-of-state community property quasi-community.

(a) Problems defining a "necessary of life"

There are several cases defining "necessaries of life." As expected, they would include food, shelter, and medical care.54/ But some rather surprising debts have been granted "necessaries" status to make liable property not subject to the management of the debtor spouse. In Wisnom v. McCarthy,55/ W, who apparently was in good health, hired a maid to do housework. The spouses were living apart (but not by agreement so that the predecessor of section 5131 was not applicable). Because of the "economic and social position" of the spouses, a maid for W was held to be a "necessary of life" and H was personally liable for the maid's salary. The Wisnom court seems to have tortured the necessaries doctrine out of sympathy for the maid, because when the case arose community property was not liable for W's non-necessaries contract. The decision reeks of an elitism that seems ludicrous under contemporary attitudes about wealth and the role of women.

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54. See, e.g., Smith v. Bentson, 127 Cal. App. Supp. 789, 15 P.2d 910 (Los Angeles County Superior Ct. App. Dept. 1952); Evans v. Noonan, 20 Cal. App. 288, 128 P. 794 (1912); Davis v. Fyfe, 107 Cal. App. 281, 290 P. 468 (1930). Washington has held that defense counsel of a spouse accused of crime is a "necessary" so that if the accused's spouse has separate wealth the defendant is not a pauper entitled to the services of the public defender. State v. Clark, 88 Wash. 2d 533, 563 P.2d 1253 (1977). Such a conclusion is logical but will lead to such bizarre results as requiring W to use her separate inheritance from Mother to pay for H's defense against criminal charges that he murdered Mother.

55. 48 Cal. App. 697, 192 P. 337 (1920).

What is reasonably debatable is whether the relative wealth of the spouses should ever affect the characterization of a debt as a "necessaries" obligation. For example, hospital care is obviously a "necessary" if a spouse is seriously ill, but if a private, single-bedded hospital room is contracted for, should the added expense (compared, for example, to the typical three-bedded hospital room) fall under the "necessaries" doctrine? In my view it would be unfortunate to answer this question based on the economic (let alone social) standing of the family. The fact that the patient had always had the most expensive health care in the past should nto convert an extravagance into a "necessary."

Given cases like Wisnom, it is probably necessary to amend sections 5121 or 5132, however, to prevent the courts from using a sliding scale based on wealth to determine what is a "necessary."

An ambiguity exists as to whether the necessaries doctrine akpplies to debts contracted by third persons or to contract obligations to which neither spouse is a party. In Credit Bureau of San Diego v. Johnson,56/ an accident rendered H unconscious and H's family

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56. 61 Cal. App. 2d Supp. 834, 142 P.2d 963 (1943).

physician hired a specialist surgeon to operate on H. The court said W would be liable.[57]

The applicable statutes then contained wording similar to that found now in section 5121 -- making that statute applicable to "debts contracted by either spouse" (emphasis added) -- and sections 5132, imposing an obligation of "support" not limited to contracts entered into by a spouse. Johnson apparently did not see the problem, that the contract was made by the family physician, not W. Or else it was clear to the court that notwithstanding section 5121, the support statute, section 5132, made W liable to the surgeon.

Before the 1975 reform legislation the statute directed at liability of H's separate property avoided the problem as the language did not require a spouse to be party to the contract.[58] Thus, in St. Vincent's

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57. At that time under former Civil Code section 171 most of W's separate property was exempt from "necessaries" liability. Property that was separately hers because of gift from H was liable, and if the couple had transmuted community property to joint tenancy or any other form of separate property, W's separate interest would be liable.

58. Former California Civil Code section 174, enacted in 1872, provided: "If the husband neglect to make adequate provision for the support of his wife, except in cases mentioned in 5131, any other person may in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband." It certainly was sound of the legislature to drop the language that limited the credit vendot to a quantum valebant suit rather than suing on the actual contract for the stipulated price.

Institution for Insane v. Davis,[59] the creditor found the insane W wandering around and took care of her without even knowing of H's existence. The court had no difficulty holding H liable under the "necessaries" statute applicable then to husbands. Almost certainly the courts would reach the same result today, holding that section 5132 is the pertinent statute, and it does not require that the obligations have been entered into by W (who was insane in Davis and simply could not have made a contract). However, to avoid uncertainty an amendment to section 5121 is advisable. It should extend liability of a spouse's separate property for "necessaries" obligations whether or not contracted by the other spouse.

(b) Problems arising from reference to quasi-community property.

Redrafting of section 5132 is urgently needed. It makes no sense as written. The problem arises from the reference to quasi-community proeprty. This concept usually has legal significance only at disso-

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59. 129 Cal. 20, 61 P. 477 (1900).

lution of marriage by death[60] or divorce[61], although the homestead law and gift tax law do recognize the concept during the marriage.[62]

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60. At which time Cal. Prob. Code §§ 201.5 -201.8 give the surviving spouse an interest in the quasi-community property closely analogous to a community property half ownership. The Probate Code sections do not use the term quasi-community property but the definition of property covered by the sections -- see Cal. Prob. Code § 201.5(a) -- is very similar to the definition of quasi-community property in the divorce context. The difference is that at divorce but not death the doctrine includes out-of-state realty. When the title holder dies, it seems clear the Probate Code sections envision any court determining the rights of the survivor to use situs law rather than California law. The quasicommunity property doctrine has no application when the marriage is dissolved by death of the spouse not holding "title" to the property. Paley v. Bank of America, 159 Cal. App. 2d 500, 324 P.2d 35 (1958). However, Cal. Prob. Code § 201.5(b) seems literally to confer a testamentary power of appointment over half the quasi-community property on the nonacquiring spouse who predeceases the title-holding spouse where there has been a change in form of the asset (e.g., a sale and reinvestment of proceeds) after its initial acquisition in another domicile. A technical amendment to conform subsection (b) to the language of subsection (a) so that it covers only acquisitions originally made by the decedent spouse and not the survivor spouse is in order.

61. In which case Cal. Civ. Code § 4800(a) calls for dividing the quasi-community property in the same manner as community property.

62. See Cal. Rev. & Tax Code §§ 15301 and 15301.4; see also § 15303.5, allowing a tax-free transmutation from quasi-community to community property. Respecting quasi-community property and homesteads, see Comment, Marital Property and the Conflict of Laws: The Constitutionality of the Quasi-Community Property Legislation, 54 Cal. L. Rev. 252, 269-72 (1966).

Suppose W buys necessaries on credit and does not pay. Her creditor obtains judgment. In seeking to collect on it he learns all the community property of the spouses is exempt under Civil Code sections 690.1 et seq. and other applicable exemption statutes. W has no separate property. Can creditor levy on H's separate property (assuming for the present) the judgment runs against H as well as W? Section 5121 incorporates the limitations in the necessaries doctrine found in section 5132, which applied literally finds no support duty attaching to H's separate property because community property does exist. That cannot be what the legislature intended. The word "nonexempt" should be implied to modify the term "community property" in section 5132. An amendment to the section clarifying this ambiguity is in order.

Suppose the necessaries creditor's judgment is for $1000 and the nonexempt community property totals $500. There is some community property on hand; does that mean the separate property cannot be reached? of course the legislature did not intend such a result, and section 5132 must be determined to authorize the creditor himself to exhaust the community property by levy of execution so that H's separate property is then liable.

A similar construction is compelled if the debt is $1000 and there is on hand $500 of quasi-community property owned by W plus non-quasi-community separate property of H. The creditor can by initial levy exhaust the quasi-community property of W's so that the conditions of section 5132 making H's separate property liable for necessaries are met.

Suppose, however, the $500 of quasi-community property is owned by H, not W? By what authority may creditor levy on anything now? The quasi-community property is H's separate property, clearly, that section 5121 makes liable, but section 5132 qualifies section 5121 and limits its scope. Taking the statutes literally, apparently the creditor cannot reach any of the property owned by H.

Obviously that was not what the legislature intended. Section 5132 must have been intended to be a pecking-order statute. The necessaries creditor can be required by the spouses to levy in the following order: community property; and when it is exhausted, quasi-community property; and when it is exhausted, separate property of the nondebtor spouse. What is completely unclear is where the separate property of the debtor spouse fits into the pecking order? Suppose debtor W was separately wealthy but there is no community property and

none of W's separate property is quasi-community? H has some quasi-community property? Can W compel creditor to levy on H's quasi-community property? Can H compel creditor to levy on W's ordinary separate property because she is the debtor spouse? Probably not.

Likewise, suppose both H and W have separate property that is not quasi-community. Can nondebtor H compel the creditor to levy on W's separate property? Apparently not.[62½]

(c) Problems concerning rights of reimbursement

If creditor elects to levy on W's property or on H's can the spouse who ends up paying for the necessaries get reimbursement as to a half share of the amount paid when the marriage is later dissolved by divorce or death? Some language in the case of See v. See,[63] would support a flat rule that any time separate property of a spouse is used to pay for necessaries there can be no reimbursement.

62½. Cf. Estate of Weringer, 100 Cal. 345, 34 P. 825 (1893), where the issue was whether W's estate, which may have included separate property, or H should pay medical bills for care rendered to the dying W. Citing the necessaries statute (former Cal. Civ. Code § 174) the court apparently holds H is responsible.

63. 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

But See is readily distinguishable. That case arose before equal management under circumstances where all the community property was managed solely by H. The Court was in a position to declare that it was H's fault that the community property was exhausted when H used separate funds to pay for family expenses.

Under equal management it may be the fault of the debtor -- whose spouse's separate property has been seized by a necessaries creditor -- that there was no community property on hand when the necessaries creditor had to be paid. The debtor spouse may have foolishly invested the community property or exhausted it on an extravagant spending spree. It certainly is not the fault of the separate property owner in such a case that no community property was on hand.64/

The See rule is also undesirable because a well-advised spouse in most instances can readily avoid it. If he can get an unsecured loan with the lender relying primarily on expected future community earnings for repayment,65/ these loan proceeds can be used rather than

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64. On the significance of fault in the reimbursement context compare See with Beam v. Bank of America, 6 Cal. 3d 12, 98 Cal. Rptr. 137, 490 P.2d 257 (1971).

65. There is a presumption that money borrowed during marriage is community; to overcome it the proof must show the lender relied for repaying primarily on the separate property of a spouse. Ford v. Ford, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435 (1969); Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953). So far there is no authority for apportioning the loan proceeds into part separate and part community when the lender relied on both estates in making the loan.

separate funds to pay the necessaries creditor. If subsequently acquired community funds are used to repay the lender, See could not have any application. Even if separate funds were used to repay the loan it is not clear whether the loan itself would be treated as a family expense under See.

If, to avoid See, H as the owner of separate property borrowed community funds from as bank to pay a necessaries creditor, the community would have to repay with interest. Can H also avoid See by the device of writing out a memo to the effect that his separate estate was makign a loan (interest free) to the community?66/ Why shouldn't the community get the benefit of such an interest-free loan? But if See can so readily be avoided by H scribbling out a memorandum of "loan" when he pays the necessaries creditor, the no reimbursement rule is simply a snare for the separate property owners lacking sharp legal advice.

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66. Compare Newland v. Newland, 529 S.W.2d 105 (Tex. Civ. App. 1975), writ dism'd, where H's after-the-fact testimony that a transfer of funds form a community to separate account was actually a loan allowed H to aovid a rule of Texas law somewhat analogous to See.

See has been cited by the state Supreme Court in a case dealing with post-1975 law as if its no-reimbursement rule were still in effect,67/ although apparently the full range of anti-See arguments have not been presented to the court. If See was correct when decided, it was only because the caselaw as well as the statutes were at that time conferring special benefits on wives to indirectly compensate them for the more extensive management powers over community property given husbands simply because of their sex. For example, at the time of See, H had an unqualified duty to support W with his separate property but hers was liable for his support only if he was unable to work because of "infirmity."68/

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67. Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 165, 154 Cal. Rptr. 413 (1979), holding H could not obtain reimbursement for necessaries paid for with his post-separation earnings that were separate property of H's under the living-apart doctrine, Cal. Civ. Code § 5118. But Epstein was not a case where W herself had separate wealth.

68. Compare former California Civil Code section 174 (H's separate property laible) with former section 176 (W's separate property, H's "infirmity").

The author believes See should be legislatively abrogated or judicially overruled. If it is to be retained at all the See rule of no-reimbursement should be made inapplicable to situations where, when community property is exhausted, both H and W own separate wealth. If one of them pays a necessaries creditor voluntarily or if the creditor levies only on the property of one of them it seems shocking, since the spouses' support obligations are equal now under sections 5121 and 5132, not to allow a reimbursement at dissolution that will result in the spouses' separate estates sharing the task of supporting the family.69/ Alternatively, the statutory scheme could authorize one

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69. The reimbursement could require W's separate estate to pay to H's half of the net amount of family expenses paid for with his separate property in excess of htat paid for by W's separate property. Or pro-ration could be based on the relative amounts of separate property each owned when the debt was paid. That is, if H used $1000 of his separate funds to pay a neacessaries creditor when there was no community property and he had $20,000 separate property and W had $60,000, H's claim for reimbursement is for $750, since W should pay for seventy-five percent of the obligation.

Reimbursement approached in either such manner should be granted even if there was community property on hand at the time H paid the debt. Particularly should this be so if the community property was not liquid. It would be absurd to require H to sell the family community-owned car, for example, in order to avoid a reimbursement rule that would apply if he used his separate cash on hand then to pay the necessaries creditor. Reimbursement should be denied only if the evidence shows the spouse using his separate funds for family expenses intended to waive the right to have the other spouse ultimately share a fair portion of the family support burden.

spouse to direct the levying creditor to seize equal amounts of the separate property of both H and W.

See should also be inapplicable where, at the time a necessaries creditor must be paid, one spouse has separate property and the other spouse none, but the latter, prior to dissolution of the marriage, inherits or otherwise obtains separate wealth.

In sum, extensive revision of Civil Code sections 5121 and 5132 are needed. It is strongly recommended that all reference to quasi-community property be eliminated. If the legislation abrogates See, distinguishing between quasi-community and ordinary separate property will be completely unnecessary because the separate estate will be reimbursed at dissolution.

Even if See is fully retained adding quasi-community property to the pecking order of liability is sensible only where the spouses have separated. With a divorce looming, the obligation of the spouse who owns the quasi-community property to share it with the other spouse is real and not just hypothetical. If it is important to distinguish between quasi-community and ordinary separate property in establishing an order of liability for necessaries debts, why isn't the same distinction appropriate in the other statute dealing with priority of liability, Civil Code section 5122, the tort liability statute?

(d) Need to clarify procedures

Sections 5121 and 5132 should be replaced by a statute defining a necessaries creditor (so as to eliminate distinctions based on wealth and social status) and empowering him to levy execution on all marital property: community, H's separate property, and W's separate property, without distinction. The statute should provide a procedure whereby one of the spouses can invoke a priority-of-liability provision, directing the creditor to community property not managed by the spouse or which the spouse cannot unilaterally convey to the creditor to pay the debt. Where it is necessary to resot to separate property to pay the necessaries creditor, the statute should authorize reimbursement at dissolution of marriage to the separate estate that pays the obligation (at least if the other spouse has or later obtains separate property). The statute should specifically state that if neither spouse invokes the priority-of-liability provisions, the creditor's levy cannot later be set aside even if the creditor seizes separate property when nonexempt community funds were on hand.

The legislature should consider whether to continue in effect the rule that the necessaries creditor cannot reach the separate property of a spouse who was not made a party to the action and did not become a judgment debtor.70/

That rule developed at a time when the spouses practically lived separate in property. There was no shared management. Now, if W is defendant she represents H in the litigation so as to bind his half interest in the community property. Should his separate estate be treated differently? Yes, if the spouses are then living separate and apart, particularly if there is no community property (or very little of it) compared to the amount of the nondebtor spouse's non-quasi-community separate estate. In such a situation the debtor spouse would have little incentive to defend the suit. In other situations, however, a needless multiplicity of actions results. The plaintiff who sues only the debtor spouse may be surprised that nonexempt community funds on hand are insufficient to pay off the judgment. Now,

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70. See, e.g., Evans v. Noonan, 20 Cal. App. 288, 128 P. 794 (1912); Credit Bureau of San Diego v. Johnson, 61 Cal. App. 2d Supp. 834, 142 P.2d 963 (San Diego County Super Ct. App. Dept. 1952). To obtain judgment against the nondebtor spouse, the necessaries creditor need not prove that that defendant actually has any separate property. Credit Bureau of Santa Monica Bay Dist. v. Terranova, 15 Cal. App. 3d 854, 93 Cal. Rptr. 538 (1971).

since plaintiff did not add the spouse as a defendant, he has to burden the courts with another suit if legally possible.71/

(e) Problems arising when spouses are separated

Section 5131, creating an exception to the necessaries doctrine when the spouses are living apart, should be repealed or redrafted. Why should it make any difference, when the issue is the liability of a spouse to support the other while they are separated, whether the separation was amicable (by agreement) or violent (no agreement). Indeed, the statute could penalize a spouse, who after the separation, becomes destitute because of his or her reasonable attitude at the time of the separation.

It was recently suggested that the "agreement" referred to in section 5131 is a formal, written contract governing the rights of the parties while living apart.72/ Such a limited scope for the statute

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71. Certainly a good argument can be made that there is no separate cause of action against the debtor spouse and the right to obtain a judgment against the latter has been merged into the judgment against the former.

72. Marriage of Epstein, 83 Cal. App. 3d 55, 147 Cal. Rptr. 595, vacated, 24 Cal. 3d 74, 154 Cal. Rptr. 413, 592 P.2d (1979).

would make it more acceptable, but still the question arises why, if the formal agreement is silent about support obligations, the law should assume that each spouse is waiving the right.[73] It would seem logical to construe the contract in favor of a continuing obligation of spousal support when ambiguity arises, particularly when the contrary approach compelled by section 5131 could force an indigent married person to rely on welfare payments financed by the taxpayers despite having a wealthy spouse.

In any event, there is authority contrary to the limited construction proposed for section 5131.[74] Therefore at least some legislative consideration of the statute is imperative. The writer recommends outright repeal; the support obligation should continue until it is specifically waived by agreement.

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73. In an antenuptial agreement the support obligation cannot be waived as a matter of California's strong public policy. Marriage of Higgason, 10 Cal. 3d 476, 110 Cal. Rptr. 897, 516 P.2d 289 (1973). The same rule would apply to a contract made between the spouses after marriage but before a rupture of their marriage relation.

74. Estate of Bose, 158 Cal. 428, 111 P. 258 (1910) (W left H without any discussion of property rights yet what is now section 5131 held to be applicable because, apparently, of an implied agreement to live apart).

(3) One-spouse community bank accounts.

California Financial Code section 851 provides:

> A bank account by or in the name of a married person shall be held for the exclusive right and benefit of the person, shall be free from the control or lien of any other person except a creditor, and shall be paid to the person or to the order of the person, and payment so made is a valid and sufficient release and discharge to the bank for the deposit or any part thereof.75/

Where one spouse has deposited community funds in an account in the name of that spouse alone, this statute creates an exception to equal management of the community by both spouses.76/ But, the statute says, "a creditor" can levy execution on the funds in the account?

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75. California Financial Code sections 7601 and 11200 make similar provisions for savings and loan and acounts and certificates in the name of one spouse.

76. Compare Cal. Civ. Code § 5125. The exception for bank accounts seems reasonably necessary to avoid utter chaos for bankers. When W seeks to withdraw money deposited by H the bank cannot know if it is separate property of H or perhaps community money of his California Civil Code section 5125(d) business (see text accompanying note _____, infra). It really cannot even be sure the woman is the depositor's wife. It must be able to rely on the contract of deposit and signature card in determining whether to approve a withdrawal of funds.

Does this mean just a creditor of the depositor? Section 851 was amended to sex neutral form in one of the four acts making up the 1975 reforms and, it will be recalled, a preamble to a companion act declared an intent to have debt liability follow management and control.[77] If this preamble is a gloss on section 851, "a creditor" refers only to a creditor of the spouse having management power over the bank account.

The writer does not believe that was the legislative intent. The preamble referred to stated a legislative policy intended to expand creditors' rights by giving retroactive effect to various new liability rules;[78] there is no suggestion in the legislative history that the preamble would be turned against the creditor.

Thus, California Financial Code section 851 should be read in conjunction with California Civil Code section 5116[79] making community

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77. See text accompanying note 49, supra.

78. See note 49, supra, and Reppy, supra note 9, at pp. 1007-1025.

79. See text preceding note 50, supra.

property generally liable for the contract debts of both spouses and California Civil Code section 5122(b), making community property liable for the torts of a spouse. One-spouse community bank accounts thus are an instance where a creditor can obtain by levy of execution property the debtor spouse lacked power to voluntarily draw on to pay the obligation.

(4) One-spouse community business assets.[79A/]

California Civil Code section 5125(d) provides:

> A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

79A. Some writers believe there exists yet another exception whereby H's separate property is liable for the prenuptial obligations of W. See Comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Cal. L. Rev. 1610, 1622-1624 (especially n. 81); cf. H. Verrall, California Community Property 399 (3d ed. 1977), making the unfounded assertion that the version of California Civil Code section 5120 effective 1975 "provides a married woman can be subjected to a similar judgment for the pre-marital debts of her husband." That statute provides: "Neither the separate property of a spouse nor the earnings of the spouse after marriage is liable for the debts of the other spouse contracted before the marriage." Obviously that statue does not create any liability. The only possible issue is whether the rule of Johnson v. Taylor, 120 Cal. App. Supp. 771, 4 P.2d 999 (San Francisco County Super. Ct. App. Dept. 1931), can survive in the face of the statutes governing debt

(fn 79A continued)

Once again the debt-liability issue is whether this is to be construed in conjunction with the statement of policy adopting the managerial system of creditors' rights or California Civil Code sections 5116 and

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liability. It held, applying the English common law of coverture, that when H married W, her debts then existing became his under the one-flesh fiction English law applied to marriage. With respect to tort obligations, Johnson v. Taylor is abrogated by California Civil Code section 5122(a): "A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefore if the marriage did not exist." As per pre-marital contract debts, section 5120, supra, removes any basis for treating the nondebtor spouse as assuming the debt through marriage. His separate property is not liable so it is foolish to treat him as a debtor. Section 5120 simply confirms the rule of law inherent in the managerial system of debt liability that the half interest in nonexempt community property owned by the nondebtor spouse can be seized by the creditors of the debtor spouse, with the nondebtor obtaining in lieu a reimbursement right assertable at least at dissolution of marriage. I think sections 5120 and 5122 are very clear, that Johnson v. Taylor has been wholly abrogated, and that no legislative action to further administer final rites to Johnson are needed. Moreover, the decision was egregiously wrong when made; it would be promptly disapproved today. The date of the case is 1931. Nothing in the opinion suggests the court was dealing with pre-1927 so-called community property. The English common law did apply to pre-1927 so-called community property (see Van Maren v. Johnson, 15 Cal. 308 (1860); Medical Finance Ass'n v. Allen, 22 Cal. App. 2d Supp. 747, 66 P.2d 761 (Los Angeles County Superior Ct. App. Dept. 1937) (dictum)), but the legislation of 1927 now found in California Civil Code section 5105 converted California to a community of property system in which W was recognized as having a present, equal ownership in the community property. She was not disabled by coverture. No conceivable basis exists for applying to post-1927 community property the English common law of coverture.

5122(b) declaring community property liable for the obligations of both spouses. If W is the judgment debtor, can the creditor levy on community assets used in a community business wherein W has never participated in management?80/ Resolving it is much more difficult than resolving the related problem involving Financial Code section 851, for section 5125(d) is obviously intended to give protection to a spouse while the Financial Code section is intended to protect the bank. If the manager spouse is H, allowing W to deplete the community assets of his business by going into debt and having judgments taken against her followed by levy of execution on the community assets in H's business will very clearly cause substantial interference for H.

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80. Just what H might do to permit W to be viewed as participating in the operation or management of the business is wholly unsettled and must be worked out if community assets in a section 5125(d) business are not to be treated as an exception to the managerial system of debt liability. I would assume that if W even works as a clerk in a community-owned store where H is the nominal manager W will be viewed as sharing int he "operation" of the business so that the problem does not arise? What if she just keeps the books?

While no reported cases deal with the problem, the commentators have stated widely varying views. Professor Bruch assumes the principles of the managerial system of debt liability stated in the Preamble apply so that none of the community assets in a section 5125(d) business operated by one spouse can be reached by ordinary creditors (i.e., not necessaries creditors) of the other spouse.81/

Professor Verrall apparently agrees that principles of the managerial system at least presumptively render community assets in a section 5125(d) business not liable for the debts of the non-manager spouse.82/ However, it seems he would permit such a creditor to

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81. Bruch, The Legal Import of Informal Marital Separations: A Survey of California and a Call for Change, 65 Cal. L. Rev. 1015, 1053 n. 136 (1977). Ms. Bruch cites the present author as sharing her view but I do not. I believe section 5116 applies to the community assets in a section 5125(d) business.

82. H. Verrall, California Community Property 401 (3d ed. 1977).

reach those assets if the debtor spouse would otherwise be insolvent.[83]

Another commentator opines that the spouse operating the section 5125(d) business can compel the creditors of the other spouse to first exhaust other property that is liable on the debt (i.e., the debtor's separate property and community property that is neither exempt or nonliable) before attempting to rreach the assets of the business.[84] If the creditor was still unpaid he could not, according to this writer, simply levy execution on the community assets in the section 5125(d) business but would have to bring a special creditor's bill in equity against the manager spouse. The judge would determine how much community equity the manager spouse needed to keep his business alive

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83. This is what he says: "[C]ommunity property can be removed from common control by investment in a business managed and controlled by one spouse. That removal from control of one of the spouses can be justified but if the effect is to deprive the creditors of that spouse of assets available to satisfy their claims, equitably and perhaps constitutionally, justification becomes difficult. In the past creditors have been allowed to trace community assets from their debtor to the spouse of that debtor on dissolution of the marriage. It would seem that any transaction removing assets from availability to creditors other than in return for fair value should permit similar tracing by creditors." Id.

84. Comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Cal. L. Rev. 1610, 1630-31 (1975).

and would declare this not liable.[85] The judge would then make a charging order in the amount of the additional community interest in the business (that is, the value of the remaining equity not declared exempt) which would be an equitable lien on the community profits of the section 5125(d) business. Apparently, too, this writer woiuld allow creditors of the manager spouse whose claims relate to the business to intervene and establish a priority in reaching the community interest in the section 5125(d) business.[86]

The commentator's theory is like a fairy tale, fascinating reading but not grounded in reality. There is simply no legislative history at all to support his idea that section 5125(d) envisions treating the one-spouse community business rather like a partnership when it comes to creditors' rights. The author of the present study has made a thorough review of the legislative history,[87] and has concluded that the legislature just did not think about the creditors' rights problem. The present law, therefore, is what the statutes say on

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85. Id. at 1633 n. 125.

86. Id. at 1632.

87. See Reppy, supra note 9, at 990-1044.

their face, and section 5116 says the community property -- without qualification -- is liable for the contract debts of both spouses. Section 5122 makes the community property liable for the tort obligations of both spouses. If W is the debtor and H the manager spouse, H simply has no basis for objection if W's judgment creditor sends the sheriff on a writ of execution to collect non-exempt equipment, stock in trade, cash, etc., that happens to be an integral part of the community business. The remedy for H is to borrow some money and pay off the creditor. Or he can incorporate the business so that what the community owns is corporate stock that W's creditor can reach, rather than specific assets.

It might be a good idea for the legislature to provide a method short of incorporating the business whereby the manager spouse could obtain the kind of protection the law review commentator thinks is deserving. The study by the present writer on the Sole Trader Act[88/] proposed a procedure for recordation of an instrument that would conclusively establish the separate or community character of business assets. If adopted, the procedure could readily accommodate recordation of an election to have a one-spouse community unincorporated business treated as entity for creditors' rights purposes.

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88. Cal. Code Civ. Proc. §§ 1811-1821.

b. Nonliability Exceptions to California's Managerial System of Debt Liability

Two statutes create exceptions to the general rule that property subject to a spouse's management power can be reached by his creditors. These are referred to herein as "nonliability" provisions to distinguish them from exemptions. They differ markedly from exemptions, because an unlimited amount of property can be removed from the reach of creditors under the nonliability provisions.

(1) Prenuptial contract debts.

California Civil Code section 5120 provides:

> Neither the separate property of a spouse nor the earnings of the spouse after marriage is liable for the debts of the other spouse contracted before the marriage.

Of course, unless the nondebtor's community earnings have been placed in his or her own bank account or are tied up in a section 5125(d) business, the debtor is free to use such funds to pay a prenuptial creditor.

There is uncertainty as to how readily the nonliability benefit can be lost. The cases decided under former California Civil Code section 168, which made W's earnings not liable for H's debts, seem inconsistent. In one, a known amount of W's money spent along with known amounts of other funds and the right of nonliability was held

lost.89/ This would suggest that any change in form of the earnings removes them from the protection of section 5120. The case certainly would prohibit any type of uncommingling where the earnings had been combined (as in a bank account) with separate property or with other community property.

Other cases under former section 168 suggested W was free to obtain nonliability by identifying the earnings through tracing and method of uncommingling.90/ Since the legislature thinks there is good reasonf or providing for nonliability for the earnings, these latter cases seem correct in not holding the benefit to be lost when tracing is possible.

The uncommingling problems raised by section 5120 are somewhat different from the usual case of uncommingling separate from community

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89. Pfunder v. Goodwin, 83 Cal. App. 551, 257 P. 119 (1927). See also Street v. Bertolone, 193 Cal. 751, 226 P. 913 (1924): earning spouse is obliged to keep earnings "separate and distinct" from property that is liable to the creditors.

90. Tedder v. Johnson, 105 Cal. App. 2d 734, 234 P.2d 149 (19__); Proter v. Nelson, 42 Cal. App. 2d 750, 109 P.2d 996 (19__), both stating the question is whether the commingling of the earnings caused them to "lose their identity" as such.

property,91/ for the problem arises when one type of community property -- earnings of the nondebtor spouse -- are mixed with other types of community property. In this situation the presumption or inference that separate funds are withdrawn to pay separate debts, community to pay family or community debts,92/ cannot be employed to determine whether the earnings are still in or have been withdrawn from a commingled bank account. About the only presumption that can apply is that each withdrawal consists of a pro-rata amount of the earnings and of other community property in the account.93/

Probably the courts will reach these sensible conclusions without amendment to section 5120; however if the legislature is going to rewrite the statutes applicable to debt collection from married per-

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91. See, e.g., Marriage of Mix, 14 Cal. 3d 604, 122 Cal. Rptr. 79, 536 P.2d 479 (1975).

92. See Hicks v. Hicks, 211 Cal. App. 2d 144, 27 Cal. Rptr. 307 (1962); White v. White, 26 Cal. App. 2d 524, 79 P.2d 759 (1938).

93. Where the issue was separate or community characterization of withdrawals, sch a pro-rata approach to uncomminling was used in one case arising under Texas law. Duncan v. United States, 247 F.2d 845 (5th Cir. 1957); but cf. rejection of this approach in an analogous circumstance in Estate of Adams, 132 Cal. App. 2d 190, 282 P.2d 190 (1955).

sons section 5120 should either be repealed[94/] or a clause added that the nonliability benefit is available so long as the spouse can trace the earnings through changes of form and any commingling back to the source in earnings. The amendment should also make clear whether the legislature intends the nonliability benefit to attach to rents and profits of the earnings, as when the spouse places them in a savings account and collects interest.

(2) Nonliability of Separate Property Where Community Security Is Given

A little-known and unique statute, California Civil Code section 5123(b) provides:

> The separate property of a spouse is not liable for any debt or obligation secured by a mortgage, deed or trust, or other

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94. Apparently the reason for nonliability is to encourage marriage and eliminate one of the benefits of "living in sin." I.e., absent section 5120, marriage would increae the amount of property one party's creditors could reach by allowing access not just to his or her own earnings but those of the partner as well. However, under current law as to the effect of a transmutation contract on creditors' rights (see companion paper on the Sole Trader Act), the parties could achieve the same effect on creditors by an antenuptial contract to live separate in property after marriage.

> hypothetication of the community property which is executed on or after January 1, 1975, unless the spouse expressly assents in writing to the liability of the separate property for the debt or obligation.95/

This is a strange form of anti-deficiency judgment protection. If the community security is insufficient, unlimited amounts of community property half owned by the debtor spouse and half by the other spouse may be seized, but the debtor spouse's own separate property is not liable.

The reason for the statute, originally giving protection to W, seems fairly evident. In 1917, legislation required W's joinder when H sought to mortgage community realty.96/ It must have become common place when W attended the closing of a credit transaction to pass her the promissory note itself to sign as well as the mortgage or deed of trust. That signature made W a co-debtor and of course her separate property became liable.

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95. With respect to pre-1975 instruments, only W's separate property is not liable. Cal. Civ. Code § 5123(a), although arguably the discrimination is unconstitutional because of sex discrimination, see Arp v. Workers' Comp. Appeal Bd., 19 Cal. 3d 935, 138 Cal. Rtr. 293, 563 P.2d 849 (19__) (anti-male rule held invalid), with the "cure" being to strike the time-limitation of section 5123(b), supra.

96. 1917 Cal. Stats. ch. 583, p. 829, § 2; now as amended, Cal. Civ. Code § 5127.

Just why the legislature in 1973-74 extended the benefits of the hprotective statute to H rather than repealing section 5123 is unclear. The writer considers the statute a snare that will trap unsuspecting creditors who believe that taking security can only increase the rights the creditor obtains. The statute simply requires adding "boiler plate" waivers of section 5123 to secured credit transactions. It should be repealed.97/

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97. See Carroll v. Puritan Leasing Co., 77 Cal. App. 3d 481, 143 Cal. Rptr. 772 (1978) (Kaus, J., concurring), suggesting that section 5123 was not intended to apply when W signed a separate promissory note and not a combination mortgage and note. If the statute can be so construed, its repeal is not significant. The writer considers it incapable of that interpretation, however.

Another reason for repeal of both section 5123 and section 5120's nonliability provisions is suggested by Comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Cal. L. Rev. 1610 (1975): that these nonliability provisions will be disregarded by federal bankruptcy courts. In the common situation where a debtor spouse owns no separate property, section 5120 is of no significance to a creditor (who doesn't care whose community earnings he is seizing) unless the nonliability provision excludes him from collecting on the debt. Similarly, section 5123 is primarily important where the creditor with community security cannot fully collect on the obligation because the obligor's separate property is not liable. If the unpaid creditor forces the debtor spouse into bankruptcy, the nonliability may well be removed by force of federal bankruptcy law superceding state law regarding liability. The new bankruptcy act permits the bankrupt to select either state law or federal law (bankruptcy act) exemptions. 11 U.S.C. § 522. Because sections 5120 and 5123 render nonliable classes of property of unlimited value, it could very well be that the federal courts will hold that they are not exemptions.

(footnote 97 continued)

B. DEBT LIABILITY WHEN SPOUSES LIVE SEPARATE AND APART

The rules of law concerning liability for debt do not change when the spouses begin living separate and apart but the practical dif-

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Under the old bankruptcy act, apparently the Washington-Arizona rule making community property nonliable for community debts was respected in federal bankruptcy courts even without statutory authorization to do so. 63 Cal. L. Rev., supra at 1657; see also Moore, The Community Property System and the Economic Reconstruction of the Family Unit: Insolvency and Bankruptcy, 11 Wash. L. Rev. 61 (1936); In re Wallace, 22 F.2d 171 (E.D. Wash. 1927). The comment, 63 Cal. L. Rev. at 1660 n. 282, finds legislative history of the new bankruptcy act to the effect, however, that the new act was to be enforced according to its literal terms making all nonexempt community property the "estate" which all classes of creditors can reach (see 11 U.S.C. § 541(a)(2)) notwithstanding the contrary law of Washington and Arizona where a debt was separate. Citing Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part I, at pp. 196-97, 93d Cong., 1st Sess.

The fate of the Washington-Arizona nonliability rule under the new act has yet to appear in a reported decision. Logically, whatever happens to that rule should apply to the nonliability provisions of sections 5120 and 5123 of the California Civil Code which are really no more state "exemptions" than the Washington-Arizona rule. If bankruptcy courts are going to disregard these nonliability provisions of California law they will have an effect only where they do not create an insolvency vis a vis the debtor spouse and a particular creditor against whom the nonliability provision is asserted. Such a limited scope for the statutes is probably not intended by the legislature, and repeal would be preferable.

ferences are extensive. California Civil Code section 5118 makes the "earnings and accumulations"[98] of both H and W after such a separation[99] the acquiring spouse's separate property. It is thus not liable for the other spouse's debts (except for necessaries or if an agency is established).

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98. Support H pays to W while they are separated has been held an "accumulation" of hers which becomes her separate property under section 5118. Marriage of Wall, 29 Cal. App. 3d 76, 105 Cal. Rptr. 201 (1972). Probably all gains accruing after the separation will be separate property on one theory or another except rents and profits from pre-separation community property. See Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975).

99. As to what kind of living arrangement triggers section 5118 to make subsequent earnings separate, see Marriage of Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (1977); Patillo v. Norris, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (1976); Loring v. Stuart, 79 Cal. 200, 21 P. 651 (1889); Makeig v. Untied Security Bank & Trust Co., 112 Cal. App. 138, 296 P. 673 (1931), and the excellent analysis in Bruch, The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change, 65 Cal. L. Rev. 1015 (1977). See also Comment, Living Separate and Apart Under Section 5118 of the Family Law Act -- Effects and Implications of the Baragry Decision, 6 Western State L. Rev. 183, 193 (1979).

Moreover, H and W probably each take with them or keep certain community assets existing at the time of separation and purchase with community cash then on hand new assets necessary when one household splits into two. (E.g., if the couple had but one television set and H moved out into his own apartment, he would likely at once buy a television set for his own use, probably using community cash savings on hand to pay for it.)

A judgment creditor of H is perfectly free to levy execution on the nonexempt community assets located at W's household, for under no theory of marshaling of assets[100/] is such community property any

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100. Comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Cal. L. Rev. 1610, 1642-28 (1975), asserts that California Civil Code section 3433 (a general provision authorizing an order marshaling assets, that is, establishing a priority of liability) empowers one spouse to compel a separate creditor of the other spouse to first exhaust the debtor's separate property before levying on community property. The argument is sensible, but there is no case authority for it when the spouses are married at the time of levy of execution (see note _____, infra, for the law after divorce). Under the commentator's theory, relief could be obtained with respect to most debts incurred by the other spouse after separation. Under the benefit test, they will usually be separate debts, incurred to maintain the new separate household or to generate separate earnings under Civil Code section 5118. (But a post-separation community debt is certainly possible -- e.g., a purchase on credit of supplies used to repair and maintain a community-owned rental unit which, despite the separation, will continue to produce community rents and profits.) The nondebtor spouse could compel the creditor to first exhaust the separate property of the debtor (and post-separation earnings will likely be on hand). However, once that is done it is impossible to distinguish, in the marshaling process, between community assets in the possession of the debtor spouse and community assets in possession of the nondebtor spouse who seeks marshaling.

less liable on the pre-separation community debt than community assets in H's apartment.

If debtor H is uncooperative and is concealing assets, the well-advised creditor will not bother with supplemental proceedings but simply send the sheriff to W's house to collect nonexempt community assets.101/

Additionally, separated spouses who obtain legal advice know to save the post-separation earnings that are separate property under section 5118 and consume on food, rent, etc., community funds on hand, for the latter can be seized by the other spouse's general creditors, while only that spouse's necessaries creditors can reach the post-separation earnings. Additionally, the community property will be divided 50-50 at a subsequent divorce while separate property is retained by the owner.102/

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101. The very difficult problem of how many exemptions exist in this situation and who can assert them is discussed at text accompanying notes _____, infra.

102. Compare Cal. Civ. Code § 4800(a) with Robinson v. Robinson, 65 Cal. App. 2d 118, 150 P.2d 7 (1944).

With respect to the separated spouse's own community debts, use of separate funds to make payment risks a finding later of gift that might bar reimbursement. If the debts are separate (as most post-separation obligations will be), the voluntary use of community funds to pay them while conserving separate property may not technically provide much of a benefit to the spouse because a right of reimbursement arises.103/ From a practical standpoint, however, the spouse and his attorney could reasonably conclude it was beneficial to have nondivisible separate property on hand with the burden on the other spouse to prove a debt paid was a separate debt in order to obtain reimbursement.104/

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103. See, e.g., Somps v. Somps, 250 Cal. App. 2d 328, 58 Cal. Rptr. 304 (1967); Marriage of Walter, 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1976).

104. There is also the hpoint that interest has never been granted in a reimbursement situation. Using community funds to pay the post-separation separate debt allows the debtor spouse to keep separate funds in an interest-paying account or otherwise use them to generate separate income.

If one of the spouses is in a position to obtain support payments from the other, Civil Code section 4805 is some help in preventing the payor spouse from draining off the community property. If suit for divorce or legal separation is commenced,[105] the court may order support or alimony payments to be made. Section 4805 provides that hte order shall require the payor spouse to first draw on post-separation earnings which would have been community property had there been no separation; only when such separate earnings are exhausted shall the payor resort to community funds to pay support. Section 4805 also assures the payor the right, however, to exhaust community and quasi-community property before resorting to property that would be ordinary separate property (not quasi-community) even absent the separation.

Revision of section 4805 in 1974[106] requiring separate earnings to be used before community property in paying spousal support during separation[107] reflects concern that the debt-payment process where

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105. See Cal. Civ. Code § 4801.

106. See 1974 Cal. Stats. ch. 1329, p. 2885, § 1.

107. Section 4805 states that its order-of-payment provisions apply to "any decree, judgment or order of support" rendered under the family law act. This would include a decree of ordering post-divorce alimony. In that context, since all the property now owned by teh payor sposue is separate, it makes no sense to require him to first draw on earnings that would have been community were the spouses still married and living together. Section 4805 should be amended to make clear it does not apply to alimony payments made after divorce.

To the extent the obligor spouse has on hand after divorce former community property not divided by the divorce court and now tenancy in common property, see, e.g., Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (1979), use of such funds to pay the support obligation would require turning over $2 for every $1 owed. No statute directed to this situation is needed.

spouses are living apart can cause tharm to one or both spouses. Additional statutory protection seems advisable. A statute specifically allowing the nondebtor spouse to require the other spouse's separate creditors to first exhaust separate property of the debtor spouse would resolve any doubts as to whether the general marshaling statute, section 3433, applies in such a case. Additionally, a statute should provide that where in separating or after separation the spouses made a voluntary division of physical possession of the community property (even if they did not intend to transmute the property to separate property), the nondebtor spouse can compel community or separate creditors of the other spouse to first exhaust community prop perty in the possession of the debtor before levying on property possessed by the spouse seeking this type of marshaling.108/

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108. The procedure should authorize the creditor to object on the ground that forcing him to locate community assets of the debtor spouse would incur costs that he might not be able to recover. The nondebtor spouse should be cautious in invoking the proposed remedy. For example, suppose the debtor is W; she now possesses such assets that no support order will be issued against H. If her creditor takes the community property in her possession her financial status (together with the other criteria considered under Civil Code section 4801) will entitle her to a support order, which H must pay out of separate earnings. H might possibly be better off and probably could not be hurt by just paying W's creditor with community property in his possession.

C. LIABILITY ON PRE-DIVORCE DEBTS WHERE LEVY OCCURS AFTER DISSOLUTION

In making an equal division of the community property, the divorce court must identify all unpaid outstanding or contingent debts, value them, and order one of the spouses to pay each debt (or to pay a specified part thereof).109/ But such an order is not binding on a creditor of either spouse110/ (unless entered in a proceeding in which the creditor was a party). Former community assets awarded to the nondebtor spouse, say W, become her separate property after divorce, but they remain liable to H's creditors who at the time of divorce have a judgment against him111/ as well as creditors to whom H is in default and who obtain their judgment after the divorce.112/ By the logic of these decisions the former community property now owned solely by W would be liable, even though the divorce court ordered H

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109. See, e.g., Marriage of Chala, 92 Cal. App. 3d 996, 155 Cal. Rptr. 605 (1979); see also Marriage of Eastis, 46 Cal. App.3d 459, 120 Cal. Rptr. 861 (1975); Marriage of Epstein, 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165 (1979); Wilson v. Wilson, 33 Cal. 2d 107, 199 P.2d 671 (1948).

110. Bank of America Nat. Trust & Savings Ass'n v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935).

111. Vest v. Superior Court, 140 Cal. App. 2d 91, 294 P.2d 988 (1956).

112. Bank of America Nat. Trust & Savings Ass'n v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935).

to be responsible for the obligation, if the contract was entered into before the divorce although the breach occurred after the divorce. A washington case illustrates this.113/ During marriage, in operating a community motel business, H contracted to rent from plaintiff television sets for the motel rooms. H and W were divorced, the court awarding H the motel and W other community property. H was ordered to be responsible for the debts of the motel business. At the time the community was dissolved the motel owed some $500 in t.v. set rentals; thereafter further defaults on rental occurred. The court held the rental contract not severable into sub-rental periods and thus in its entirety it was an obligation made by H during marriage. W was an appropriate defendant in plaintiff's suit for breach of contract, since property she owned was liable for the breach.

In all such cases where W ends up paying any part of a debt assigned to H by the divorce court she will have a cause of action against him for reimbursement of the amount paid (hopefully with interest from the date of her payment). Additionally, the law should imply a right on her part to reimbursement of all litigation expenses, including attorney's fees she had to pay.

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113. Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash. 2d 893, 425 P.2d 623 (1967).

Additionally, when the creditor strikes after H and W have been divorced, there is authority that a court of equity will order marshaling of assets by an order compelling the creditor to first exhaust the assets owned now by the debtor spouse.114/

May the creditor levy against former community property now owned by W after divorce when the judgment runs only against H? In other words, is W a necessary party if post-divorce execution is to be levied against her property? Clearly she is not a necessary party if the judgment is obtained before divorce.115/ Under current California law it would seem not to matter that the suit was filed against H and the judgment obtained while he and W were living separate and apart, since the equal management statute does not cut off the power of each spouse acting alone to bind the community property when a separation occurs.116/

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114. Mayberry v. Whittier, 144 Cal. 322, 78 P. 16 (1904) (dictum).

115. See Vest v. Superior Court, 140 Cal. App. 2d 91, 294 P.2d 988 (1956); Mayberry v. Whittier, 144 Cal. 322, 78 P. 16 (1904) (dictum).

116. Cal. Civ. Code § 5125. The obvious need for legislative attention to this problem is discussed in Bruch, The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change, 65 Cal. L. Rev. 1015 (1977); see also Cross, Equality for Spouses in Washington Community Property Law -- 1972 Statutory Changes, 48 Wash. L. Rev. 427, 543-45 (1973).

Where the suit is commenced against H before a final divorce decree and the creditor obtains his judgment on the debt after divorce, one California case indicates W is bound although she was not made a party.117/ This seems necessary as a practical matter. The creditor who begins his suit when equal management is in effect cannot be sure, even if the spouses are separated, there will ever be a divorce. Even if the creditor begins the suit while divorce is pending, that is still during the time of equal management. W's lawyer in the divorce suit should able to find out about the litigation and bring it to the attention of the divorce court. Probably, a separated W can intervene in the suit against H as a party defendant to protect her interests.118/ So long as H is the statutory co-manager

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117. Bank of America Nat. Trust & Savings Ass'n v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935) (assuming, which is not clear from the facts, the final divorce decree was obtained after the interlocutory decree period without substantial delay). The problem of whether W was bound by the judgment against H as a privy of his was not discussed.

118. The fact of separation distinguishes the situation where one spouse becomes a party during marriage and cohabitation in litigation affecting the community. I have elswehre taken the view as to this situation that the spouse first making an appearance as a party "seizes control" of the community interest in the suit, disabling the other spouse from filing documents, dismissing counsel, etc. See Reppy, supra note 9, at 1021.

of the community property when suit is filed, it would seem not to deny due process to place on W at that moment the status of H's privy in order to make the judgment binding on her interest in community property (as well as H's interest in assets) awarded to her at a divorce subsequently entered.

Where the creditor begins the suit after divorce, the state of Washington requires that W be made a party if former community property now owned by her is to be bound.[119] Due process would seem to require as much since the co-manager relationship on which privity was based when the suit began before divorce is absent. California courts can be expected to follow the Washington precedent without a statute,[120] yet legislative codification is desirable because there

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119. Northern Commercial Co. v. E. J. Hermann Co., Inc., 22 Wash. App. 963, 593 P.2d 1332 (1979); cf. Credit Bureau of Santa Monica Bay Dist. v. Etrranova, 15 Cal. App. 3d 854, 93 Cal. Rptr. 538 (1971) (W's necessaries creditor must make H a party to be able to reach H's separate property).

120. If W has moved out of state, the transaction entered into by H will have sufficient connections to California (at least if H and W were domiciled here when H entered into it) that long-arm jurisdiction can constitutionally be had over W. The community, of which W was a member, will almost certainly have sufficiently availed itself of the benefits of California law so that either community partner can be subjected to service of process out of state or by publication. As to the present due process standard for long-arm service see Kulko v. Superior Court, 436 U.S. 84 (1978). Section 410.10 of the Code of Civil Procedure provides for long-arm jurisdiction in all situations where the state and federal constitutions permit its exercise.

are difficult related problems that need legislative solution. First, may W assert counterclaims and set-off available to H? Surely she should be able to do so, but some procedure must be fashioned so that the judgment of the court on such defensive claims is binding on H so that the creditor will not have to relitigate them in litigation between H and that party. The statute then should provide that W may assert defensively all claims H could (even if not related at all to the community, as for example, a set-off based on some post-divorce activity involving H and the plaintiff). But to do so W must make H a party.121/

The second question is whether the creditor has any pre-judgment remedy such as attachment to prevent W from consuming the only property she possesses -- former community property -- that is liable on the debt. It would seem that so long as W received consideration for her expenditures (as, for example, purchasing food, medical care, rental housing, etc.), the creditor has no legitimate basis for complaint. Anytime the law makes certain classes of property liable

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121. For the reasons stated in the preceding footnote, W ought to be able to get long-arm jurisdiction over H with respect to the issues she seeks to raise because of likely close connection between H and the debt that has brought W into court. The California divorce decree ordering H to pay that debt itself should be ample basis for such long-arm jurisdiction.

to a creditor and other classes not liable or exempt, the debtor is invited to consume the former and preserve the latter. That W will do all she possibly can to consume the former community property prior to rendition of judgment against her is something the creditor is well aware of prior to bringing suit.

Finally, what form should the judgment take? Should it determine what assets are former community property? Should it be an unlimited judgment against W with the issue of what property is liable postponed to the execution stage of proceedings?

Analogous cases indicate that the creditor need not identify at the trial any property W possesses that is liable on H's debt.122/ If W permits an unlimited judgment to be entered against her, she may waive the nonliability status attached to her property that is not former community property.123/ Since there is no authority directly on point, legislation laying out the principles would be useful.

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122. Credit Bureau of Santa Monica Bay Dist. v. Terranova, 15 Cal. App. 3d 854, 93 Cal. Rptr. 538 (1971).

123. See Carroll v. Puritan Leasing Co., 77 Cal. App. 3d 481, 143 Cal. Rptr. 772 (1978), holding nonliability of separate property under California Civil Code section 5123 is waived if not raised at trial and made part of the judgment. Carroll is distinguishable in that involved a wife who was a primary debtor, not just the owner of property that is liable. The distinction may not be significant, however, as the requirement that the judgment list the nature of property that is not liable may be for the benefit of the sheriff levying execution subsequently. A smoothy execution procedure is needed whether or not the spouse sued is primarily liable or derivatively as as the owner of property that is liable.

D. DEBT LIABILITY AND PROPERTY OF UNMARRIED PERSONS LIVING TOGETHER AS IF MARRIED

1. Voidable Marriages.

A marriage declared voidable by California Civil Code sections 4401 and 4425,[124] is treated for all purposes under the law until a party with standing to attack it obtains a judgment of nullity[125] (California's cumbersome new term for annulment[126]). The annulment

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124. Section 4401 (as well as section 4425(b)) makes a bigamous marriage voidable and not void if the former spouse was missing for five years before the second "marriage" and reputed to be or believed to be dead. Section 4425 makes marriages voidable where consent of a "spouse" is tained by minority, insanity, or fraud or when one spouse has proved to be permanently impotent.

125. Estate of Gregorson, 160 Cal. 21, 116 P. 60 (1911), indicating standing is conferred on the aggrieved "spouse" and such persons as conservators who protect his or her interests but not on strangers to the marriage. Certainly a creditor will not have such standing. (Seldom would a creditor benefit from such an attack, but he could if he had contractually agreed to look only to separate property of a spouse to obtain repayment of a loan, for example. Voiding the marriage ould make at least half of the debtor "spouse's" earnings debtor's separate property, perhaps all.)

126. See Cal. Civ. Code §§ 4450, 4451.

then retroactively wipes out the community.[127] Acquisitions which previously were community property are now called in the annulment proceedings quasi-marital property[128] if a spouse establishes putative status by showing a good faith belief in validity of the

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127. Trantafello v. Trantafello, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979); Coats v. Coats, 160 Cal. 671, 118 P. 441 (19__) (declaring property that had been community no longer was and that community property rules re ivision on dissolution would "apply by analogy" in favor of a putative spouse). See generally Comment, The Void and Voidable Marriage: A Study in Judicial Method, 7 Stan. L. Rev. 529 (1955), observing that retroactive invalidation of all effects of the voidable marriage is the "black letter rule" but that many exceptions are recognized (citing, e.g., People v. Godines, 17 Cal. App. 2d 721, 62 P.2d 787 (1936) (annulment does not eliminate a claim of marital privilege for pre-annulment communications)). Civil Code section 4429 states: "The effect of a judgment of nullity is to restore the parties to the status of unmarried persons." This certainly does not mandate retroactive change in the community status of acquisitions prior to the annulment.

128. Cal. Civ. Code § 4452.

marriage.[129] (If neither spouse establishes putative status the rules applicable to "Marvin" relationships[130] apply.) No case has arisen as to whether a pre-annulment creditor of one of the "spouses" to a voidable marriage can be adversely affected by annulment retroactively eliminating the community. For example, Joe and Sue marry, he having obtained her consent by fraud. Joe incurs large debts. Sue frugally saves her earnings and successfully invests them. Sue learns of the fraud and sues for annulment, with a judgment rendered shortly before Joe's creditors levy execution on judgments they obtain against him. If the marriage had been valid we know the dissolution judgment would not bar creditors from levying on Sue's earnings awarded her at

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129. It is unsettled whether, if one of the "spouses" was in good faith but the other knew of the defect preventing a valid marriage, the latter can take a quasi-marital half share in the acquisitions of the good faith "spouse" that were community property before annulment. Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 75 (1976), notes and specifically refrains from deciding the issue while overruling on other grounds Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), which had declared the nonputative "spouse" could benefit from the quasi-marital property doctrine.

Kay and Amyx, Marvin v. Marvin, Preserving the Options, 65 Cal. L. Rev. 937, 947-52 (1977), think Cary was wrong and that only a putative spouse has standing to invoke section 4452. Civil Code section 4455 is clear that only a putative spouse can be awarded alimony pending judgment in an annulment suit.

130. See text accompanying notes _____, infra.

divorce. But what happens when Joe and Sue's marriage has been declared voidable and annulment decreed? If the effect is retroactive as to creditors, all of Sue's earnings are properly not liable on the ground they were retroactively converted to her separate property.131/

It seems possible that if Joe's creditor could establish that Sue and Joe had held themselves out as married and the creditor relied on that in entering into his transaction with Joe, some sort of estoppel would arise to prevent Sue from denying the community status of her pre-annulment earnings.132/ However, it is unlikely a creditor could prove that he knew Sue was holding herself out as married or, if he

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131. Joe's necessaries creditors could not reach Sue's separate property if full retroactive effect were given to the annulment decree, as Sue ould never have had a duty to support the man she was never married to. It is conceivable that notwithstanding the fraud that tainted the marriage an implied Marvin-style sharing contract could be found between Joe and Sue. If that agreement made her earnings co-owned by Joe, his creditors could perhaps reach a half interest after the annulment.

132. There certainly would be no problem raising an estoppel if Sue were the spouse who knew of the defect of the marriage. On the hypothetical facts, however, if Joe defrauded Sue and she had no reason to know that when she held herself out as his wife, she has no superior knowledge than the creditor of the true facts and one of the usual elements of estoppel in pais is absent. Mott v. Nardo, 73 Cal. App. 2d 159, 166 P.2d 37 (1946) (no estoppel where knowledge of facts by parties is "equal"); see also Interinsurance Exchange of Auto Club of So. California v. Velji, 44 Cal. App. 3d 310, 118 Cal. Rptr. 596 (1975) (no estoppel if party to be estopped not "fully advised"); Primm v. Joyce, 87 Cal. App. 2d 288, 196 P.2d 829 (1948) (knowledge must be actual, not constructive); Hacker Pipe & Steel Co. v. Chapman Valve Mfg. Co., 17 Cal. App. 2d 265, 61 P.2d 944 (1936).

could prove that, establish the further element of estoppel that he dealt with Joe in reliance on his being married to Sue.133/

Interestingly, however, the cases involving estoppel and the effect of annulment on third parties have not required evidence of any reliance by the third party. In one,134/ a woman's status as trust beneficiary would terminate on her marriage. She "married" but then obtained an annulment. The court held her estopped to deny the marriage, conceding the alternate trust beneficiaries had not taken any action in reliance on the apparent marriage but holding this was irrelevant. A statute provides that "[a] judgment of nullity is conclusive only as to the proceeding and those claiming under them."135/ It is doubtful that the legislature had in mind in enacting this the rights of creditors of the parties to an annulment,

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133. See Cal. Evid. Code § 623. Comment, The Void and Voidable Marriage: A Study in Judicial Method, 7 Stan. L. Rev. 529 (1955), opines that the relation back of the fiction of annulment law should not be used to the harm of third parties who relied on the existence of the marriage and that the "reasonable expectation of creditors" should be given weight.

134. Stoner v. Nethercutt, 6 Cal. App. 3d 667, 87 Cal. Rptr. 659 (1970). Cf. Watson v. Watson, ____ Cal. 2d ____, 246 P.2d 19 (1952); Estate of Lamont, 7 Cal. App. 3d 437, 86 Cal. Rptr. 810 (1970).

135. Cal. Civ. Code § 4451.

but it is susceptible of the interpretation that creditors can avoid the retroactive effect of annulment without proving the elements of estoppel in pais such as reliance, unequal knowledge of actual facts, etc.136/

Since the law is so uncertain in this area, a specific statute to the effect that annulment of a void marriage shall not bar creditors from asserting the former community property status of assets now owned by the "husband" or "wife" is advisable.

2. Void Marriages.

Incestuous an most bigamous marriages are declared void ab initio by statute.137/ If both parties know of the defect, the union will be treated as a "Marvin" arrangement.138/

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136. See note 132, supra.

137. Cal. Civ. Code §§ 4400, 4401.

138. See discussion accompanying notes _____, infra. Apparently the very instant one of the "spouses" learns of the invalid marriages he or she loses putative spouse status. Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948). Thus, if Pam "married" Ed in good faith but he knew he had never been divorced; the couple had several children; years later confessed and agreed to quickly get a divorce from his first wife; Pam chose to stay with Ed and forgive him, especially because of the children; this rule means Pam has no community or quasi-marital interest in Ed's earnings the day after his confession. The rule apparently reflects what this writer considers a totally unrealistic morality. The rule is preposterous and should be legislatively abrogated. Section 4452 should be amended to provide that putative status once attaching continues until annulment or death of a party absent unusual facts making this inequitable. See Jackson v. Swift & Co., 151 So. 816 (La. App. 1934).

If both parties believe in good faith that the union is valid, we know only that at annulment their earnings will be quasi-marital property and distributed like community property at divorce.139/ The case law is also quite clear that prior to annulment the earnings of the parties that woiuld be community in a valid marriage are not community property.140/ One decision implies that the "spouses" prior to annulment own such property as tenants in common.141/ Under basic

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139. California Civil Code section 4452. See note _____ supra, observing the uncertainty as to whether both "spouses" obtain the benefits of the quasi-marital property doctrine when only one was in good faith. Obviously this uncertainty should be legislatively resolved. Legislation specifically extending the quasi-marital property doctrine to dissolution of the union by death is also needed. At present, the courts must apply the doctrine by analogy on the basis of equities when dissolution is by death. Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); see also Estate of Krone, 83 Cal. App. 2d 766, 189 P.2d 741 (1948) (decided before the quasi-marital property statute was enacted). The quasi-community property system is made applicable at death (although that term is not used), Cal. Prob. Code §§ 201.5 - 201.8, as well as at divorce, Cal. Civ. Code §§ 4803, 4800(a). Similar symmetry seems desirable for the quasi-marital property doctrine.

140. See, e.g., Goff v. Goff, 125 P.2d 848, 52 Cal. App. 2d 23 (1942).

141. Sousa v. Freitas, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970). Earnings from a business in which both parties to the marriage worked might also be held as business partnership property.

principles of debt liability the creditor of each could seize only a half interest. (There is no authority as to whether a necessaries creditor of one "spouse" to a void marriage can reach separate property of the other spouse when the creditor cannot raise an estoppel in pais.142/)

However, most of the cases dividing such earnings at dissolution of the void marriage speak of doing equity and take an approach inconsistent with the existence prior to the court order awarding the property with any ownership interest existing in the "spouse" of the party making the acquisition.143/ On this theory, the creditors of

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142. In the context of married couples, the necessaries doctrine turns on the obligation of support. See Cal. Civ. Code § 5121, referring to Cal. Civ. Code § 5132; see also § 5131. A statute authorizes a good faith putative spouse to a void or voidable marriage to obtain alimony pendente lite. Cal. Civ. Code § 4455. Thus, at least where the necessaries debtor is such a putative spouse it would appear that the basis for permitting the creditor to reach the separate property of the debtor's "spouse" exists. The writer recommends legislation imposing the duty of mutual support on parties who have gone through a marriage ceremony (whether the marriage was void or voidable). The statute should make clear that creditors can invoke it.

143. See, e.g., Schneider v. Schneider, 103 Cal. 335, 191 P. 533 (1920); Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974). A curious statute, Cal Code Civ. Proc. § 872.210(a)(b) provides that no action to partition quasi-marital property can be brought. This does not necessarily mean, however, that the nonacquiring spouse has before annulment a property interest in what California Civil Code section 4452 calls quasi-marital property. If the parties to the invalid marriage (each being a putative spouse) combined their earnings to buy land, it would be quasi-marital and partition before annulment would be available absent the bar of section 872.210.

the nonacquiring "spouse" could seize all of his earnings but none of the other "spouse's" earnings.

The writer of this article is of the view that for creditors' rights purposes a void marriage should be treated as valid. For debt liability purposes, at least, the creditor could treat the earnings of each as community property. The voidness of the marriage should be a problem between the spouses, not something reducing the rights of third parties. Since the courts are unwilling to take this step -- even when both spouses are in good faith so that at Spanish civil law on which the post-1927 California system is based there would be in fact a community of property[144/] -- it is up to the legislature to make such a reform.

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144. The many cases stating there can be no community of property without a valid marriage reject the civil law. This has forced California courts to turn to equitable principles and analogies to achieve the just results that are straightforward under the civil law doctrine. Sometime the California courts have refused to fashion some device to give a good faith spouse the benefits of the civil law rule. Thus, a putative spouse was denied the status of heir of her "husband" in Estate of Levie, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975), an outrageously bad decision especially in its misunderstanding of the policy behind Civil Code section 4104 to validate rather than invalidate marriages. Since we supposedly have a community property system in California, why not follow the civil law in the area of putative marriage? Enactment in California of La. Civ. Code arts. 117 and 118 seems long overdue.

3. "Marvin" Relationships.

The relationship between persons who live together as if they were married but never having attempted to marry (or having gone through a ceremony both knowing it was invalid) has been called meretricious.[145] This term suggested a sort of lawless union, but now that the much discussed case of Marvin v. Marvin[146] gives considerable legal protection to parties based on the implications of that relationship, some new term to describe it seems needed. Until something catches the public fancy, I am calling them Marvin relationships or arrangements and the parties thereto M (for male) and F (for female).

The Marvin decision approved enforcement at the termination of a living-together arrangement of an expressed or implied contract (so long as it was not a contract for prostitution) to share earnings. Disapproving a contrary Court of Appeal case,[147] Marvin also held that provisions of the Family Law Act (such as Civil Code section 5110) did not apply to such a relationship to make the earnings of M or F actually community property by force of statute.

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145. Reppy & de Funiak, Community Property in the United States 66 (1975).

146. 18 Cal. 3d 360, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

147. Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

Marvin is utterly silent as to how, prior to a judgment enforcing the express or implied contract, the earnings and other onerous acquisitions of M and F are owned. Under the contract theory of Marvin, this would depend on the intent of the parties. A formal document declaring a tenancy in common would settle the issue. A formal contract announcing the earnings would be community property would cause problems. Since there is no marriage, the assets cannot be owned as true community property. Such an agreement should be construed as making applicable to the arrangement as much of the community property law as can lawfully apply. That should include the rules of California Civil Code sections 5116 and 5122 concerning debt liability.148/ A contract theory where M agrees that his earnings shall be liable for M's contract debts made during the living arrangement would plainly be construed as conferring third party beneficiary

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148. As well, of course, of such limitations as are found in section 5120 and expansions under the necessaries doctrine.

rights on the creditors.149/ This implicit in an agreement between M and F to live under community property laws.149A/

Of course, few parties to a Marvin relationship will have made a formal, written contract (or if they do it may be vague on the issue being considered, such as "we agree to share everything 50-50."). Probably most often any contract found under the Marvin doctrine will

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149. With advice of counsel the agreement might expressly negate third party beneficiary rights of creditors. Legislation making such a clause void as against public policy seems advisable.

149A. There is no reported case yet of a creditor claiming as third party beneficiary under a Marvin contract. In Planck v. Hartung, _____ Cal. App. 3d ____, 159 Cal. Rptr. 673 (1979), M negligently caused a fire destroying plaintiff's property while using F's barbeque apparatus. Plaintiff apparently sought an unlimited judgment in tort against F apparently on the theory that barbecuing the meal was a joint venture. The court affirmed a judgment dismissing the claim against F. That was erroneous. Plaintiff ought to be allowed to prove a Marvin-style contract adopting by analogy the principles of community property and sue on it as a third party beneficiary. Applying California Civil Code § 5122(b) by analogy M committed a community tort and F's earnings during the relationship are primarily liable. If the parties were married, it is true, F would not be a necessary defendant, but that type of analogy to community property law was not the reason for dismissal. Given the uncertainty of remedy against a Marvin relationship concert under facts like Planck v. Hartung, obviously F had to be made a party defendant if plaintiff was to reach F's earnings. The court said: "If Hartung (M) had McDavid (F) had been married, there would have been no liability on the part of McDavid (see Civ. Code § 5122, subd. (a)." 159 Cal. Rptr. at 675. The court's failure then to deal with the implications of subdivision (b) is truly astonishing.

be implied rather than express. In such circumstances the law has to fill in the gaps for the parties. The possibilities are: (1) as much of the community property rules as the law allows; (2) ownership of earnings as tenants in common; (3) ownership by the acquiring party alone subject to a contractual duty to share 50-50 such acquisitions when the relationship ends by death or splitting up.

In a case where the creditor is lead to believe that M and F are married and acts in reliance, both parties should be estopped to deny that their agreement is alternative No. (1), analogy to community property that allows the creditor to reach all the earnings of both spouses in most instances. Such an estoppel will be unusual. Even without it, public policy ought to place the burden of proof on the cohabiters to establish that their Marvin contract was not of the type most favorable to third parties. Legislation codifying such a rule is recommended.

The legislature should also consider the wisdom of a statute imposing obligations of mutual support on parties to a Marvin relationship so that if the contract between the parties were clearly not ype No. (1) a supplier of necessaries to one of them coiuld still reach the separate property of the other.150/ It may be argued that

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150. Compare Gerlach v. Terry, 75 Cal. 290, 17 P. 207 (1888). Apparently M and F were living in a meretricious relationship. M employed a physician to care for F. The court held her separate property not liable on M's contract with the physician.

the recommended package of legislation almost approaches recognition of a common law marriage.151/ But fairness to credit vendors would be served by such a step. The supplier of medical care, food, rent, etc., on credit should not be denied the benefits of the necessaries doctrine applicable to married persons when it turns out the debtor is actually just living "in sin" after the Marvin decision gives legitimacy to the relationship and so many of the benefits of community of property.

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151. There is one important area, however, where community-style obligations built upon a Marvin contract foundation will be treated very differently from the effect given to a true community of property following a marriage: federal taxation. When the community arises out of a contract and not as a matter of law at the time of marriage, the Internal Revenue Service treats the resulting co-equal ownership as arising from an assignment of income. Commissioner v. Harmon, 323 U.S. 44 (1944). There appears to be no consideration in money or money's worth for the assignment, see 26 U.S.C. § 2511, so the gift tax implications are staggering.

PART TWO: JOINT TENANCIES AND TENANCIES IN COMMON; PROBLEMS OF TRANSMUTATION

A. JOINT TENANCY PROPERTY IS TREATED AS SEPARATE PROPERTY

California spouses may choose to co-own property in three forms besides community property: joint tenancy, tenancy in common, and business partnership.[152] Creation of a joint tenancy requires a written instrument whether realty or personalty is involved.[153]

If H and W each take $5000 of separate property owned by him and her (e.g., each has inherited property) and combine it to purchase land under a deed reciting a joint tenancy, it is obvious that the interests of the spouses can only be separate property. Each can

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152. Cal. Civ. Code § 682. This statute has the effect of barring recognition of the English common law estate of tenancy by the entirety. Hammon v. Southern Pacific R. Co., 12 Cal. App. 350, 107 P. 335 (1909).

153. Cal. Civ. Code § 683; Estate of Baglione, 65 Cal. 2d 192, 53 Cal. Rptr. 139, 416 P.2d 683 (1966). The writing need not be executed with the formality of a will even though joint tenancy has a built-in survivorship provision that operates like a will to transmit ownership at death of one co-owner. Additionally, the writing need not be signed by the joint tenants and usually is not. Knowing acceptance by H and W of a deed poll reciting joint tenancy is sufficient. See discussion in Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (1954); Lovetro v. Steers, 234 Cal. App. 2d 461, 44 Cal. Rptr. 604 (1965); Crook v. Crook, 184 Cal. App. 2d 745, 7 Cal. Rptr. 892 (1960) (stock certificate almost certainly not signed by the spouses).

alienate only a half interest;154/ an ordinary creditor of the spouse can reach only his half interest.155/ When the debtor's half interest is conveyed at execution sale, the joint tenancy is broken and the buyer becomes a tenant in common with the nondebtor spouse.156/

When community property is used to buy assets allegedly owned in joint tenancy, analysis of the effect on creditors is much more difficult. One spouse alone cannot unilaterally change community property into joint tenancy for this deprives the other of testamentary power over a half interest and, if the property is personalty, of the power to convey the entire asset and not an undivided half interest in it. These rights can only be voluntarily lost, although consent need not be in writing.157/

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154. See Hansford v. Lassar, 53 Cal. App. 3d 364, 125 Cal. Rptr. 804 (1975).

155. See Zeigler v. Bonnell, 52 Cal. App. 2d 217, 216 P.2d 118 (1942); Rupp v. Kahn, 246 Cal. App. 2d 188, 55 Cal. Rptr. 108 (1966). This in many ways is an exception to the managerial system of determining liability of marital property. While one joint tenant cannot convey more than a half interest, he is realistically co-manager of all of the estate. He has the right to possess, use himself and even license or lease others to use all of the joint tenancy property. 15 Cal. Jur. 3d Cotenancy and Joint Ownership, §§ 21, 22, 25 (1974).

156. Schoenfeld v. Norberg, 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970). In the case of a tenancy in common the spouse's interests need not be equal; whatever fractional share the debtor spouse owns can be seized by the creditor and subjected to execution sale.

157. See cases cited at note 153, supra.

California has heretofore indulged in a presumption of such consent from the mere fact of the deed poll reciting a joint tenancy,158/ although it was known or presumed community funds were used to make the purchase.159/

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158. E.g., Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (1954).

159. Even if it is not known when the money was acquired, the fact it was possessed during marriage (as it had to be to be used to buy the subject property during marriage) will raise a presumption the money was community owned. Lynam v. Vorwerk, 13 Cal. App. 507, 110 P. 355 (1910). The presumption does not apply when the issue is divisibility of a single family residence at divorce. (This is to enable the court to award the house entirely to one spouse with offsetting community property of similar value to the spouse not receiving the residence.) California Civil Code section 5110 says in part: "When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purposes of the division of such property upon dissolution . . . . the presumption is that such single-family residence is community property . . . ." Of course, if the spouses did acquire the house "as joint tenants," then there is no room for any presumption about ownership; we know it is a joint tenancy. Apparently "acquired by them . . . as joint tenants" means acquired by a deed reciting a joint tenancy but not signed by them so that a question exists as to whether they both intended a joint tenancy. The statute should be redrafted to state what is intended; it is foolish as written. Better still, the purpose of the statute would be far better fulfilled by simply authorizing a divorce court to treat the residence of the spouses even if actually held in an uncontestable joint tenancy as if it were community property for purposes of division of assets. Compare Ariz. Rev. Stat. § 25-318, empowering the divorce court to treat joint tenancy property like community property in a state where unequal division at divorce is permissible (although rarely made). Buttram v. Buttram, ____ Ariz. App. ____, 596 P.2d 719 (1979).

As a result of the fact that a deed poll reciting a joint tenancy is inconclusive as to whether the subject property is actually owned in joint tenancy or as community property,159A/ creditors have been permitted to impeach the joint tenancy recital to the detriment of the spouses and the spouses have been free to impeach the presumptive joint tenancy to defeat creditors,160/ at least those who have not

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159A. Obviously, a deed poll reciting tenancy in common ownership by the spouses is equally subject to impeachment. A change from community property to tenancy in common does not cause loss of testamentary power, but the alteration in management power is substantial. The spouse being deprived of equal management under Civil Code section 5125 will have had to consent.

160. See pages 11-12 of the writer's report on the Sole Trader Act. Another case where the creditor improved his position by impeaching the joint tenancy recital is In re McNair v. Ryan, 95 F. Supp. 434 (S.D. Cal. 1951). The court here, however, misapprehends where California places the burden of proof. The creditor claiming the property is really community must show either that one or both of the spouses did not know of the use of joint tenancy form or did not understand the difference between joint tenancy and community property. (In the latter situation a transmutation agreement by the ignorant spouse is impossible; or, stated differently, that spouse could not have intelligently waived his or her testamentary and equal management powers in exchange for a right of survivorship.)

acted in reliance on the designation on the deed.161/ The upshot is a considerable amount of litigation that ought to be avoided by some legislative scheme.

2. Recognition of Community Property With Right of Survivorship

A number of approaches could be taken to supply more certainty to the law applicable to the liability of joint tenancy property for the debts of the spouses. One would be a statute providing that for purposes of liability to creditors property acquired during marriage with community funds would be conclusively presumed to be community property unless the instrument of title was executed by both spouses.162/

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161. The case of a creditor resisting impeachment of the deed by the spouse[s] has yet to arise in California. Cf. Jeffers v. Martinez, 601 P.2d 1204 (N.M. App. 1979); title was in the name of W alone with the date on the deed showing she owned it before marriage. By an unrecorded instrument she had transmuted the property to community. She alone contracted to sell the property and then tried to resist specific performance on the basis of New Mexico's equivalent to California Civil Code section 5127, which required H to join in the contract of sale. The court held that W was bound by the record or apparent title and was subject to specific performance unless her promisees knew of the transmutation. It was not indicated whether the latter had to establish that they in fact saw the original title (in particular, the date on it before W's marriage) and relied thereon in not asking H to sign the contract of sale.

162. Cf. Estate of Olson, 87 Wash. 2d 855, 557 P.2d 302 (1976).

A second approach would be to recognize a new category of property -- community property with right of survivorship[163/] -- and raise a presumption that this is what the parties intend by recital of joint tenancy in a deed poll. Logically, the presumption would be equally applicable to a deed of indenture signed by both spouses. To create a "pure" joint tenancy it would be necessary to negate community ownership specifically on the face of the instrument (e.g., ". . . as joint tenants with right of survivorship and not as community property). Additionally, the requirement of the signature of both spouses (or at least the spouse harmed by a transmutation) could be imposed.

Alternatively, the statute simply could recognize the possibility of a right of survivorship attached to community property and let the spouses and draftsmen of deeds create a new form that does not use the words "joint tenancy" at all.

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163. This is advocated in a useful article, Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961). Griffith felt that the spouses used a joint tenancy form of deed solely for the benefits of the right of survivorship and not to obtain any other of the characteristics of separate-property joint tenancy ownership inconsistent with community property. His argument is even stronger now that the change of form of ownership from community to joint tenants results in a loss of equal management power (at least with respect to wives).

The appellate courts have held that a community of property cannot exist coupled with a right of survivorship.164/ History as well as Civil Code section 682 (which lists joint and community ownership as distinct types of co-ownership) seem to support the holding;165/ policies of freedom of contract between the spouses166/ and ability to rely on record title strongly suggest it would be wise to legislatively abrogate it.

Any new conclusive presumption should apply only to post-enactment instruments in situations where any party might have relied on the prior law as to the effect of a joint tenancy recital. However, if the presumption is to apply only in creditors' rights cases, it is hard to imagine there being such reliance. Could a married debtor ever convince a trier of fact that he relied (under existing California law that freely allows impeachment of joint tenancy deeds poll) when he entered into a credit transaction on a joint tenancy deed protecting his wife's half interest in the subject property from liability? Very unlikely. Reliance by the creditor to his detriment is almost inconceivable.

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164. Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003 (1932).

165. But see Cal. Prob. Code § 228, making intestate decedent's former in-laws his heirs, in certain situations, to inherit former community property that came to the decedent by "right of survivorship"!

166. See Cal. Civ. Code § 5103.

Thus, the portion of the legislation directed to retroactivity might read as follows: "The legislature intends this act to apply to all pre-enactment instrumetns and pre-enactment obligations unless a party establishes that such application will prejudice the party and the party acted in reliance on pre-enactment law."

PART THREE: MARITAL PROPERTY AND EXEMPTIONS FROM LIABILITY

A. FAMILY-UNIT VERSUS INDIVIDUAL-DEBTORS THEORIES UNDERLYING EXEMPTION STATUTES

In dealing above with nonliability provisions affecting marital property, this article has shown California law to vary greatly -- depending on the nature of the debt -- in the extent to which it will treat the family as a unit with all of the property of both H and W liable for the debts of either. This total-liability position has been taken only in the case of "necessaries" creditors. Whether the debtor is H or W, all the property of both is liable (albeit section 5132 attempts to lay out some sort of pecking order of liability).[167] At the other extreme, liability law could treat the spouses as if they were not married. Under this theory the debtor spouse's separate property and his or her half interest in community property would be reached b the creditor. This happens in only one unusual circumstance in California: when the "creditor" is a child living with one parent who is married to a person not the child's parent, the parent has no community income, and the parent's spouse owes no child support to any child of his own.[168]

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167. See text accompanying notes _____, supra.

168. Cal. Civ. Code § 5127.6, discussed at text accompanying notes _____, supra. Where the child does not live with the parent, the partition of the nonparent spouse's community income occurs after section 5127.5 renders $300 per month not liable at all.

In most creditors' rights situations, California law combines the family-unit and individual-debtor approaches. The latter theory causes the separate property of teh nondebtor spouse to be not liable; the family-unit theory, however, causes the nondebtor spouse's half interest in the community property to be subject to the creditor's claim (whether or not the debt was incurred for family or community purposes[169]).

A survey of some American cases involving exemptions from execution[170] discloses the states adopting various forms of the same two approaches. The family-unit approach is by far the most common. Under it types of properties of specified values may be claimed as exempt, usually by the "head of the family" when he is the judgment

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169. Except where the debt is a separate pre-nuptial contract obligation, in which case not only is the nondebtor spouse's interest in his or her own earnings not liable but so is the debtor's own half interest. Cal. Civ. Code § 5120.

170. Exemptions are distinguished from nonliability provisions in the discussion on the following basis: exemptions are usually unlimited in the amount of property affected (one common exception being an unlimited exemption attaching to unaccrued interests in a pension or retirement plan): exemptions almost always are based on the use made of property (e.g., a home, tools of the trade, clothing of the children, etc.); although this is not invariably the rule (e.g., an exemption of $500 in wages owing; of $300 worth of personal property). By contrast, nonliability provisions look to the source, such as community or separate property, earnings of H vs. earnings of W, etc.

debtor.171/ A common variation on the scheme alowed the spouse of the family head to assert the exemption when the former did not do so.172/ A fairer version of the family-unit scheme would allow either spouse, whether or not the "head" of the family, to assert the exemption as judgment debtor,173/ since the family can be harmed by near

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171. See Arnold v. Coleman, 88 Ill. App. 608 (1899);Farwell v. Martin, 65 Ill. App. 55 (1895); Smith v. Miller, 58 S.D. 570, 237 N.W. 829 (1931); Holleman v. Gaynor, 58 S.D. 574, 237 N.W. 827 (1931). In each of the above cases the head-of-family exemption operated in an unacceptably sexist manner. The debtor was W. The courts held the head of the family was H and only he could assert the exemption; W could assert none at all because she was neither head of a family nor unmarried. No matter how crucial to the family W's property was, then, all of it could be seized by her creditor. Compare Scholler v. Kurtz, 25 Neb. 41 N.W. 642 (1889), holding W was the head of the family when H due to infirmity did not work and W's income supported the family.

172. See In re Diehl, 53 F. Supp. 703 (E.D. Mo. 1944); White v. Smith, 104 Mo. App. 199, 78 S.W. 51 (1904); State vo Oberheide, 39 S.W.2d 395 (Mo. App. 1931); Luster v. Cook, 297 S.W. 459 (Mo. App. 1927); Sparks v. Shelmutt, 89 Ga. 629, 25 S.E. 853 (1896); see also Reid v. Halpin, 185 Miss. 396, 188 So. 310 (1939); and compare State ex rel. Archer v. Creech, 18 Wash. 186, 51 P. 363 (1897) (H was absent so W could claim exemptions on community property not ordinarily subject to her management when H's judgment debtor sought levy of execution) with Carter v. Davis, 6 Wash. 327, 833 (1893) (W could not assert exemptions when H had left state for purpose of defrauding creditors).

173. Cf. Crane v. Waggoner, 33 Ind. 83 (1870), permitting a wife to assert the exemption for a "resident householder" to the extent the husband's property did not reach the $300 exemption cut-off level. Crane seems to be an early case allowing H and W to apportion an exemption between them although it has sexist overtones, indicating W would have been out of luck had H owned more than $300 worth of property subject to exemption.

insolvency whether it is the "head's" (usually understood by the legislatures and courts in the past to mean husband's) property or this spouse's property whose loss creates financial ruin.

The key feature of the family-unit approach to exemptions is that joint or joint and several liability under the judgment of both spouses does not increase the amount of property exempt from execution.

The less common individual debtor approach, on the other hand, does increase the amount of exemption available for the marital property (all that owned by H or W separately or in some form of co-ownership).174/ Some versions of the individual-debtor approach arise from construing "head of family" exemption statutes as permitting two heads.175/

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174. See Bristol Grocery Co. v. Bails, 177 N.C. 298, 98 S.E. 768 (1919); see also Northwest Bank & Trust Co. v. Minor, 275 Wis. 516, 82 N.W.2d 323 (1957): the judgment debtor was the absconding H; W was dependent on use of H's car for her job that supported her and the children; the exemption statute was construed as extending only to property necessary for the debtor's trade or business, so the car was lost and, one assumes, W lost her job.

175. See Ginsberg v. Groner, 117 La. 268, 41 So. 569 (1906) (Louisiana wife who had obtained separation of property decree); Memphis & Little Rock Ry. v. Adams, 46 Ark. 159 (1885).

For community property jurisdictions, the family-unit approach to exemptions seems much more suitable than the individual-debtor approach.176/ The family (husband-wife marital partnership, technically) shares ownership of most gains during the marriage because of the institution of community property; the spouses also share liability for the debts177/ in that W's half interest in community assets will be taken by H's judgment creditor even though W may have been wholly unaware of the debt.

If on the other hand, the spouses have separated and are living in two households, the family-unit approach, as will be shown below, becomes unworkable. When the family is intact, the writer of this article envisions only one situation where public policy suggests exemptions should be increased simply because a judgment runs against both H and W. That is the case where they both work but the tools of the trade of one of them are that spouse's separate property. The

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176. Cf. Barlow v. Estate of Carr, 292 So.2d 721, 726 (La. App. 1974), stating there was no basis for distinguishing between community and separate ownershp of property in applying a homestead type exemption intended to protect the family home.

177. In Arizona and Washington this is limited to community debts.

basic tools necessary to keep both spouses in business should be exempt.178/

The exemption statutes of most community property states179/ are inartfully drafted and far from clear as to whether the family-unit or individual-debtor model is being adopted. Texas has done the best job of codifying the family-unit approach in article 3836 of its Civil Statutes, which provides: "Personal property (not to exceed an aggregate fair market value of $15,000 for each single person, not a constituent of a family, or $30,000 for a family) is exempt from

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178. In the stated fact situation it is assumed the separate property tools of trade of the owner spouse could not have been seized had he or she not been a judgment debtor. The policy requiring protection of the tools of the rade of both spouses may require an increase of exemptions even when only oen of them is a debtor. If my interpretation of California Civil Code sections 5116 and 5125(d) is correct (see text accompanying notes _____, supra), if the tools of trade of both H and W were community property, the judgment creditor of one of them could, absent an exemption statute, levy on the tools of the other or of both of them. See State ex rel. Archer v. Creech, 18 Wash. 186, 51 P. 363 (1897), raising the possibility that a tools-of-trade exemption should be construed to be "cumulative" where H and W were "of different occupations." Better is a statute simply exempting the necessary tools of trade of both spouses. See the statute in Mounger v. Ferrell, 11 So. 2d (La. App. 1942). This seems a type of family-unit approach to the exemption process rather than a resort to the individual-debtor theory when both spouses work at a trade.

179. See the appendix to this article.

attachment, execution and every type of seizure for the satisfaction of liabilities, except for encumbrances properly fixed thereon . . . ." The statute goes on to list the types of personal property included within the exemption.180/

Apparently attempting to apply the family-unit approach too is Arizona. A statute,181/ defines "debtor" as "an individual or marital community." Another statute182/ lists household items that may be exempt if "personally used by the debtor" (apparently meaning any member of the family) up to $4000 in value in the aggregate. The "or" in the definitional statute implies that if a judgment in Arizona runs against both the marital community and the spouses individually, only one $4000 exemption may be asserted. It seems odd, however, that the individual debtor should have as much of a personal property exemption as a family.

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180. It does strike the writer as strange that the Texas statute limits the exemption to one bicycle or motorcycle whether or not the debtor is a family or single person. Art. 3836(a)(3). Why not let the family exempt one bicycle for each member so long as the $30,000 limit is not exceeded? Similarly, subsection (4) limits the number of exempt ducks and turkeys to 30 regardless of whether the family or individual exemption applies.

181. Ariz. Rev. Stat. § 33-1121, enacted in 1976.

182. Ariz. Rev. Stat. § 33-1123.

B. THE CALIFORNIA APPROACH: FAMILY-UNIT TREATMENT FOR HOMESTEADS

The California declared homestead legislation[183] as construed by the courts folows the family-unit model. The homestead may be selected by either spouse out of community property or separate property of either, which includes joint tenancy and tenancy in common property.[184] Only one homestead per family is permitted,[185] so if H has declared a homestead, W may not.[186] The value limitation for

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183. Cal. Civ. Code §§ 1237 et seq. An exemption-style homestead not requiring the formalities of declaration is provided for by Cal. Code Civ. Proc. § 690.31. The scope of it is the same as the declared homestead, since section 690.31 incorporates the pertinent Civil Code sections by reference. There are numerous situations where the exemption homestead is unavailable. See particularly Cal. Code Civ. Proc. § 674(c) (judgment lien attaches); see also Cal. Code Civ. Proc. § 690.31(b).

184. Cal. Civ. Code § 1238.

185. Gambette v. Brock, 41 Cal. 78 (1871); Strangman v. Duke, 140 Cal. App. 2d 185, 295 P.2d 12 (1956). The considerable authority stating that the homestead exemption is intended to benefit the family as a unit and not its members individually includes Lies v. De Diablar, 12 Cal. 327 (1859); Johnson v. Branner, 131 Cal. App. 2d 713, 281 P.2d 50 (195_).

186. She would want to declare a second homestead on the family residence if possible to increase the amount of exemption; if the family had two homes (e.g., one for summer and one winter home) use of the individual-debtor rather than family-unit approach to the homestead would invite a construction of the term "dwelling house" in section 1237, which declares eligible property, to permit more than one per family if, for example, one was W's separate property and one was H's.

When the spouses are living under a decree of legal separation, each can declare a "married person's separate property" from his or her own separate property or from community property awarded the declarant in the decree. Cal. Civ. Code § 1300.

the homestead if $40,000 for the head of a family,[187] $25,000 for most unmarried persons.[188] Accordingly, whether a judgment runs against H or against H and W as debtors jointly and severally liable, the value of realty exempt under a homestead declaration cannot exceed $40,000.

1. Homestead of Joint Tenancy or Tenancy in Common Property

When joint tenancy or property[189] owned by H and W as tenants in common,[190] is declared to be a homestead by a head of family, the

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187. Defined in Cal. Civ. Code § 1261 to include in addition to "the husband or wife", a person who has residing with him specified issue, collaterals, ascendants and in-laws. It would seem that the "husband" or "wife" of a void marriage could not be the "head of a family."

Clearly, M or F of a Marvin couple with children living with them can each qualify as a head of a family and obtain a $40,000 exemption. A curious fact situation arises if both M and F have children from prior relationships and live together in the same house, each claiming to be head of a different family. If in fact there are different families and if M and F own the house in joint tenancy or as tenants in common, it would seem that each could declare a $40,000 homestead. However, if M and F were in fact holding themselves out to the public as married or as one unmarried family, the creditor of either should be able to obtain a judgment invaliding the homestead declared second in time. Public policy should not permit manipulation of homestead and exemption statutes so that creditors of parties "living in sin" have less rights than creditors of those lawfully married.

188. Cal. Civ. Code § 1260.

189. See Swan v. Walden, 156 Cal. 195, 103 P. 931 (1909); Squibb v. Squibb, 190 Cal. App. 2d 766, 12 Cal. Rptr. 346 (1961).

190. The tenancy in common homestead would be treated exactly the same as a joint tenancy homestead when the spouses are 50-50 co-tenants. If they own the shares unequally (as sixty percent W's separate property, forty percent H's; or eighty percent community, twenty percent H's separate property) some curious problems of apportionment will arise when both spouses are the debtors. The logical solution is to apportion the $40,000 value limit between H's and W's estates if the debtor spouses cannot themselves agree how to apply the $40,000 exemption.

$40,000 value limitation applies but a curious and beneficial (to the debtor spouses) attribute to the homestead exemption has been found to exist by the courts: the ability of the homestead to shift from H's interest or W's depending on who the debtor spouse is.191/ Thus, if joint tenancy property not subject to any encumbrances is worth $80,000, and a non-necessaries creditor of H obtains a judgment, the creditor cannot reach any of the property. The interest of W is simply not liable and the interest of H is wholly exempt as a homestead. W's non-necessaries creditor runs up against the same wall. However, if X has a judgment against W and Z has a judgment against H, the assertion of the homestead exemption against the first to levy apparently attaches it to the interest of the debtor spouse of that creditor, the second to levy then reaches the full interest of the other debtor spouse.192/ If H and W are codebtors jointly and severally liable on the same judgment the only possible solution to the homestead exemption problem is, if the spouses cannot agree what interests the $40,000 exemption will apply to, is to apportion it $20,000 to each joint tenant's interest.

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191. See Strangman v. Duke, 140 Cal. App. 2d 185, 295 P.2d 12 (1956); Schoenfeld v. Norberg, 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970). It matters not whether H or W declared the homestead.

192. Id.

One commentator discussing Schoenfeld v. Norberg,193/ objects to the interaction of joint tenancy (or tenancy in common) and the homestead exemption and calls for legislation that would permit the creditor to reach the excess value over $40,000 "whether the homestead was held in joint tenancy or as community property."194/ The remedy sought by this commentator is not appropriate given the problem that seems to bother him. Consider the case where H has taken $50,000 he inherited and W $50,000 she inherited to purchase the joint tenancy property which has been homesteaded. H's non-necessaries creditor obtains a judgment against him. Surely there is no reasonable basis (unless the managerial system of debt liability is to be abandoned in favor of total liability of all marital property for the ordinary debts of either spouse) for permitting the creditor to seize $60,000 in this situation, which must include $10,000 of W's separate property. Instead, the issue is whether the creditor should get $10,000 (as he does under existing law) or $30,000, by a change in the law that would not let the $40,000 exemption shift but would pro-rate it

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193. 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970).

194. Adams, Homestead Legislation in California, 9 Pac. L.J. 723, 728 (1978).

so that only $20,000 of it attached to H's half interest. The writer of this article approves of legislation abolishing the capacity of a homestead on joint tenancy or tenancy in common property to shift, depending on who the debtor spouse is. That gives these forms of ownership a special debtors' rights benefit not enjoyed by community property.

The analysis of the hypothetical above would be no different if the joint tenancy property had been purchased with $100,000 of community funds. If the debt was outstanding at the time of the transmutation from community ownership of the $100,000 to separate ownership of two $50,000 shares, the creditor can have the transmutation set aside as a fraud on creditors.195/ If the debt was incurred after the transmutation was recorded, the creditor has no more basis for complaint than he would have if the spouses spent separate inheritances to buy the joint tenancy. If the debt was incurred before the transmutation, the transmutation did not then render the debtor spouse insolvent, but later events combined with the transmutation create an insolvency at the time the obligation is to be paid, some relief is warranted in favor of a creditor who relied on the community status of

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195. See Wikes v. Smith, 465 F.2d 1142 (9th Cir. 1972).

the assets at the time the debt was created. But it will be rather hard for the creditor to establish such reliance, since if he was concerned about not being able to reach all of the subject property for payment he would likely have asked for a security interest.

In sum, interaction of the joint tenancy and homestead law simply implements the theories of the managerial system of debt liability, and onlyh the shifting effect of a homestead on joint tenancy or tenancy in common property invites legislative change.196/

C. PERSONAL EXEMPTIONS IN CALIFORNIA: UNCERTAINTY AS TO EXTENT OF INDIVIDUAL-DEBTOR THEORY IN USE

Of the numerous California statutes creating personal property exemptions to execution, one literally embraces the individual-debtor theory, another probably does, and the rest are ambiguous. Code of Civil Procedure section 690.7 provides exemption of $1000 of any combination of savings and loan deposits and certificates. Subsection (b) states:

> Such exemption set forth in subdivision (a) shall be a maximum of one thousand dollars ($1,000) per person, whether the character of the property be separate or community.

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196. Prior studies by the California Law Revision Commission (e.g., Memo No. 78-48, and attachments), make clear that the homestead statutes in effect also raise serious problems as to the effect of pre-existing encumbrances and priorities of distribution of funds obtained on sale. These are not related to marital property problems and have not been considered in the writing of this study.

The language has not been construed. Probably its intent is to allow judgment debtor H to exempt a $1000 savings and loan certificate that is community property even though his ownership share of it is $5000. But the "per person" language literally has broader implications. On its face it permits the family members H and W to obtain $2000 in exemptions if the judgment runs against both spouses.

A less than literal interpretation (converting the statute into a family-unit type of exemption) would allow the $2000 exemption in every instance where the named judgment debtor was married. The theory would be that a judgment against a married person really makes two "persons" liable, since the community interest of the spouse in assets subject to levy of execution can be seized even though that person is not named a judgment debtor. Certainly it is logical to conclude that a family unit of husband and wife should be accorded double the exemption of a single person.197/

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197. That is the Texas scheme. See text accompanying notes _____, supra.

The suggested interpretation would be unfair to family units equally deserving of the double exemption, as where a widow is raising eight children. (Cf. Cal. Civ. Code § 1261, qualifying such a widow as a head of family to get the $40,000 rather than the $25,000 homestead.) The children are not persons who are liable. If they were, the theory combined with the hypothetical facts would allow nine times the $1000 exemption, which is certainly unwarranted.

However, double exemptions for family units seems rather clearly not to be the theory underlying the personal property, as opposed to homestead, exemptions of California law. For example, Code of Civil Procedure section 690.1 exempts[198/]

> Necessary household furnishings and appliances and wearing apparel, ordinarily and reasonably necessary to, and personally used by, the debtor and[199/] his resident family, including but not limited to, one piano; one radio and one television receiver; . . . one shotgun and one rifle . . . .[200/]

Code of Civil Procedure section 690.4 exempts $2500 worth of tools of the trade "personally owned and used by the debtor" exclusively in his business. It seems obvious that if H and W are jointly and severally liable on the judgment and each has a separately-owned business, the statute raises the total exemption for tools of trade to $5000 worth.

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198. Cal. Code Civ. Proc. § 690 empowers the "judgment debtor or defendant" to claim the exemptions in sections 690.1 et seq. This certainly seems to exclude the debtor's sposue when he or she is not a party.

199. To avoid absurd results this has got to be interpreted as "or." Otherwise a single person could not invoke section 690.1. Moreover, if H were the debtor and W but not he played the piano, that instrument could not be exmept unless the "or" interpretation is adopted.

200. A portion of the statute not quoted exempts a three-month supply of fuel for the residence of the debtor. This provides flexibility, but the amount of exmeption does not turn on family status. A single debtor living in a drafty mansion will find this part of the exemption status far more useful than a large family living in an energy-efficient solar home.

If the businesses' tools are community property are they "personally" owned? Keep in mind that they cannot be liable unless they are either separate or community property, thus it would be superfluous to construe "personally" as meaning not wholly owned by a stranger. It would be absurd not to allow the exemption for tools of trade that are community property, and so the courts will have to ignore the word "personally" as something that inadvertently slipped into section 690.4 and has no meaning. If H is the debtor and he is unemployed but W uses community property tools of the trade in her business, can they be exempted under section 690.4?[201] It will take a courageous interpretation of the word "debtor" to achieve this desirable conclusion. (As noted above, the suggested interpretation of "debtor" in other exemption statutes will cause doubling of the exemptionf or married persons, apparently contrary to the intention of the legislature.) Section 690.4 is atrociously drafted; even if the legislature ultimately decides to use an individual-debtor approach to personal exemptions while employing the family-unit approach to realty homesteads, there is no reasonable basis for excluding community (or

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201. Assume W's business is not California Civil Code section 5125(d) community business or that Civil Code section 5116 makes the assets of W's section 5125(d) business liable for H's debts as an exception to the managerial system of liability.

for that matter H's separately owned[202]) tools of the trade used by the debtor's spouse[203] but not by the debtor. The family may be dependent on the spouse and financially ruined if the spouse is thrown out of business by the levy of execution.

Section 690.2 of the Code of Civil Procedure by implication suggests an individual-debtor approach to exemptions for motor vehicles. It exempts "one motor vehicle" (with a $500 equity limit).

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202. The statute should also embrace tools of the trade owned by the nondebtor spouse as his or her separate property if it is procedurally possible for a necessaries' creditor to levy execution against such property even though the owner was not a party to the action and not mentioned in the judgment. That happened in White v. Gobey, 130 Cal. App. Supp. 789, 19 P.2d 876 (San Francisco Couinty Super. Ct. App. Dept. 1933). The nondebtor spouse did not raise the due process and procedural objection which, other cases indicate, could have successfully been raised. See notes _____, supra, and accompanying text. As indicated there, this writer thinks White v. Gobey did not err in allowing the necessaries creditor to levy on the separate property of the debtor's spouse although the latter was not a party to the litigation and not mentioned in the judgment. In White, the nondebtor spouse successfully asserted an exemption literally available only to the debtor by the terms of the statute.

203. It seems to the writer that it should not matter who, whether the spouse, a child, or even an employee, is the one who uses the tools of the trade owned by the debtor separately or as community property if their seizure would destroy the business upon which the family is dependent for their income. For example, suppose H ran a blackshop's business and owned the tools; he retired when he became physically incapacitated and the business is run by H's son, who supports H, and uses H's tools in operating the business. Every reason for the tools-of-trade exemption seems present on these facts.

The statute then lays out procedures for execution sale when "the debtor has only one vehicle."204/ In 1977 there was deleted from the statute a provision to the effect that the debtor spouse would be treated for exemption purpose as owning the entire vehicle if the vehicle were community property.205/ The stricken language had as its apparent purpose a quick answer to any claim by a married debtor that he could double the exemption from $500 of equity to $1000 of equity.

The amendment removing that language certainly undercut some of the argument in favor of two $500 motor vehicle exmeptions when a judgment runs against both H and W. Yet remaining language strongly implies that the double exemption will be available. The language about procedure when "the debtor has only one vehicle" seems to compel recognizing W as a new and different debtor when the judgment runs against her and H, not just him, and she owns a car separately. H does not "have" that car; W "has" that car. Thus, the term "debtor" must treat H and W individually. This being clear when W's car is separately owned by her, it would seem unfair not to give the second $500 motor vehicle exemption when W as a joint judgment debtor owned merely a community half interest in one or two vehicles. Certainly amendment to section 690.2 is needed to clarify whether and to what extent the exemption doubles when both spouses are judgment debtors.

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204. Cal. Code Civ. Proc. § 690.2(b).

205. 1977 Cal. Stats. ch. 683, § 1, p. _____.

With respect to two areas of exemption, the statutes rather clearly avoid the problem of double exemption by conferring the benefit on a "person" or "employee" rather than a debtor. For example, Code of Civil Procedure section 690.18 exempts pention payments received "by any person." Since W is a person, if H's judgment creditor seeks to seize her community pension payments, the statute plainly exempts them. The new Employees' Earnings Protection Law,206/ enacted in 1978, similarly exempts "the earnings of an employee."207/ This form of exemption statute is consistent with the family-unit approach to debt liability of married persons and is recommended by the writer.

Examining the several forms of exemption (including homestead) statutes one finds inconsistency, ambiguity,208/ and confusion. The

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206. Cal. Code Civ. Proc. §§ 723.101 et seq.

207. Id. § 723.121. Unfortunately, section 723.050 of the same act says that "the amount of earnings of a judgment debtor exempt" is determined by a specified federal statute. Obviously, "judgment debtor" must be construed to include the debtor's spouse when his or her wages are sought to be garnished or else there would be no statute limiting the amount of the exemption of such "employee." Section 723.050 should be amended to strike the words "judgment debtor" and insert in lieu thereof "employee." Similar problems exist with use of the term "judgment debtor" in sections 123.151 and 723.052.

208. Observe that White v. Gobey, supra note _____, by no means suggests that any ambiguity should be resolved in favor of dual exemptions when a judgment runs against both H and W. The judgment in White was treated as having that effect, but only one set of exemptions was at issue -- those claimed by H -- since levy of execution had not, so far as the case suggests, been attempted on any property in which W had an interest.

mixing of the individual-debtor and family-unit approaches makes little sense. If, when it comes to realty, a 40 to 25 ratio on the amount of exemption is considered appropriate (with heads of families being able to claim the larger amount), why shouldn't there be a similar approach to personal property in the home, to savings and loan accounts, etc.? Certainly, the mere fortuity that the judgment runs against both spouses should not determine whether the exemption is to be doubled.

The writer recommends an approach like that taken in article 3836 of the Texas Civil Statutes.209/ It applies the family-unit approach generally to all personal property exemptions. To obtain the larger exemptions for debtors who are members of families it is not necessary to get judgment against both spouses.

D. THE EXEMPTION PROCESS AND SEPARATED SPOUSES.

The exemption process must be utter chaos in California when the spouses are living separate and apart.210/ Literally applied, Code of

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209. See note _____ and accompanying text.

210. The only guidance at all is found in Cal. Civ. Code §§ 1300-1304, providing a procedure for splitting the homestead (actually, converting one $40,000 homestead into two $25,000 separate homesteads) when married persons obtain a decree of legal separation. Very few Californians get such a decree. It is very common, however, for them to live separate and apart in different households of which each is the "head" before obtaining a divorce.

Civil Procedure 690.1[211] operates in a most hideous fashion. If H is the judgment debtor, community property left in W's possession is liable on the judgment but the statute exempts only household furnishings "personally used by the debtor and his resident family." It becomes necessary to avoid an absurd result of not exempting the community furnishings at W's residence to construe "debtor" to include W but to further construe W's "family" as not including the children who are living with H (and thus not using the community household furnishings at W's residence). If W successfully asserts section 690.1 household furnishings exemption, the creditor may now turn to H's residence to seek assets.[212] Can H assert the 690.1 exemption? If W has exempted "one piano; one radio and one television receiver" can H in effect double the exemption to the harm of the creditor by exempting one more of each? Or do each of the spouses get to exempt half a piano and half a radio?[213]

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211. See text accompanying note _____, supra.

212. The legal problem is the same when the creditor starts at H's place, is met with an exemption, and sends the sheriff over to W's.

213. That seems absurd, but halving the three-month fuel supply exemption of section 690.1 to one and a half month's each is not at all absurd. It accommodates H, W, and the creditor.

It is obvious that extensive changes in the law are in order to handle the exemption problem when the spouses have separated and set up separate households. One partial solution is proposed in part E, below.214/ But a workable system will require a radical departure from the present statutory framework. I recommend something like the Texas system, lumping most personal property exemptions into one statute and giving one hundred percent or eighty percent (or whatever is determined to be the appropriate increase) more exemption to a married debtor. So long as the spouses cohabit, the amount of exemption is fixed and is not affected by whether the judgment runs against one or both.

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214. In short, denying any exemption if the claimant has nonliable property that would be exempt if the nonliability were removed. Separated spouses will have income that is separate property of the spouses under Cal. Civ. Code § 5118. Except in cases where both spouses are personally liable and in cases of necessaries creditors, these earnings will not be liable for the other spouse's debts. Some household items such as the television set may be purchased with post-separation earnings.

In some instances, a separated spouse will not work for wages but look to rents and profits of pre-separation community gains for income. In such cases the likelihood of there being nonliable property that can cancel out the exemption is reduced. However, the spouse may have separate property owned before marriage, inherited, etc.

A separation that triggers Civil Code section 5118,215/ should result in the splitting of the exemption, half going with W and half with H.216/ Subject to the reduced total value amount, each spouse could exempt an automobile, each a television set, etc. The one problem I see with this approach is that it might tend to discourage reconciliation and the reconsolidation of the two households into the one marital household in that newly bought pianos, television sets, etc., would lose an exemption. Personally, I find it hard to believe such financial considerations would affect the decision to reconcile. If legislators are troubled by this, one solution is to permit all families to exmept as many pianos and television sets as they want so long as the total value of exempted personalty does not exceed a specified limit.

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215. See note _____, supra.

216. If the 40-25 ratio of Civil Code section 2160 were used rather than the 30-15 ratio of the Texas statute, it would not be seriously unfair to creditors to give each spouse 25 rather than 20 under the California scheme. That is, separation would involve not just a split of the exemption but a slight increase in the total amount of property exempted.

At present, a decree of legal separation can be an occasion for splitting the homestead exemption.217/ At the very least legislation extending this approach to personal property exemptions seems indicated.

A divorce creates two single individuals and probably two judgment debtors in most instances. However, the case of a levy of execution after divorce on a judgment obtained during marriage against H alone on former community property awarded by the divorce court to W is possible.218/ Therefore, the legislation calling for a split exemption at separation should be specific in extending it beyond divorce. (As is brought out in Part E of section III of this paper, the divorcee's remarriage should nto increase the exemption she has in such a suit by the former husband's creditor because the nonliability status of all her property except former community property is adequate protection for her.)

D. WHO SHOULD ASSERT THE EXEMPTION WHEN THE FAMILY-UNIT APPROACH APPLIES?

The preceding discussion proposed employing a family-unit approach to personal exemptions until the sposues separate. This raises a problem of which spouse should assert the exemption? When only one

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217. See note _____, supra.

218. See notes _____, supra, and accompanying text.

spouse is the judgment debtor, he or she is the logical party to do so. (The statute should empower the spouse of the debtor to claim the exemption, however, when the debtor is absent; when the debtor is present but does not take advantage of the exemptions, his or her spouse should be able to claim them only in community property or the spouse's separate property -- in the case of a necessaries creditor[219/] -- and not in the debtor's own separate estate.) This means that if there are two pianos liable -- one community and one separate property of the debtor's -- the debtor can select his own separate property for the exemption. If the debt was a separate debt, the debtor's spouse will not have a remedy until reimbursement is ordered at dissolution for loss of the community piano to pay a separate debt. However, the debtor spouse could have voluntarily sold the community piano and used the proceeds to partially pay off the separate obligation, therefore there is no reason for the exemption law to distinguish between community and separate debts.

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219. It is assumed here that legislation will approve the procedure used in White v. Gobey, 130 Cal. App. Supp. 789, 19 P.2d 876 (San Francisco Cty. Super. Ct. App. Dept. 1933), where by one spouse's necessaries creditor levied on the separate property of the debtor's spouse who was not a party to the action.

If both spouses living together are the judgment debtors, the family-unit exemption they share can be asserted by either of them. If they disagree as to which piano, which t.v. set, etc. is to be rescued from the creditor's grasp, no workable solution appears other than ot let the first to make the exemption claim bind the other spouse.220/ The decision may, as noted, lead to rights of reimbursement at dissolution if it results in community funds going to pay a separate debt.221/

E. THE INTERACTION OF NONLIABILITY AND EXEMPTION PROVISIONS

1. Community Property Not Liable.

The final section of this article strongly urges legislation requiring that homestead and personal exemptions must be exhausted on available marital property that would be liable to the creditor under a total liability approach to marital property. It should be kept in

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220. That is, the law would recognize another "seize control" situation, inherent in California's equal management scheme. See Reppy, supra note 9, at pp. 1013-1022.

221. If the exemption decision causes separate funds of the acting sposue to pay community debts, a fact situation arises whether a gift to the community was intended. If the acting spouse exempted a valuable piano loved by the family to let a battered-up separately owned piano of his own go to the creditor, for example, the trier of fact on a reimbursement claim would not find donative intent so much as the exercise of common sense.

mind that what property qualifies for the exemption is really only significant in an insolvency situation where the creditor is not going to get paid.222/

Fairness to creditors makes the proposal for denying the exemptions especially equitable when community property sufficient to exhaust the exemption is immune under exceptions to the managerial system.

For example, if the creditor is a post-nuptial creditor of W's, H's earnings are not liable. Presumably that nonliability is not lost when H invests those earnings in a piano, television set, automobile, etc. If debtor W also invests her earnings, which are liable, in duplicative investments223/ the purpose of the granting personal exemptions to save the family from ruin will not be furthered by allowing W to assert the exemptions for one piano, one t.v. set, one automobile, etc.

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222. For example, if debtor H wants to save a beloved piano from the creditor in a situation where enough assets exist to pay the creditor, H ought to voluntarily pay him and avoid the procedural runaround of asserting the exemption. However, that is mpossible where solvency to pay the creditor turns on the existence of community realty (and W won't joint in a conveyance to sell it), of a community bank account managed by W, probably of a Civil Code section 5125(d) community business managed by W, and, where the creditor is a necessaries creditor, of separate property of W's.

223. For example, if the family has a summer house, to pianos, are possible; numerous t.v. sets would be owned by many families.

The need for a workable interaction of the nonliability and exemption provisions becomes even more clear where the levy of execution is made after divorce by a creditor of one former spouse seeking to reach (for payment of a debt assigned by the divorce court to H) former community property in the hands of the other former spouse. Such property is the only property the creditor can reach. All other property of the nondebtor former spouse is not liable. If W on a divorce from H was awarded a community piano, television set, and automobile, and she has remarried and the new community has bought similar items with community funds of the second marriage, the reason for any exemption of the former community property vanishes. All the more so is it clear that an exemption in this posture would be improper when we recall that on paying the creditor for a debt the divorce court assigned to H, W obtains a cause of action for reimbursement against H. The levy of execution against the former community property actually works but a change in the form of assets (albeit if H-1 has vanished the change is very detrimental to W).

2. Separate Property Not Liable

The proposal to exhaust the exemptions if there exists marital property that is not liable, but which would claim the exemption if it were liable, becomes debatable when the nonliability is based on the separate nature of the property. For example, H and W marry at a time

when he owns a house with a piano, a television set, an automobile, etc. Later, out of community earnings, the couple buy a summer house and a piano and t.v. set for it. They buy a second car that is community property. Now W's judgment creditor on a post-marriage debt strikes, and she claims the piano and t.v. at the summer house as well as the second car to be exempt. Under present law she plainly can do so. Treating the family as a unit, the reasons for the exemption are not present, as H's nonliable separate property provides the family with its basic needs. Obviously creditors can make a strong case of unfairness to them resulting from combining the nonliability of separate property with personal exemptions for the marital property that is liable.

On the other hand, W can reasonably respond that the situation where nonliable property is the nondebtor spouse's separate estate[224] is significantly different from that where the nonliable property is community. That is so, she urges, because the existence of H's separate property will not save her from being left in financial ruin at dissolution of the marriage by his death or divorce.[225]

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224. Under no circumstances should the debtor be able to claim exemptions in community property when his or her own separate estate, immune under the bizarre Cal Civ. Code § 5123, contains assets of the same type for which exemption is claimed under statutes such as Cal. Code Civ. Proc. § 690.1.

225. The argument that the exemption is necessary to protect her testamentary power at dissolution of the marriage by her own death is not persuasive as the exemption statutes are intended to provide protection only to the living.

Awards of alimony at divorce and of family allowance and probate homestead at H's death will be some protection to W. If these are considered not enough protection, it appears to the writer that the solution is not to make H's creditors pay for additional security for W by virtue of claimed exemptions that cause a debt to go unpaid when the property preserved is not really needed by the family. Instead, a statute can be enacted which -- when the amount of community property remaining to W is insufficient for her maintenance -- authorizes further invasion of H's separate estate for her benefit.226/

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226. See Note, Community Property -- Marital Portion, 10 La. L. Rev. 257 (1950); Comment, The Marital Portion in Louisiana, 2 Loyola (New Orleans) L.Rev. 58 (1943).

APPENDIX

Selected Homestead and Exemption Statutes from Community Property States (in effect January 1, 1980)

I. ARIZONA REVISED STATUTES

§ 33-1101. Homestead defined; homestead exemptions; persons entitled to hold homesteads

A. Any person the age of eighteen or over, married or single, who resides within the state may hold as a homestead exempt from attachment, execution and forced sale, not exceeding twenty thousand dollars in value, any one of the following:

1. Real property in one compact body upon which exists a dwelling house in which the claimant resides.

2. Land in a compact body which the claimant designates.

B. Any person the age of eighteen or over, married or single, who resides within the state may hold as a homestead exempt from attachment, execution and forced sale, not exceeding ten thousand dollars in value, any of the following:

1. A mobile home in which the claimant resides.

2. A mobile home in which the claimant resides plus the land upon which that mobile home is located at the time of filing.

C. Only one homestead may be claimed by a married couple or a single person under the provisions of this section. The value as specified in this section refers to the equity of a single person or married couple claiming the homestead. As amended Laws 1977, Ch. 106, § 1.

§ 33-1121. Definitions

In this article, unless the context otherwise requires:

1. "Debtor" means an individual or marital community utilizing property described in this article for personal or family use.

2. "Process" means execution, attachment, garnishment, replevin, sale or any final process issued from any court or any other judicial remedy provided for collection of debts. Added Laws 1976, Ch. 170, § 21.

§ 33-1122. Debtor's property not exempt from process

The property declared exempt by this article is not exempt from process utilized to enforce a security interest in or pledge of such property, or to obtain possession of leased property. Added Laws 1976, Ch. 170, § 21.

§ 33-1123. Household furniture, furnishings and appliances

The following household furniture, furnishings and appliances personally used by the debtor are exempt from process provided their aggregate fair market value does not exceed four thousand dollars:

1. One kitchen and one dining room table with four chairs each, plus one additional chair for each dependent of the debtor who resides in the household if the debtor and dependents exceed four in number.

2. One living room couch.

3. One living room chair, plus one additional chair for each dependent of the debtor who resides in the household.

4. Three living room coffee or end tables.

5. Three living room lamps.

6. One living room carpet or rug.

7. Two beds, plus one additional bed for each dependent of the debtor who resides in the household.

8. One bed-table, dresser and lamp for each bed allowed by paragraph 7.

9. Bedding for each bed allowed by this section.

10. Pictures, oil paintings and drawings, drawn or painted by debtor and family portraits in their necessary frames.

11. One television set.

12. One radio.

13. One stove.

14. One refrigerator.

15. One washing machine. Added Laws 1976, Ch. 170, § 21.

§ 33-1124. Food, fuel and provisions

All food, fuel and provisions actually provided for the debtor's individual or family use for six months are exempt from process. Added Laws 1976, Ch. 170, § 21.

§ 33-1125. Personal items

The following property of a debtor shall be exempt from process:

1. All wearing apparel not in excess of a fair market value of five hundred dollars.

2. All musical instruments provided for debtor's individual or family use not in excess of an aggregate fair market value of two hundred fifty dollars.

3. Domestic pets, horses, milk cows and poultry not in excess of an aggregate fair market value of five hundred dollars.

4. All engagement and wedding rings not in excess of an aggregate fair market value of one thousand dollars.

5. The library of a debtor, including books, manuals, published materials and personal documents not in excess of an aggregate fair market value of two hundred fifty dollars.

6. One watch, one typewriter, one bicycle, one sewing machine, a family bible, a lot in any burial ground, one shotgun and one rifle, not in excess of an aggregate fair market value of five hundred dollars. As amended Laws 1976, Ch. 170, § 22.

§ 33-1126. Money benefits or proceeds

The following property of a debtor shall be exempt from execution, attachment or sale on any process issued from any court:

1. All money received by or payable to a surviving spouse or child upon the life of a deceased spouse or parent, not exceeding ten thousand dollars.

2. The earnings of the minor child of a debtor or the proceeds thereof by reason of any liability of such debtor not contracted for the special benefit of such minor child.

3. All money, proceeds or benefits of any kind to be paid in a lump sum or to be rendered on a periodic or installment basis to the insured or any beneficiary under any policy of health, accident or disability insurance or any similar plan or program of benefits in use by any employer, shall be exempt from process, except for premiums payable on such policy or debt of the insured secured by a pledge, and except for collection of any debt or obligation for which the insured or beneficiary has been paid under the plan or policy.

4. All money arising from any claim for the destruction of, or damage to, exempt property and all proceeds or benefits of any kind arising from fire or other insurance upon any property exempt under this article shall be exempt from process.

5. The cash surrender value of insurance policies where for a continued, unexpired period of one year such policies have been owned by a debtor and have named as beneficiary the debtor's surviving spouse, child, parent, brother, sister, or any dependent, to the extent of one thousand dollars for each surviving spouse, child, parent, brother, sister, or other dependent, not to exceed five thousand dollars in the aggregate. For this section a dependent is defined as one who is dependent upon the insured debtor for not less than one-half support.

6. Any claim for damages recoverable by any person by reason of any levy upon or sale under execution of his exempt personal property or by reason of the wrongful taking or detention of such property by any person, and the judgment recovered for such damages.

7. A total of one hundred dollars held in a single account in any one financial institution as defined by § 6-101, provided that such sum shall not be exempt until the debtor files with the branch of the financial institution at which the account is carried an election designating the specific account to be protected. An election so filed shall be effective if received by the court and the financial institution at any time before judgment is entered against the garnishee or any other court order directing the financial institution to pay the proceeds of the account to any creditor or alleged creditor of the debtor is issued or entered. As amended Laws 1976, Ch. 170, § 23.

§ 33-1130. Tools and equipment used in a commercial activity, trade, business or profession

The following property of a debtor shall be exempt from process:

1. The tools of a mechanic or artisan necessary to carry on his or her trade not in excess of an aggregate fair market value of two thousand five hundred dollars.

2. The instruments, books and office furniture of a clergyman, surgeon, physician, dentist, surveyor, engineer, notary, attorney, judge or teacher necessary to carry on his or her profession or any instruments, books and office furniture necessary to carry on the profession of any other professional, tradesman or artisan not in excess of an aggregate fair market value of two thousand five hundred dollars.

3. The camping outfit of a prospector, including mining tools, saddles, burros not in excess of an aggregate fair market value of one thousand five hundred dollars.

4. One motor vehicle not in excess of a fair market value of one thousand dollars.

5. Farm machinery, utensils, implements of husbandry, feed, seed, grain and animals not in excess of an aggregate fair market value of one thousand five hundred dollars belonging to a debtor whose primary income is derived from farming.

6. All arms, uniforms and accoutrements required by law to be kept by a debtor.

7. One motor vehicle belonging to any debtor who is maimed or crippled not in excess of a fair market value of three thousand dollars. Added Laws 1976, Ch. 170, § 24.

§ 33-1131. Wages; salary; compensation

A. For the purposes of this section, "disposable earnings" means that remaining portion of a debtor's wages, salary or compensation for his personal services, including bonuses and commissions, or otherwise, and includes payments pursuant to a pension or retirement program, after deducting from such earnings those amounts required by law to be withheld.

B. Except as provided in subsection C of this section, the maximum part of the disposable earnings of a debtor for any work week which is subject to process may not exceed twenty-five per centum of disposable earnings for that week or the amount by which disposable earnings for that week exceed thirty times the minimum hourly wage prescribed by federal law in effect at the time the earnings are payable, whichever is less.

C. The exemptions provided in subsection B of this section do not apply in the case of any order of any court for the support of any person. In such case, one-half of the disposable earnings of a debtor for any pay period is exempt from process.

D. The exemptions provided in this section do not apply in the case of any order of any court of bankruptcy under chapter XIII of the federal bankruptcy act or any debt due for any state or federal tax. Added Laws 1976, Ch. 170, § 24.

Comments

Sections 33-1121(1) in defining "debtor" as the marital community is helpful in preventing subsequent statutes from calling for absurd results. Thus the "one washing machine" exempt under section 33-1123(15) can be used by W and be exempt when the judgment runs against H. Also, reference to "dependent of the debtor" in section 33-1123 includes dependents of W in H's home when the judgment runs against him.

The Arizona scheme is unworkable when the spouses live separate and apart. It is impossible to guess whose "one television set", for example, will be exempt when the creditor of H or of W can levy against community personalty in the home of each spouse.

Section 33-1124 implies a doubling of the fuel exemption when the marital community is living in two households but is, obviously, ambiguous.

Section 33-1125(6) is almost ludicrous in exempting only one watch when the "marital community" is the debtor. Whose shall be seized, H's or W's? Who shall decide which watch to exempt?

Section 33-1130(1), especially by the reference to "his or her trade" is ambiguous as to whether community tools of the trade of W are exempt as well as H's tools of the trade when the debtor is the marital community. The exemption in subsection (4) of only one vehicle is going to cause all kinds of problems when the spouses are living apart.

II. IDAHO CODE

CHAPTER 6

EXEMPTION OF PROPERTY FROM ATTACHMENT OR LEVY

11-601. Definitions. — As used in this act, unless the context otherwise requires:

(1) "Individual" means a natural person and not an artificial person such as a corporation, partnership, or other entity created by law.

(2) "Dependent" means an individual who derives support primarily from another individual. [I.C., § 11-601, as added by 1978, ch. 348, § 1, p. 909.]

11-602. Protection of property of residents and nonresidents. — (1) Residents of this state are entitled to the exemptions provided by this act. Nonresidents are entitled to the exemptions provided by the law of the jurisdiction of their residence.

(2) The term "resident" means an individual who intends to maintain his home in this state. [I.C., § 11-602, as added by 1978, ch. 348, § 1, p. 909.]

11-603. Property exempt without limitation. — An individual is entitled to exemption of the following property:

(1) A burial plot for the individual and his family;

(2) Health aids reasonably necessary to enable the individual or a dependent to work or to sustain health;

(3) Benefits the individual is entitled to receive under federal social security, state unemployment compensation, or veteran's benefits, or under federal, state, or local public assistance legislation;

(4) Benefits payable for medical, surgical, or hospital care. [I.C., § 11-603, as added by 1978, ch. 348, § 1, p. 909.]

11-604. Property exempt to extent reasonably necessary for support. — (1) An individual is entitled to exemption of the following property to the extent reasonably necessary for the support of him and his dependents:

(a) Benefits paid or payable by reason of disability, illness, or unemployment;

(b) Money or personal property received, and rights to receive money or personal property for alimony, support, or separate maintenance;

(c) Proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent;

(d) Proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and

(e) Assets held, payments made, and amounts payable under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract, providing benefits by reason of age, illness, disability, or length of service.

(2) The phrase "property to the extent reasonably necessary for the support of him and his dependents" means property required to meet the present and anticipated needs of the individual and his dependents, as determined by the court after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual, including that which is exempt.

(3) The exemptions allowed by this section shall be lost immediately upon the commingling of any of the funds or amounts described in this section with any other funds. [I.C., § 11-604, as added by 1978, ch. 348, § 1, p. 909.]

11-605. Exemptions of personal property subject to value limitations. — (1) An individual is entitled to exemption of the following property to the extent of a value not exceeding five hundred dollars ($500) in [on] any item of property:

(a) Furnishings and appliances reasonably necessary for one (1) household;

(b) If reasonably held for the personal use of the individual or a dependent, wearing apparel, animals, books, and musical instruments; and

(c) Family portraits and heirlooms of particular sentimental value to the individual.

(2) An individual is entitled to exemption of jewelry, not exceeding two hundred fifty dollars ($250) in aggregate value, if held for the personal use of the individual.

(3) An individual is entitled to exemption, not exceeding one thousand dollars ($1,000) in aggregate value, of implements, professional books, and tools of the trade; and to an exemption of one (1) motor vehicle to the extent of a value not exceeding five hundred dollars ($500).

(4) All courthouses, jails, public offices and buildings, school houses, lots, grounds and personal property appertaining thereto, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the courthouse, jail and public offices belonging to any county of this state, or for the use of schools, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state. No article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon.

(5) All arms, uniforms and accouterments required for the use of an individual as a peace officer, a member of the national guard or military service.

(6) A water right not to exceed one hundred sixty (160) inches of water used for the irrigation of lands actually cultivated by the individual, and the crop or crops growing or grown on fifty (50) acres of land, leased, owned or possessed by an individual cultivating the same, provided, that the amount of the crops so exempted shall not exceed the value of one thousand dollars ($1,000). [I.C., § 11-605, as added by 1978, ch. 348, § 1, p. 909.]

11-606. Tracing exempt property. — (1) If property, or a part thereof, that could have been claimed as exempt, such as, a burial plot under subsection (1) of section 11-603, Idaho Code, a health aid under subsection (2) of section 11-603, Idaho Code, or personal property subject to a value limitation under paragraph (a) or (b) of subsection (1) or subsection (3) of section 11-605, Idaho Code, has been taken by condemnation, or has been lost, damaged, or destroyed, and the owner has been indemnified therefore, the individual is entitled to an exemption of proceeds that are traceable for three (3) months after the proceeds are received. The exemption of proceeds

41-1833. Exemption of proceeds — Life insurance. — (1) If a policy of insurance, whether heretofore or hereafter issued, if effected by any person on his own life, or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or executors or administrators of such insured or the person so effecting such insurance, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person, and such proceeds and avails shall be exempt from all liability for any debt of the beneficiary existing at the time the policy is made available for his use: provided, that subject to the statute of limitations, the amount of any premiums for such insurance paid with intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the insurer issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, the insurer shall have received written notice at its home office, by or in behalf of a creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specification of the amount claimed.

(2) For the purposes of subsection (1) above, a policy shall also be deemed to be payable to a person other than the insured if and to the extent that a facility-of-payment clause or similar clause in the policy permits the insurer to discharge its obligation after the death of the individual insured by paying the death benefits to a person as permitted by such clause. [1961, ch. 330, § 425, p. 645.]

41-1834. Exemption of proceeds — Disability insurance. — Except as may otherwise be expressly provided by the policy or contract, the proceeds or avails of all contracts of disability insurance and of provisions providing benefits on account of the insured's disability which are supplemental to life insurance or annuity contracts heretofore or hereafter effected shall be exempt from all liability for any debt of the insured, and from any debt of the beneficiary existing at the time the proceeds are made available for his use. [1961, ch. 330, § 426, p. 645.]

41-1835. Exemption of proceeds — Group insurance. — (1) A policy of group life insurance or group disability insurance or the proceeds thereof payable to the individual insured or to the beneficiary thereunder, shall not be liable, either before or after payment, to be applied by any legal or equitable process to pay any debt or liability of such insured individual or his beneficiary or of any other person having a right under the policy. The proceeds thereof, when not made payable to a named beneficiary or to a

third person pursuant to a facility-of-payment clause, shall not constitute a part of the estate of the individual insured for the payment of his debts.

(2) This section shall not apply to group insurance issued pursuant to this code to a creditor covering his debtors, to the extent that such proceeds are applied to payment of the obligation for the purpose of which the insurance was so issued. [1961, ch. 330, § 427, p. 645.]

41-1836. Exemption of proceeds — Annuity contracts — Assignability of rights. — (1) The benefits, rights, privileges and options which under any annuity contract heretofore or hereafter issued are due or prospectively due the annuitant, shall not be subject to execution nor shall the annuitant be compelled to exercise any such rights, powers, or options, nor shall creditors be allowed to interfere with or terminate the contract, except:

(a) As to amounts paid for or as premium on any such annuity with intent to defraud creditors, with interest thereon, and of which the creditor has given the insurer written notice at its home office prior to the making of the payments to the annuitant out of which the creditor seeks to recover. Any such notice shall specify the amount claimed or such facts as will enable the insurer to ascertain such amount, and shall set forth such facts as will enable the insurer to ascertain the annuity contract, the annuitant and the payments sought to be avoided on the ground of fraud.

(b) The total exemption of benefits presently due and payable to any annuitant periodically or at stated times under all annuity contracts under which he is an annuitant, shall not at any time exceed three hundred and fifty dollars ($350) per month for the length of time represented by such instalments, and that such periodic payments in excess of three hundred and fifty dollars ($350) per month shall be subject to garnishee execution to the same extent as are wages and salaries.

(c) If the total benefits presently due and payable to any annuitant under all annuity contracts under which he is an annuitant, shall at any time exceed payment at the rate of three hundred and fifty dollars ($350) per month, then the court may order such annuitant to pay to a judgment creditor or apply on the judgment, in instalments, such portion of such excess benefits as to the court may appear just and proper, after due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders.

(2) If the contract so provides, the benefits, rights, privileges or options accruing under such contract to a beneficiary or assignee shall not be transferable nor subject to commutation, and if the benefits are payable periodically or at stated times, the same exemptions and exceptions contained herein for the annuitant, shall apply with respect to such beneficiary or assignee.

(3) An annuity contract within the meaning of this section shall be any obligation to pay certain sums at stated times, during life or lives, or for a specified term or terms, issued for a valuable consideration, regardless of whether or not such sums are payable to one or more persons, jointly or otherwise, but does not include payments under life insurance contracts at

stated time during life or lives, or for a specified term or terms. [1961, ch. 330, § 428, p. 645.]

41-3218. **Benefits not attachable.** — No money or other benefit, charity, relief or aid to be paid, provided or rendered by any society, shall be liable to attachment, garnishment or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment by the society. [1961, ch. 330, § 695, p. 645.]

Comments

Section 11-601(1) in defining an individual but making clear whether the spouse of a debtor can be an "individual" although not named in the judgment creates unfortunate ambiguities. For example, under section 11-603, it becomes ambiguous whether community owned assistance benefits of the spouse of a debtor are exempt. (Obviously Idaho so intends, but the drafting is less than clear.) If "individual" means both H and W, then Idaho is in section 11-605 apparently doubling the $500 personalty exemption to $1000 when a debtor is married whether or not the spouse is also named a judgment debtor. But this is very unclear. It is conceivable Idaho will construe this to allow exemption of $1000 of community personalty only when the judgment runs against both H and W.

Section 41-1833 is more usefully drafted in terms of "person" rather than individual debtor. It should cover community-owned policies whether the person insured is H or W.

Section 41-1835 probably exempts community disability proceeds payable to H when the judgment runs against W, as community property law gives her "a right under the policy." Certainly the statute could be improved by specific consideration of the payee's spouse as debtor.

III. LOUISIANA REVISED STATUTES

Title 20, Section 1.

§ 1. Declaration of homestead; exemption from seizure and sale; debts excluded from exemption; waiver

A. The bona fide homestead, consisting of a tract of land or two or more tracts of land with a residence on one tract and a field, pasture, or garden on the other tract or tracts, not exceeding one hundred sixty acres, buildings and appurtenances, whether rural or urban, owned, and occupied by any person, is exempt from seizure and sale under any writ, mandate or process whatsoever, except as provided by Subsections C and D of this Section. This exemption extends to fifteen thousand dollars in value of a homestead. It shall extend to the surviving spouse or minor children of a deceased owner and shall apply when the homestead is occupied as such and title to it is in either the husband or wife but not to more than one homestead owned by the husband or the wife.

B. Repealed by Acts 1978, No. 13, § 1, eff. May 24, 1978.

C. This exemption shall not apply to the following debts:

(1) For the purchase price of property or any part of such purchase price;

(2) For labor, money, and material furnished for building, repairing, or improving homesteads;

(3) For liabilities incurred by any public officer, or fiduciary, or any attorney at law, for money collected or received on deposits;

(4) For taxes or assessments;

(5) For rent which bears a privilege upon said property;

(6) For the amount which may be due a homestead or building and loan association for a loan made by it on the security of the property; provided, that if at the time of making such loan the borrower be married, and not separated from bed and board from the other spouse, the latter shall have consented thereto; or

(7) For the amount which may be due for money advanced on the security of a mortgage on said property; provided, that if at the time of granting such mortgage the mortgagor be married, and not separated from bed and board from the other spouse, the latter shall have consented thereto.

D. The right to sell voluntarily any property that is exempt as a homestead shall be preserved; but no sale shall destroy or impair any rights of creditors thereon. Any person entitled to a homestead may waive same, in whole or in part, by signing a written waiver thereof; provided, that if the person is married, and not separated from bed and board from the other spouse, then the waiver shall not be effective unless signed by the latter; and all such waivers shall be recorded in the mortgage records of the parish where the homestead is situated. The waiver may be either general or special, and shall have effect from the time of recording.

Amended by Acts 1977, No. 446, § 1.

Title 20, Section 32.

§ 32. Garnishment of exempt wages by certain lenders prohibited; penalty

No person engaged in lending money at more than ten per cent per year, nor any member, officer, agent, or employee of any such person, shall employ garnishment process against any legally exempt salary or wages of a debtor in an attempt to enforce payment of a debt.

Whoever violates this Section shall be imprisoned not less than sixty days nor more than ninety days.

Comments

Other statutes dealing with how the homestead is declared make clear the family-unit approach is used. There can be but one homestead in Louisiana.

IV. NEVADA REVISED STATUTES

21.090 Property exempt from execution.

1. The following property is exempt from execution, except as herein otherwise specifically provided:

(a) Private libraries not to exceed $500 in value, and all family pictures and keepsakes.

(b) Necessary household goods, appliances, furniture, home and yard equipment, not to exceed $1,000 in value, belonging to the judgment debtor to be selected by him.

(c) Farm trucks, farm stock, farm tools, farm equipment, supplies and seed not to exceed $1,500 in value, belonging to the judgment debtor to be selected by him.

(d) Professional libraries, office equipment, office supplies and the tools, instruments and materials used to carry on the trade of the judgment debtor for the support of himself and his family not to exceed $1,500 in value.

(e) The cabin or dwelling of a miner or prospector, not to exceed $500 in value; also, his cars, implements and appliances necessary for carrying on any mining operations not to exceed $500 in value; also, his mining claim actually worked by him, not exceeding $1,000 in value.

(f) One vehicle if the judgment debtor's equity does not exceed $1,000 or the creditor is paid an amount equal to any excess above that equity.

(g) Poultry not exceeding in value $75.

(h) For any pay period, 75 percent of the disposable earnings of a judgment debtor during such period, or the amount by which his disposable earnings for each week of such period exceed 30 times the minimum hourly wage prescribed by section 6(a)(1) of the federal Fair Labor Standards Act of 1938 and in effect at the time the earnings are payable, whichever is greater. The exemption provided in this paragraph does not apply in the case of any order of a court of competent jurisdiction for the support of any person, any order of a court of bankruptcy or of any debt due for any state or federal tax. As used in this paragraph, "disposable earnings" means that part of the earnings of a judgment debtor remaining after the deduction from those earnings of any amounts required by law, to be withheld.

(i) All fire engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under the laws of this state.

(j) All arms, uniforms and accouterments required by law to be kept by any person, and also one gun, to be selected by the debtor.

(k) All courthouses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the courthouse, jail and public offices belonging to any county of this state, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state.

(l) All moneys, benefits, privileges or immunities accruing or in any manner growing out of any life insurance, if the annual premium paid does not exceed $500, and if they exceed that sum a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges and immunities so accruing or growing out of such insurance that the $500 bears to the whole annual premium paid.

(m) The homestead as provided for by law.

(n) The dwelling of the judgment debtor occupied as a home for himself

and family, not exceeding $25,000 in value, where the dwelling is situate upon lands not owned by him.

2. No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment to recover for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon.

[1911 CPA § 346; A 1921, 22; 1941, 32; 1931 NCL § 8844]—(NRS A 1969, 841; 1971, 1498; 1973, 23; 1975, 215; 1977, 650)

21.100 Mineral collections, art curiosities, paleontological remains exempt from execution.

1. Any bona fide owner of a collection or cabinet of metal-bearing ores, geological specimens, art curiosities, or paleontological remains who shall properly arrange, classify, number and catalogue in a suitable book or books of reference any such collection of ores, specimens, curiosities or remains, whether the same be kept at a private residence or in a public hall or in a place of public business or traffic, shall be entitled to hold the same exempt from execution as other property is exempted from execution under the provisions of NRS 21.090.

2. The owner of any collection or cabinet as described in subsection 1 shall keep constantly at or near such collection or cabinet, for free inspection of all visitors who may desire to examine the same, written or printed catalogues as provided in subsection 1. Any person owning such collection or cabinet who fails or neglects to comply with the provisions of this section shall forfeit all right to hold such collection or cabinet exempt from legal execution as provided herein.

3. Nothing in this section shall be construed so as to exempt from execution any numismatic collection, such as gold and silver coins, paper currency, bank notes, legal tender currency, national or state bonds, or any negotiable note, or valuable copper, bronze, nickel, platinum or other coin.

[1:60:1879; BH § 4986; C § 5023; RL § 5822; NCL § 9426] + [2:60:1879; BH § 4987; C § 5024; RL § 5823; NCL § 9427] + [3:60:1879; BH § 4988; C § 5025; RL § 5824; NCL § 9428]

115.010 Homestead: Definition; amount exempt; exceptions; extension of exemption.

1. The homestead, consisting of either a quantity of land, together with the dwelling house thereon and its appurtenances, or a mobile home whether or not the underlying land is owned by the claimant, not exceeding $25,000 in value, to be selected by the husband and wife, or either of them, other head of a family, or other single person claiming the homestead, shall not be subject to forced sale on execution, or any final process from any court, except process to enforce the payment of the purchase money for the premises, or for improvements made thereon, or for legal taxes imposed thereon, or for the payment of:

(a) Any mortgage or deed of trust thereon executed and given; or

(b) Any lien to which prior consent has been given through the acceptance of property subject to any recorded declaration of restrictions, deed restriction, restrictive covenant or equitable servitude,

by both husband and wife, when that relation exists.

2. Any declaration of homestead which has been filed before July 1, 1975, is deemed to have been amended on that date by extending the homestead exemption commensurate with any increase in the value of the property selected and claimed for the exemption up to the value permitted by law on that date, but the increase shall not impair the right of any creditor to execute upon the property when that right existed before July 1, 1975.

[Part 1:72:1865; A 1879, 140; 1949, 51; 1943 NCL § 3315]—(NRS A 1965, 28; 1971, 575; 1975, 215, 981; 1977, 933, 1492)

115.020 Declaration of homestead: Contents; recording; husband and wife to hold as joint tenants.

1. The homestead selection shall be made by either the husband or wife or both of them, other head of a family, or other single person, declaring an intention in writing to claim the same as a homestead.

2. The declaration shall state:

(a) When made by a married person or persons, that they or either of them are married, or if not married, that he or she is the head of a family or a householder.

(b) When made by a married person or persons, that they or either of them, as the case may be, are, at the time of making the declaration, residing with their family, or with the person or persons under their care and maintenance, on the premises, particularly describing the premises.

(c) When made by any claimant under this section, that it is their or his intention to use and claim the same as a homestead.

3. The declaration shall be signed by the person or persons making the same, and acknowledged and recorded as conveyances affecting real property are required to be acknowledged and recorded. From and after the filing for record of the declaration, the husband and wife shall be deemed to hold the homestead as joint tenants.

4. If the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration; and if the property shall retain its character of separate property until the death of one or the other of the spouses, then the homestead right shall cease in and upon the property and the same belong to the person (or his or her heirs) to whom it belonged when filed upon as a homestead.

[Part 1:72:1865; A 1879, 140; 1949, 51; 1943 NCL § 3315]—(NRS A 1971, 575)

Comments

In the main, section 21.090 is carefully drafted, exempting named assets without respect to who the owner is. This suggests that there is no increase of the exemption when the judgment runs against both H and W; however the statute is at least ambiguous in that regard.

Subsection (c) is not well drafted. "Belonging to the judgment debtor" is vague. If H is the judgment debtor, he is only half owner of community tools of the trade of both himself and W. The wording of subsection (c) allows a strong argument that when both H and W are judgment debtors and each practices a trade, the total exemption is $1500 per person.

Section 115.020(3) is ambiguous as to whether the nonexempt portion of homestead property is to be treated as held in joint tenancy for creditors' rights purposes or whether the property is treated as joint tenancy solely for purposes of succession at death.

V. NEW MEXICO REVISED STATUTES

42-10-1. Exemptions of married persons or heads of households.

Personal property in the amount of five hundred dollars ($500), one motor vehicle, clothing, furniture, tools of the trade, books, medical health equipment being used for the health of the person and not for his profession, and any interest in or proceeds from a pension or retirement fund of every person supporting another person is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, fines, attachment, execution or foreclosure by a judgment creditor. Property exempted shall be valued at the market value of used chattels.

42-10-2. Exemptions of persons who support only themselves.

Personal property other than money in the amount of five hundred dollars ($500), one motor vehicle, clothing, furniture, tools of the trade, books, medical health equipment being used for the health of the person and not for his profession, and any interest in or proceeds from a pension or retirement fund of every person supporting only themselves [himself] is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, executors or administrators in probate, fines, attachment, execution or foreclosure by a judgment creditor. Property exempted shall be valued at the market value of used chattels.

42-10-3. [Life, accident and health insurance benefits.]

The cash surrender value of any life insurance policy, the withdrawal value of any optional settlement, annuity contract or deposit with any life insurance company, all weekly, monthly, quarterly, semiannual or annual annuities, indemnities or payments of every kind from any life, accident or health insurance policy, annuity contract or deposit heretofore or hereafter issued upon the life of a citizen or resident of the state of New Mexico, or made by any such insurance company with such citizen, upon whatever form and whether the insured or the person protected thereby has the right to change the beneficiary therein or not, shall in no case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or who is protected by said contract, or who receives or is to receive the benefit thereof, nor shall it be subject in any other manner to the debts of the person whose life is so insured, or who is protected by said contract or who receives or is to receive the benefit thereof, unless such policy, contract or deposit be taken out, made or assigned in writing for the benefit of such creditor.

42-10-4. [Benefits from benevolent associations.]

Any beneficiary fund not exceeding five thousand dollars [($5,000)], set apart, appropriated or paid, by any benevolent association or society, according to its rules, regulations or bylaws, to the family of any deceased member, or to any member of such family, shall not be liable to be taken by any process or proceedings, legal or equitable, to pay any debts of such deceased member.

40-10-5. [Life insurance proceeds.]

The proceeds of any life insurance are not subject to the debts of the deceased, except by special contract or arrangement, to be made in writing.

42-10-9. Homestead exemption.

A married person, widow, widower or person who is supporting another person shall have exempt a homestead in a dwelling-house and land occupied by him or in a dwelling-house occupied by him although the dwelling is on land owned by another, provided that the dwelling is owned, leased or being purchased by the person claiming the exemption. Such a person has a homestead of twenty thousand dollars ($20,000) exempt from attachment, execution or foreclosure by a judgment creditor, and from any proceeding of receivers or trustees in insolvency proceedings, and from executors or administrators in probate.

42-10-10. Exemption in lieu of homestead.

A. Any resident of this state who does not own a homestead shall in addition to other exemptions hold exempt real or personal property in the amount of two thousand dollars ($2,000) in lieu of the homestead exemption.

B. Where the resident does not own a homestead, the sheriff or any other person or officer seeking to attach, execute or foreclose by judgment on property shall provide the resident with written notification of the resident's right to exemption in lieu of homestead as described in Subsection A of this section, together with a simple form by which the resident may designate that he is aware of the exemption and does or does not desire to claim the exemption. Where the resident refuses to make the election provided for in this section, the sheriff, other person or officer shall proceed to attach, execute or foreclose on the resident's property. Where the resident claims his exemption in lieu of homestead, the sheriff, other person or officer making attachment, execution or foreclosure by judgment shall file as part of his return a description, including the resident's stated value, of the property claimed as exempt bearing the resident's signature witnessed by the sheriff, other person or officer seeking to attach, execute or foreclose.

Comments

The homestead statute is by no means clear that the $20,000 exemption cannot be claimed by both H and W. Section 42-10-9. The proviso that the claimant be the owner of the property exempted is ambiguous where the property is community. In section 42-10-10, granting exemption in lieu of homestead, the phrase "any resident" is going to make it very difficult for the courts to deny H and W the right to double the exemption (in community property) from $2000 to $4000 when they are both judgment debtors. This commentator has no idea from the statutory scheme what the New Mexico legislature actually intends. However, the fact that a married person's personal property exemption under section 42-10-1 is the same $500 as the unmarried person claims under section 42-10-2 suggests that notwithstanding separate statutes for married and unmarried debtors, the individual-debtor approach is being taken. That would mean there would be two "persons" to assert the $500 exemption if the judgment ran against both H and W. Section 42-10-3 could be more clear in assuring that the life insurance exemption is available whether or not the community policy is on the life of the debtor spouse or the nondebtor spouse. Section 42-10-5 is wholly ambiguous as to whether and to what extent community life insurance proceeds are subject to community debts incurred by the survivor spouse.

Art. 3833. [3786] [2396] [2336] Homestead

(a) If it is used for the purposes of a home, or as a place to exercise the calling or business to provide for a family or a single, adult person, not a constituent of a family, the homestead of a family or a single, adult person, not a constituent of a family, shall consist of:

(1) for a family, not more than two hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(2) for a single, adult person, not a constituent of a family, not more than one hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(3) for a family or a single, adult person, not a constituent of a family, a lot or lots, not to exceed in value ten thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon, if in a city, town, or village.

(b) Temporary renting of the homestead shall not change its homestead character when no other homestead has been acquired.

Amended by Acts 1969, 61st Leg., p. 2518, ch. 841, § 1, emerg. eff. June 18, 1969; Acts 1973, 63rd Leg., p. 1627, ch. 588, § 1, eff. Jan. 1, 1974.

Art. 3835. [3788] [2397] [2337] Interests in land exempt from satisfaction of liabilities

The homestead of a family or a single, adult person, not a constituent of a family, and a lot or lots held for the purposes of sepulchre of a family or a single, adult person, not a constituent of a family, are exempt from attachment, execution and every type of forced sale for the payment of debts, except for encumbrances properly fixed thereon.

Amended by Acts 1973, 63rd Leg., p. 1628, ch. 588, § 2, eff. Jan. 1, 1974.

Art. 3836. [3785] [2395] [2335] Personal property exempt from satisfaction of liabilities

(a) Personal property (not to exceed an aggregate fair market value of $15,000 for each single, adult person, not a constituent of a family, or $30,000 for a family) is exempt from attachment, execution and every type of seizure for the satisfaction of liabilities, except for encumbrances properly fixed thereon, if included among the following:

(1) furnishings of a home, including family heirlooms, and provisions for consumption;

(2) all of the following which are reasonably necessary for the family or single, adult person, not a constituent of a family: implements of farming or ranching; tools, equipment, apparatus (including a boat), and books used in any trade or profession; wearing apparel; two firearms and athletic and sporting equipment;

(3) any two of the following categories of means of travel: two animals from the following kinds with a saddle and bridle for each: horses, colts, mules, and donkeys; a bicycle or motorcycle; a wagon, cart, or dray, with harness reasonably necessary for its use; an automobile or station wagon; a truck cab; a truck trailer; a camper-truck; a truck; a pickup truck;

(4) livestock and fowl not to exceed the following in number and forage on hand reasonably necessary for their consumption: 5 cows and their calves, one breeding-age bull, 20 hogs, 20 sheep, 20 goats, 50 chickens, 30 turkeys, 30 ducks, 30 geese, 30 guineas;

(5) a dog, cat, and other household pets;

(6) the cash surrender value of any life insurance policy in force for more than two years to the extent that a member or members of the family of the insured person or a dependent or dependents of a single, adult person, not a constituent of a family, is beneficiary thereof;

(7) current wages for personal services.

(b) The use of any property not exempt from attachment, execution and every type of forced sale for the payment of debts to acquire property described in Subsection (a) of this article, or any interest therein, to make improvements thereon, or to pay indebtedness thereon with the intent to defraud, delay or hinder a creditor or other interested person from obtaining that to which he is or may become entitled shall not cause the property or interest so acquired, or improvements made to be exempt from seizure for the satisfaction of liabilities under Subsection (a) of this article.

(c) If any property or any interest therein or improvement is acquired by discharge of an encumbrance held by another, a person defrauded, delayed, or hindered by that acquisition as provided in Subsection (b) of this article is subrogated to the rights of the prior encumbrancer.

(d) A creditor must assert his claim under Subsections (b) and (c) of this article within four years of the transaction of which he complains. A person with an unliquidated or contingent demand must assert his claim under Subsections (b) and (c) of this article within one year after his demand is reduced to judgment.

Amended by Acts 1973, 63rd Leg., p. 1628, ch. 588, § 3, eff. Jan. 1, 1974.

Art. 3832a. Insurance policies

The cash surrender value of any life insurance policy which has been in force more than two years, shall be exempt from liability for any debt, and shall not be subject to forced sale, or other process to satisfy any debt, provided a member or members of the family of the insured are the beneficiaries under such policy, and in event they are only partially the beneficiaries then such policies shall be so exempt to the extent of their beneficiary interest. This act shall not apply to debts arising under the policy nor to debts secured by lawful assignment of the policy. Acts 1929, 41st Leg., 2nd C.S., p. 78, ch. 43, § 1.

Art. 6243d-1. Pensions not subject to execution, etc.

Sec. 17. No portion of any such pension fund, either before or after its order of disbursement by said pension board, and no amounts due or to become due any beneficiary or pensioner, under this Act, shall ever be held, seized, taken, subjected to, detained, or levied upon by virtue of any execution, attachment, garnishment, injunction, or other writ, and no order or decree, or any process or proceeding whatsoever, shall issue out of or by any Court of this State for the payment or satisfaction in whole or in part out of said pension fund, of any debt, damage, claim, demand, or judgment against any such members, pensioners, dependents, or any person whomsoever, nor shall such police pension fund or any part thereof, or any claim thereto be directly or indirectly assigned or transferred and any attempt to transfer or assign the same or any part thereof, or any claim thereto, shall be void. Said fund shall be sacredly held, kept, and disbursed for the purposes provided by this Act, and for no other purposes whatsoever.

Art. 6243a

Exemption from Execution

Sec. 9. All retirement annuity payments, member's contributions, optional benefit payments, and any and all rights accrued or accruing to any person under the provisions of this Act, as well as the moneys in various funds created by this Act, shall be and the same are hereby exempt from any State, County, or Local tax, levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassigned except as specifically provided in this Act.

A. That any retired member who has been a member of a group insurance plan prior to retirement and who wishes to continue same after retirement may have any premiums due by him to be paid any group insurance deducted from his retirement allowance by specifically authorizing such deduction and payment in writing addressed to the Executive Secretary of the Employees Retirement System, provided, however, that such retired member may thereafter withdraw such authorization by a thirty (30) day written notice addressed to the Executive Secretary of such Retirement System.

Comments

The Texas exemption statutes are the best among those of the community property states (including California). At no point does the exemption turn on whether an item is used by or owned by H or W or who is the judgment debtor. If the creditor can reach the item and if it falls within the category exempted, the debtor can claim the exemption. The life insurance and pension exemption statutes likewise just exempt the asset without regard to who the insured is or who the pensioner is. This style of drafting is highly recommended to all community property jurisdictions. The one fault I have with the statutes of Texas is that art. 3836 is unworkable in the case of married persons living separate and apart and keeping separate households. The problem is alleviated somewhat in Texas because the community earnings of W if not commingled with H-managed property are not liable for H's contract debts (and vice versa). See Tex. Fam. Code §§ 5.22, 5.61. But see Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975) narrowly construing the statutes creating nonliability status of property managed by one spouse for the contract debts incurred by the other and Tex. Fam. Code § 5.61(d) making all community property liable for the torts of either spouse.

VII. REVISED CODE OF WASHINGTON

CHAPTER 6.12--HOMESTEADS

6.12.020 From what homestead may be selected

If the claimant be married the homestead may be selected from the community property, or, with the consent of the husband, from his separate property, or, with the consent of the wife, from her separate property: *Provided*, That the same premises may not be claimed separately by the husband and wife with the effect of increasing the net value of the homestead available to the marital community beyond the amount specified in RCW 6.12.050 as now or hereafter amended, either at the time the declaration of homestead is filed or at any subsequent time. When the claimant is not married the homestead may be selected from any of his or her property. [Amended by Laws 1st Ex Sess 1973 ch 154 § 6; Laws 1st Ex Sess 1977 ch 98 § 1, effective May 28, 1977.]

6.12.030 Selection from separate estate of wife or husband

The homestead cannot be selected from the separate property of the wife without her consent or from the separate property of the husband without his consent, shown by his or her making the declaration of homestead. [Amended by Laws 1st Ex Sess 1973 ch 154 § 7.]

6.12.040 Mode of selection—Declaration of homestead

In order to select a homestead the claimant must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record. [Amended by Laws 1st Ex Sess 1973 ch 154 § 8; Laws 1st Ex Sess 1977 ch 98 § 2, effective May 28, 1977.]

6.12.050 Value of homestead limited—Must be used as home

Homesteads may be selected and claimed in lands and tenements with the improvements thereon, as defined in RCW 6.12.010, regardless of area but not exceeding in net value, of both the lands and improvements, the sum of twenty thousand dollars. The premises thus included in the homestead must be actually intended or used as a home for the claimant, and shall not be devoted exclusively to any other purpose. [Amended by Laws 1st Ex Sess 1971 ch 12 § 1; Laws 1st Ex Sess 1977 ch 98 § 3, effective May 28, 1977.]

6.12.060 Contents of declaration

The declaration of homestead must contain—

(1) A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claims them as a homestead.

CHAPTER 6.16--PERSONAL EXEMPTIONS

6.16.010 "Householder" defined

A householder, as designated in all statutes relating to exemptions, is defined to be:

(1) The husband and wife, or either.

(2) Every person who has residing with him or her, and under his or her care and maintenance, either:

(a) When such child be under eighteen years of age, his or her child, or the child of his or her deceased wife or husband.

(b) When such brother or sister or child be under eighteen years of age, a brother or sister, or the child of a deceased brother or sister.

(c) A father, mother, grandfather or grandmother.

(d) The father, mother, grandfather or grandmother of deceased husband or wife.

(e) Any other of the relatives mentioned in this section who has attained the age of eighteen years, and are unable to take care of or support themselves. [Amended by Laws 1st Ex Sess 1971 ch 292 § 6; Laws 1st Ex Sess 1973 ch 154 § 12.]

6.16.020 Exempt property specified

The following personal property shall be exempt from execution and attachment, except as hereinafter specially provided:

(1) All wearing apparel of every person and family, but not to exceed five hundred dollars in value in furs, jewelry, and personal ornaments for any person.

(2) All private libraries not to exceed five hundred dollars in value, and all family pictures and keepsakes.

(3) To each householder, (a) his household goods, appliances, furniture and home and yard equipment, not to exceed one thousand dollars in value;

(b) provisions and fuel for the comfortable maintenance of such household and family for three months; and

(c) other property not to exceed four hundred dollars in value, of which not more than one hundred dollars in value may consist of cash, bank accounts, savings and loan accounts, stocks, bonds, or other securities.

(4) To a person not a householder, other property not to exceed two hundred dollars in value, of which not more than one hundred dollars in value may consist of cash, bank accounts, savings and loan accounts, stocks, bonds, or other securities.

(5) To a farmer, farm trucks, farm stock, farm tools, farm equipment, supplies and seed, not to exceed one thousand five hundred dollars in value.

(6) To a physician, surgeon, attorney, clergyman, or other professional man, his library, office furniture, office equipment and supplies, not to exceed one thousand five hundred dollars in value.

(7) To any other person, the tools and instruments and materials used to carry on his trade for the support of himself or family, not to exceed one thousand five hundred dollars in value.

The property referred to in the foregoing subsection (3) shall be selected by the husband or wife if present, and in case neither husband nor wife nor other person entitled to the exemption shall be present to make the selection, then the sheriff or the director of public safety shall make a selection equal in value to the applicable exemptions above described and he shall return the same as exempt by inventory. Any selection made as above provided shall be prima facie evidence (a) that the property so selected is exempt from execution and attachment, and (b) that the property so selected is not in excess of the values specified for the exemptions. Except as above provided, the exempt property shall be selected by the person claiming the exemption. No person shall be entitled to more than one exemption under the provisions of the foregoing subsections (5), (6) and (7).

For purposes of this section "value" shall mean the reasonable market value of the article or item at the time of its selection, and shall be of the debtor's interest therein, exclusive of all liens and encumbrances thereon.

Wages, salary, or other compensation regularly paid for personal services rendered by the person claiming the exemption may not be claimed as exempt under the foregoing provisions, but the same may be claimed as exempt in any bankruptcy or insolvency proceeding to the same extent as allowed under the statutes relating to garnishments.

No property shall be exempt under this section from an execution issued upon a judgment for all or any part of the purchase price thereof, or for any tax levied upon such property. [Amended by Laws 1965 ch 89 § 1; Laws 1st Ex Sess 1973 ch 154 § 13.]

6.16.070 Separate property of spouse exempt

All real and personal estate belonging to any married person at the time of his or her marriage, and all which he or she may have acquired subsequently to such marriage, or to which he or she shall hereafter become entitled in his or her own right, and all his or her personal earnings, and all the issues, rents and profits of such real estate, shall be exempt from attachment and execution upon any liability or judgment against the other spouse, so long as he or she or any minor heir of his or her body shall be living: *Provided*, That the separate property of each spouse shall be liable for debts owing by him or her at the time of marriage. [Amended by Laws 1st Ex Sess 1973 ch 154 § 14.]

6.16.090 Claim of exemption and proceedings thereon

As used in this section the masculine shall apply also to the feminine.

When a debtor claims personal property as exempt he shall deliver to the officer making the levy an itemized list of all the personal property owned or claimed by him, including money, bonds, bills, notes, claims and demands, with the residence of the person indebted upon the said bonds, bills, notes, claims and demands, and shall verify such list by affidavit. He shall also deliver to such officer a list by separate items of the property he claims as exempt. If the creditor, his agent or attorney demand an appraisement thereof, two disinterested householders of the neighborhood shall be chosen, one by the debtor and the other by the creditor, his agent or attorney, and these two, if they cannot agree, shall select a third; but if either party fail to choose an appraiser, or the two fail to select a third, or if one or more of the appraisers fail to act, the officer shall appoint one. The appraisers shall forthwith proceed to make a list by separate items, of the personal property selected by the debtor as exempt, which they shall decide as exempt, stating the value of each article, and annexing to the list their affidavit to the following effect: "We solemnly swear that to the best of our judgment the above is a fair cash valuation of the property therein described," which affidavit shall be signed by two appraisers at least, and be certified by the officer administering the oaths. The list shall be delivered to the officer holding the execution or other process and be by him annexed to and made part of his return and the property therein specified shall be exempt from levy and sale, and the other personal estate of the debtor shall remain subject thereto. In case no appraisement be required the officer shall return with the process the list of the property claimed as exempt by the debtor. The appraisers shall each be entitled to one dollar, to be paid by the creditor, if all the property claimed by the debtor shall be exempt; otherwise to be paid by the debtor. [Amended by Laws 1st Ex Sess 1973 ch 154 § 15.]

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

6.16.080 Exemption may be waived—Absconding debtors. Nothing in this chapter shall be so construed as to prevent the mortgaging of personal property which might be claimed as exempt, or the enforcement of such mortgage, nor to prevent the waiver of the right of exemption by failure to claim the same prior to sale under execution, and nothing in this chapter shall be construed to exempt from attachment or execution the personal property of a nonresident of this state, or a person who has left or is about to leave the state with the intention to defraud his creditors.

41.32.590 Exemption from taxation and judicial process—Nonassignability—Premium deduction authorized. The right of a person to a pension, an annuity, a retirement allowance, or disability allowance, to the return of contributions, any optional benefit or death benefit, any other right accrued or accruing to any person under the provisions of this chapter and the moneys in the various funds created by this chapter shall be unassignable, and are hereby exempt from any state, county, municipal or other local tax, and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or other process of law whatsoever: *Provided*, That this section shall not be deemed to prohibit a beneficiary of a retirement allowance who is eligible under RCW 41.05.080 from authorizing deductions therefrom for payment of premiums due on any group life or disability insurance policy or plan issued for the benefit of a group comprised of public employees of the state of Washington or its political subdivisions in accordance with rules and regulations that may be promulgated by the retirement board.

41.24.240 Benefits not transferable or subject to legal process--Chapter not exclusive. The right of any person to any future payment under the provisions of this chapter shall not be transferable or assignable at law or in equity, and none of the moneys paid or payable or the rights existing under this chapter, shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. Nothing in this chapter shall be construed to deprive any fireman, eligible to receive a pension hereunder, from receiving a pension under any other act to which he may become eligible by reason of services other than or in addition to his services as a fireman under this chapter.

Comments

The definition of "householder" in section 6.16.010 as H and W or either solves some problems and creates others. It apparently makes the primary Washington exemption statute workable when the spouses are living separate and apart by recognizing that each spouse can have a household. See R.C.W. § 6.16.020(3). What is unclear, however, is whether to be a "householder" one must be a judgment debtor. That would lead to such unfair results where H and W are separated that one suspects that a person who has an interest in property being seized is a "householder" under the statute even if the judgment runs against his or her spouse. On this interpretation, when the judgment debtor is married under section 6.16.020(3)(c) the personal property exemption will be $800 and not just $400 of community property even though only one spouse is named as the judgment debtor. (That would be very unusual under Washington practice where the plaintiff regularly sues the marital community if he wants to obtain a judgment permitting him to levy on community property.)

Section 6.16.020(5) is vague as to its effect when the judgment runs against both H and W and both are farmers. Is the exemption doubled? Subsection (7) and several other parts of the statute raise the same problem.

Section 6.16.090 does nothing to solve the problem of which spouse can assert exemptions on community property when the judgment runs against only one (or for that matter, when both are judgment debtors). The suggestion is only a "debtor" spouse can claim the exemption, but the typical Washington judgment will declare the community to be the debtor.

The two pension exemption statutes are well drafted to protect the rights of a "person" and not a debtor. The pension of both H and W are thus protected even if the judgment does not specify the marital community as judgment debtor.