Memorandum 80-8

Subject: Study D-315 - Creditors' Remedies (Married Woman as Sole Trader)

The California sole trader statute is found in Code of Civil Procedure Sections 1811 to 1821 (a copy of which is appended to the enclosed background study). The statute permits a married woman to obtain, and record in the counties where she proposes to do business, a judgment that she is authorized to carry on, in her own name and on her own account, a business as a "sole trader." The effect of the recorded judgment is that up to $500 of community property or the husband's separate property may be invested in the sole trader's business, and the property invested becomes the sole trader's separate property and is not subject to the husband's debts. Moreover, any income from the sole trader's business remains her separate property and does not become community property, and any business debts are her separate debts for which the husband is not liable.

The Commission's consultant on creditors' remedies aspects of marital property, Professor William A. Reppy, Jr. of Duke Law School, has prepared the enclosed background study concerning the sole trader statute. Professor Reppy traces the origin and use of the sole trader statute and concludes that it has no contemporary vitality and is probably unconstitutional. Professor Reppy recommends repeal of the statute.

The staff agrees with Professor Reppy's recommendation and has drafted a proposed repeal of the sole trader statute, which is also enclosed. The staff has drafted this as a final recommendation rather than as a tentative recommendation because we believe that the recommendation is so obvious and noncontroversial it is pointless to send it out for comment. We would introduce the legislation at the 1980 legislative session.

There are two matters discussed in Professor Reppy's study that the staff believes require some Commission consideration. The first matter is the problem of converting community to separate property. Under existing law the spouses by informal agreement and without notice to anyone may transmute community to separate property, possibly to the

detriment of creditors of the community. The sole trader statute permits conversion of community to separate property, but requires that the sole trader judgment be recorded; in this way there is some formality required and creditors are put on notice of the changed character of the property. Professor Reppy suggests that in connection with the repeal of the sole trader statute some scheme be enacted to formalize and give notice of conversions of community to separate property, at least as between the spouses and third parties such as creditors, if not as between the spouses themselves.

The staff agrees with Professor Reppy that this is an important matter that should be dealt with. However, we do not believe it should be tied to the sole trader repealer. The sole trader repealer is a severable matter that should go through easily. Any regulation of conversion of community to separate property is complex and bound to be controversial; it requires some initial decisions concerning the liability of community and separate property for community obligations and deserves to be widely distributed for review and comment. We propose that the Commission consider this matter in the context of creditors' remedies against marital property generally.

The other matter the Commission should consider is the rights of persons during the transitional period after the sole trader repealer is enacted. The magnitude of this problem is small since there are few if any sole traders currently operating in California. Professor Reppy points out that persons who have relied on sole trader status in their dealings should be protected in that reliance--prior conveyances and executory contracts should not be invalidated by repeal of the sole trader statute. The staff has drafted a provision to accomplish this in the enclosed recommendation.

Professor Reppy also offers alternative suggestions for dealing with property rights as between spouses--either (1) convert the sole trader's property to community or (2) leave the property separate but future earnings would be community or separate to the same extent as provided in the general community property laws. As the staff views these alternatives, they present a choice between the policy of equality in the marital property system and the policy of protecting the mutual understanding and reliance of the parties. This is in effect a choice

between abstract justice and concrete justice. The staff prefers concrete justice and has provided in the draft that rights acquired by a sole trader prior to repeal of the sole trader statute are not affected by the repeal. This choice also is the simpler of the two, since it avoids the problems of ascertaining what of the sole trader's property would have been separate and what would have been community, but for the sole trader statute.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

#D-315

STAFF DRAFT

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

MARRIED WOMEN AS SOLE TRADERS

January 1980

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

STAFF DRAFT

January 18, 1980

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Commission herewith submits its recommendation to repeal the California sole trader statute (Code of Civil Procedure Sections 1811-1821). The sole trader statute dates from an era of California law when married women had few property rights; it is inconsistent with community property concepts, is probably unconstitutional, and appears to be largely unused. The Commission wishes to express its appreciation to its consultant, Professor William A. Reppy, Jr., of Duke Law School, for preparing the background study on which this recommendation is based.

This recommendation is submitted pursuant to the Commission's legislative directives to study creditors' remedies (1974 Cal. Stats. res. ch. 45) and community property (1978 Cal. Stats. res. ch. 65).

Respectfully submitted,

Beatrice P. Lawson
Chairperson

STAFF DRAFT

RECOMMENDATION

relating to

MARRIED WOMEN AS SOLE TRADERS

The California sole trader statute[1] permits a married woman to obtain, and record in the counties where she proposes to do business, a judgment that she is authorized to carry on, in her own name and on her own account, a business as a sole trader. The effect of the recorded judgment is that up to $500 of community property or the husband's separate property may be invested in the sole trader's business, and the property invested becomes the sole trader's separate property and is not subject to the husband's debts. Moreover, any income from the sole trader's business remains her separate property and does not become community property, and any business debts are her separate debts for which the husband is not liable. This statute is a relic of an era in California law when married women had few property rights; it is inconsistent with modern community property principles, is probably unconstitutional, and appears to be largely unused.

The sole trader statute was first enacted in 1852.[2] At that time the husband had management and control of both the community property and the wife's separate property. This situation no longer prevails. A married women now has the sole management and control of her separate property[3] and of community personal property in any business which she operates or manages.[4]

Under the sole trader statute business income of the wife remains her separate property and the business property is not subject to the

1. Code Civ. Proc. §§ 1811-1821.

2. 1852 Cal. Stats. ch. 42, p. 101.

3. Civil Code §§ 5102, 5107.

4. Civil Code § 5125(d) provides:

> (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.

debts of her husband. These principles are inconsistent with the fundamental concepts of California community property law. As a general rule earnings of a spouse during marriage are community property;[5] even where the spouse has a separate property business, that portion of the business income and property attributable to the labor, skill, or capacity of the spouse is community property.[6] And community property is liable to satisfy the debts of either spouse.[7]

The inconsistency of the sole trader statute with general community property principles also makes the statute constitutionally suspect. The business or other earnings of a husband are community property, whereas the sole trader statute insulates the business earnings of the wife from the community. This discriminates without rational justification not only against husbands but also against other married women who are wage earners and thus cannot take advantage of the sole trader provisions.

In addition to the legal and constitutional defects of the sole trader statute, the statute appears to have little or no current vitality. The last reported case involving a sole trader occurred in 1926,[8] before the enactment (commencing in 1927) of community property law reforms that have rendered the sole trader statute obsolete. Investigation by the Law Revision Commission staff with the county recorders' offices in San Francisco, Los Angeles, and Santa Clara counties indicates that no separate indices of sole trader judgments are maintained and that the employees in those offices do not recall a sole trader judgment ever having been recorded.

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5. See, e.g., 7 B. Witkin, Summary of California Law, Community Property § 12 (8th ed. 1974).

6. Id. at §§ 25-30.

7. Civil Code § 5116.

8. Gray v. Perlis, 76 Cal. App. 511, 245 P. 221 (1926) (wife adjudged a sole trader in 1916).

The sole trader statute is unnecessary, unfair, and obsolete, and should be repealed.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to repeal Title 12 (commencing with Section 1811) of Part 3 of the Code of Civil Procedure, relating to sole traders.

The people of the State of California do enact as follows:

32694

SECTION 1. Title 12 (commencing with Section 1811) of Part 3 of the Code of Civil Procedure is repealed.

Comment. Former Sections 1811 to 1821, inclusive, relating to married women as sole traders, is not continued. It was a relic of the 19th century California marital property system, was inconsistent with California's community property system, was constitutionally suspect, and was largely unused. See Recommendation Relating to Married Women as Sole Traders, 15 Cal. L. Revision Comm'n Reports ___ (1980). Under Civil Code Section 5125(d), a spouse who operates or manages a business which is community personal property has the sole management and control of the business.

SEC. 2. (a) A judgment made and entered under Title 12 (commencing with Section 1811) of Part 3 of the Code of Civil Procedure shall, on the effective date of this act, cease to have any effect for any purpose.

(b) Rights acquired prior to the effective date of this act are not affected by the repeal of Title 12 (commencing with Section 1811) of Part 3 of the Code of Civil Procedure and such rights shall be recognized to the same extent as they would have been recognized had the repeal not been made.

#D-313 12/28/79

CONSIDERATIONS RESPECTING REPEAL OF THE "SOLE TRADER ACT"-- CODE OF CIVIL PROCEDURE SECTIONS*

*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: DECEMBER 10, 1979

TOPIC: CONSIDERATIONS RESPECTING REPEAL OF THE "SOLE TRADER ACT" -- CODE OF CIVIL PROCEDURE SECTIONS 1811-1821*

SUMMARY OF CONCLUSIONS: The "Sole Trader Act," originally enacted in 1852, provides a method by which married women, but not men, may, without the consent of their spouse, make their earnings from a trade or a business their separate property. The act is almost certainly unconstitutional because of sex discrimination, and, since it was enacted as part of what was essentially an English Common Law marital property system existing in California in the 19th century and codifies a principle that contravenes all of the theories of California's contemporary community property system, most likely the courts would remedy the constitutionality by declaring the act void rather than extending its benefits to married men.

This study recommends repeal of the Act fully retroactively except to the extent that third parties (i.e., persons other than a sole trader wife and her husband) have relied to their detriment on the provisions of the act. This would mean recharacterizing pre-repeal earnings of a sole-trader wife from her separate to community property unless she and her husband by agreement continue the separate property characterization.

DETAILED ANALYSIS.

I. Historical Background -- Enactment of the Sole Trader Scheme in 1852 as Part of an English Common Law Separate Property System.

The California constitutional convention of 1849, while generally rejecting the Spanish-Mexican civil law nominally then in effect in the territory, adopted the civil law institution of community and separate property to govern the marital property rights of California.[1] The provision in the state's first constitution defined a wife's separate property and directed the legislature to make laws with respect to the rights of the wife in "property . . . held in common with her husband. . . ." The debates with respect to this proposal make clear that property "held in common" was community property (bienes gananciales) of Spanish-Mexican law.[2]

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*The complete text of these statutes appears in the Appendix.

1. Cal. Const. art. XI, § 14 (1849).

2. J. Browne, Report of the Debates in The Convention of California 257-69 (1850); Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 8-24 (1976).

Nevertheless, the implementing legislation of 1850 was wholly inconsistent with Spanish-Mexican law of marital property. The most startling departure from the constitutional mandate was a statute[3] giving the husband management and control over the wife's separate property. Since the wife managed no property at all there was no property she could utilize to pay her debts. She was as much a femme covert as an English common law wife and, expectedly, the courts held she was incapable of making a contract that could bind her property.[4]

To remedy the situation where the assets of a married woman's business were not liable for her contracts made while operating the business and also to give women some relief from the oppressive property system fashioned by the 1850 legislation, the Sole Trader Act was passed in 1852.[5]

A. The Sole Trader Act Is Inconsistent with Community Property Principles.

The 1852 Act entitled the wife to file a declaration that she was going to engage in a business as a sole trader. If the declaration was proper in form and recorded,[6] the earnings of the business venture were the wife's separate property, subject to her exclusive management, and, of course, liable for her debts incurred in operating the business.

The Act applies to a married woman who is in "business" or a "trader."[7] Although one early case said that the Act required the wife's business to be one "not unsuited to her sex,"[8] the 19th century cases disclose women in a wide

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3. 1849-1850 Cal. Stats. ch. 103, § 6, p. 254. The husband could not alienate or encumber the wife's property, however, without her consent. The statute is discussed in Prager, supra note 2, at 25-27.

4. Maclay v. Love, 25 Cal. 367 (1864); Smith v. Greer, 31 Cal. 477 (1866).

5. 1852 Cal. Stats. ch. 42, p. 101. Dean Younger describes it as a type of Married Woman's Property Right Act, i.e., an English common law style innovation. Younger, Community Property, Women and the Law School Curriculum, 48 N.Y.U. L. Rev. 211, 223. It was probably based on precedents from English common law states. See, e.g., Pa. Stat. Ann. tit. 48, § 41, a sole trader statute for the wives of "absent mariners" dating from 1718. Cf. Adams v. Knowleton, 22 Cal. 283 (1863), where the briefs of counsel cite as precedent under the California act cases from Pennsylvania implementing a sole trader statute of 1855 much like California's. It is now Pa. Stat. Ann. tit. 48, § 43.

6. McKune v. McGarvey, 1 Labatt 205 (6th Dist. Ct. (Sacramento) 1857).

7. See the current Code Civ. Proc. §§ 1811, 1812, 1814.

8. Guttman v. Scannell, 7 Cal. 455, 459 (1857), indicating, however, that haberdashery business was not unsuited to the female sex. No language in the Act even remotely implied any limitation on the type of trade or business a woman could operate under it.

variety of trades utilizing the benefits of the Act.[9]

No reported case concerns a married woman attempting to invoke the Act to make her wages as a salaried worker her separate property. Undoubtedly it was understood that the concept of trade or business under the Act was not broad enough to include the job of serving as an employee of another person or entity. Thus the Act was and remains of benefit to only a small fraction of married women who by their labor earn income.

Why, it may be asked, did not the Act make the wife's earnings from her business community property subject to her exclusive management, just as the husband's earnings were then community property subject to his management? The answer seems clear: as early as 1852 the legislature understood what the Supreme Court would soon confirm[10] -- the concept of community property did not exist in California.

The great concern in the early cases was that the Sole Trader Act rights of married women might be used as a device to shield property from the creditors of the husband. Apparently out of sympathy for husband's creditors the Act was strictly construed so that minor mistakes or omissions in the wife's declaration papers precluded her from having sole trader status.[11] Gains from her labors

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9. See, e.g., Alverson v. Jones, 10 Cal. 9 (1858) (wife in "the business of livery-stable keeping, and trading in horses"); Abrams v. Howard, 23 Cal. 388 (1863) ("buying and selling of goods, wares, and merchandise, etc."); Hurlbut v. Jones, 25 Cal. 226 (1864) ("general ranching business"); Thomas v. Desmond, 63 Cal. 426 (1883) (rooming house); Gray v. Perlis, 76 Cal. App. 511, 245 P. 221 (1926) (ladies' tailor shop).

10. Van Maren v. Johnson, 15 Cal. 308 (1860), held that what was called common or community property was actually owned solely by the husband; the wife had the mere expectancy of an heir. This judicial development is analyzed in Prager, supra note 2, at pp. 34-36, and Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977, 1055-59 (1975). Note that where W was not a sole trader her earnings were this type of "community" property owned by H. Washburn v. Washburn, 9 Cal. 475 (1858); Martin v. Southern Pac. Co., 130 Cal. 285, 62 P. 515 (1900). Of course, such earnings were controlled solely by H. Moseian v. Parker, 44 Cal. App. 2d 544, 112 P.2d 705 (1941).

11. See, e.g., Adams v. Knowleton, 22 Cal. 283 (1863). W's declaration that she would be a sole trader in operating a restaurant-hotel business neglected to include the statutory language that she would carry on the business "in her own name"; she was denied the protection of the act in a suit by H's creditors. Also holding that in such litigation the burden of proof is on the wife to prove she properly registered as a sole trader is Alverson v. Jones, 10 Cal. 9 (1858). Cf. Reading v. Muller, 31 Cal. 104 (1866) (W's declaration was proper in form but husband's creditor prevailed under best evidence rule when W produced merely a copy of the declaration).

That the purpose of such strict construction was to benefit husband's creditors is clear from the cases denying standing to the wife to rely on such defects in defending a suit alleging wife's breach of contract entered into in conducting the business. Porter v. Gamba, 43 Cal. 105 (1872).

were then community property owned by the husband and reachable by his creditors.

Even if the wife's declaration was proper in form she was denied the protection of the act if the evidence established she only nominally engaged in the business and that she and H agreed to use the sole trader form "for the mere purpose of shielding their several and joint earnings against existing and subsequent creditors of the husband, it being understood between them that all . . . profits should belong to him as between them . . . ."[12/]

The original Sole Trader Act authorized investment of $5000 of husband's property (community or his separate property) in the business and apparently transmuted it to wife's separate property.[13/] In any event, husband's creditors could not reach this capital, unless according to the construction of the statute given by the courts, he was insolvent at the time the funds were invested in the wife's business.[14/]

To further strengthen the position of H's creditor under the Sole Trader system legislation in 1862 changed the procedure from one of mere registration and recordation by the wife to a judicial proceeding in which husband's creditors may become parties and oppose the wife's request to become a sole trader.[15/] This procedure remains as part of the present law. Wife files a petition in Superior Court in the county where she has resided six months.[16/] Notice of the petition is published.[17/] Wife's petition must state the "justification" for her application and aver that she does not seek to defraud, delay or hinder any creditor of her husband.[18/] These averments may be contested by a creditor of the husband,[19/] and "the issues of fact joined, if any, must be

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12. Hurlburt v. Jones, 25 Cal. 226 (1864). The case indicates that even without intent to defeat creditors on the part of the spouses, a creditor can invoke the benefits of their oral agreement to own property in a manner different from the record title.

13. 1852 Cal. Stats. ch. 42, § 5, p. 101. The $5000 limitation provision was repealed by 1862 Cal. Stats. ch. 121, § 4, p. 109, but was restored at the level of $500 in 1872 by enactment of the current Code Civ. Proc. § 1814. See Thomas v. Desmond, 63 Cal. 426 (1883).

14. Guttman v. Scannell, 7 Cal. 455 (1857).

15. 1862 Cal. Stats. ch. 121, § 2, p. 108.

16. Code Civ. Proc. § 1811.

17. Code Civ. Proc. § 1812.

18. Code Civ. Proc. § 1813.

19. Code Civ. Proc. § 1815.

tried as in other cases . . . ."[20] It is only after a judgment is entered and filed that under the contemporary statute a wife has the benefit of the sole trader provisions, and she must have recorded a copy of the judgment in every county where she does business as a sole trader.[21]

B. Criticism of the Sole Trader Act: Inconsistent With 1927, 1951, and 1975 Reforms.

In the 19th century, since Husband was viewed as the owner of his earnings during marriage, a small step towards male-female equality was taken by the Sole Trader Act, which entitled some working women (but probably only a small fraction, since wage earners apparently could not invoke the act) to own and manage their earnings, too.

In 1927, the leigslature rejected the English common law notion that the husband is the owner of marital property acquisitions during marriage in favor of the civil law or community property system under which husband and wife are co-owners.[22] It would have been logical at this time to amend the Sole Trader Act to provide that the profits of the sole trader wife's business were community property, yet under her management, but apparently at this time management of the community by a woman was inconceivable; hence the Sole Trader Act remained as an English Common Law institution co-existing along with the civil law's community of property in post-1927 California.

In 1951 a California wife was given exclusive management and control of her own uncommingled earnings.[23] At this point the Sole Trader Act -- still unamended -- became rather obviously discriminatory in favor of women who operated a trade or business, since they could make their earnings separate property, and against not only men but all other women earning income.

With adoption of the equal management reforms effective in 1975, a type of "sole-trader" provision took effect that applies to both husbands and wives. 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.

A wife's business operated under this statute differs from a sole trader's business in one important respect: profits are the wife's separate property. If

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20. Code Civ. Proc. § 1816.

21. Code Civ. Proc. § 1819.

22. 1927 Cal. Stats. ch. 265, § 1. As amended to remove reference to male management of the community the provision appears now as Civ. Code § 5105.

23. 1951 Cal. Stats. ch. 1102, § 1, p. 2860 (former Civ. Code § 171c).

section 5125(d) governs the business the profits are community.[24] It is undecided yet whether the husband's ordinary (i.e., not "necessaries" and not prenuptial) creditors can reach the assets of the community business managed by the wife under section 5125(d).[25]

In this writer's opinion, the provision of the Sole Trader Act making a wife's earnings from her labor during marriage and cohabitation her separate property is not only discriminatory but utterly indefensible. Since the whole theory of the community system is a partnership sharing,[26] the appropriate remedy is not to extend the provisions of the Act to husbands engaged in a trade or business but to either repeal the Sole Trader Act in toto or amend it to make the profits derived from labor community property, unless, of course, the spouses by agreement make the income wife's separate property. If it is desirable that the creditors of one spouse be unable to reach the community assets in the business under sole management of the other spouse, that feature of the Sole Trader Act can be retained and restated in a sex-neutral statute.

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24. Civ. Code § 5110. It is assumed that all of the capital is community so that no portion of the gain would be wife's separate property as a return on capital (see Civ. Code § 5107).

25. It is this writer's opinion that Civil Code section 5116 makes the community property in a section 5125(d) business liable for the ordinary debts of both husband and wife. The contrary argument asserts that section 5125(d) was not intended to be an exception to the general rule that, absent an express legislative declaration to the contrary, liability for debts follows management and control. That is, if one has the power to voluntarily use a fund to pay a creditor, on obtaining a judgment that creditor can compel the spouse to exercise the power. See policy declaration in preamble to the equal management reforms, 1974 Cal. Stats., ch. 1206, § 1, p. 2609. Bruch, The Legal Import of Informal Marital Separations: A Survey of California and a Call for Change, 65 Calif. L. Rev. 1015, 1053, n. 136 (1977), thus assumes that H's creditors cannot reach W's section 5125(d) business assets. Positions somewhere in between my own and Carol Bruch's appear in H. Verrall, California Community Property 401 (3d ed. 1977), and Comment, The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy, 63 Calif. L. Rev. 1610 (1975).

26. Prager, Sharing Principles and the Future of Marital Property Law, 25 U.C.L.A. L. Rev. 1 (1977); Bartke, Community Property Law Reform in the United States and in Canada -- A Comparison and Critique, 50 Tul. L. Rev. 213 (1976); Bartke, Marital Property Law Reform: Canadian Style, 25 Am. J. Comp. Law 46 (1977); Barke, Marital Sharing -- Why Not Do It By Contract, 67 Georgetown L.J. 1131 (1979).

C. The Act Is Unconstitutional.

In Sail'er Inn v. Kirby,[27] the California Supreme Court construed the state constitution's equal protection clause[28] to make sex disrimination as suspect as race discrimination. State action discriminating on the basis of sex could be upheld only upon showing a "compelling interest" was implicated and that the discrimination was "necessary" to achieve the goal. This strict approach to sex discrimination was applied to anti-male as well as anti-female statutes,[29] and was applicable even when the "right" being extended in discriminatory fashion was not fundamental.[30] By contrast the federal equal protection clause of the fourteenth amendment is construed to impose a "middle tier"[31] test of the constitutionality of sex discrimination by government action. The government interest being furthered by the discrimination must be "important" and the discrimination "must be substantially related to achievement of those objectives."[32] Since the state Supreme Court very recently has departed from the strict-scrutiny approach in sex discrimination cases,[33] the constitutionality of the Sole Trader Act can most profitably be tested under the federal intermediate standard. It cannot pass it.

For many years the Sole Trader Act served an important government objective by making it possible, under a marital property system heavily biased in favor

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27. 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971).

28. Now found in Cal. Const. art. I, § 7.

29. Arp v. Workers' Comp. Appeal Bd., 19 Cal. 3d 935, 138 Cal. Rptr. 293, 563 P.2d 849 (1977).

30. Molar v. Gates, ____ Cal. App. 3d ____, 159 Cal. Rptr. 239 (1979).

31. I.e., it is somewhere in between the strict scrutiny approach of racial discrimination cases and the any-rational-basis approach applied in cases involving line-drawing in economic regulation.

32. Craig v. Boren, 429 U.S. 190 (1976); see also Reed v. Reed, 404 U.S. 71 (1971). In Orr v. Orr, 440 U.S. 268 (1979), this test was applied to invalidate an anti-male law permitting only wives to be awarded alimony at divorce.

33. Michael M. v. Superior Court, ____ Cal. 3d ____, 159 Cal. Rptr. 340, 601 P.2d 572 (1979), gives lip service to the strict-scrutiny approach but obviously does not apply it. At issue was constitutionality of a statutory rape statute that punished only the male when two consenting juveniles engaged in sex without consideration of whether the male or female was the instigator. It hardly seems "necessary" -- in order to discourage teenage pregnancies -- to exempt from prosecution a girl who seduces a boy. On the contrary, the public purpose would be more served by punishing the instigator without regard to gender. The Michael M. result is correct, if at all, only under a less strict standard such as the federal "substantially related" test.

of men, for women to engage in business. Since 1975[34] it no longer is necessary to achieve this goal.

The only argument that can be made in favor of constitutionality of the sex discrimination in the Sole Trader Act is that by making the wife's earnings from a business her separate property the law ameliorates the lingering discriminatory consequences of the pre-1975 marital property system.[35] But given the existence since 1852 of the Sole Trader Act, the discriminatory law caused little harm to women in business.[36] Indeed, they were, overall, probably better off in the area of property rights before 1975 than their husbands since almost all community property consists of earnings of either the husband or wife, and the law allowed the married business woman not only to control her earnings but to own them as well. It is the wife who did not engage in business who suffers any substantial lingering effects of the many years of sex discrimination in California, yet she does not receive any benefits under the Sole Trader Act.

It may be argued that even though the Sole Trader Act has since 1852 given the married businesswoman most of the powers over property that men have enjoyed, the legislature could reasonably conclude that there persisted even

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34. A strong argument can be made that the Act has been unnecessary since 1951, but the wife's management rights over her earnings during 1951-1975 were somewhat precarious. Control would be lost if her earnings were commingled with other community property (although liability to her creditors continued despite loss of control, Tinsley v. Bauer, 125 Cal. App. 2d 724, 271 P.2d 116 (1954)). There was doubt as to what changes of form (e.g., expenditures for investments) W's earnings could go through and still be subject to her exclusive management.

35. Under the fourteenth amendment, sex discrimination in favor of women for the purpose of enabling them to cope with the continuing effects of male domination is upheld. Kahn v. Shevin, 416 U.S. 351 (1974); Califano v. Webster, 430 U.S. 313 (1977).

36. In Sail'er Inn v. Kirby, supra n. 27, 5 Cal. 3d at 20, n. 20, the state Supreme Court cited the Sole Trader Act to support the proposition that laws had historically treated married women as inferior persons when it came to property ownership and management. The Court said the Act made it necessary for a married woman to obtain court approval before she "may engage in an independent business." That ceased to be true in 1951 when the wife obtained control of her own uncommingled earnings. At that point her business -- at least if not started with community capital under H's control -- was her "independent" business even if she did not register as a sole trader. Rather than being a burden, the Sole Trader Act after 1951 gave the wife benefits the husband lacked. Moreover, court approval would almost always be a mere formality. Opposition by a creditor of husband (Civ. Code § 1815) could only be based on the husband's being insolvent yet proposing to transfer $500 of his separate property or husband-managed community property to the wife's business (Civ. Code § 1814). Where there was no opposition the Superior Court was to "hear the proofs of the applicant [wife], and find facts in accordance therewith." Civ. Code § 1816. I.e., the judgment would issue as a matter of course.

still in California culture an anti-female bias, particularly with respect to women engaged in commerce which men have historically dominated. This may be true, but making the wife's business earnings her separate property simply does not help her cope with the societal discrimination. If compensatory damages are to be paid to women in business because the law for years supported the discrimination against them,[37] the payor should be the state in general. Continued application of the Sole Trader Act has the effect of making the husband pay. That is, the Act alters the marital partnership so as to make the husband's community earnings co-owned by his wife while enabling her to unilaterally withdraw her earnings from the partnership by becoming a sole trader. In sum, the Sole Trader Act unreasonably discriminates against men.

It is my opinion that the Act also unconstitutionally discriminates against wage-earning women. The any-rational-basis test would be applied when the Act is attacked in this manner. Giving the spouse conducting a business sole management is rational but I cannot even begin to guess how it would be argued that it is rational to grant the wife in business double the ownership of her earnings compared to the property interests of salaried wives. The reason ended in 1927 when California became a true community property jurisdiction, recognizing in the wife an ownership interest in community property and thus making it reasonable to give her the management power over classes of such property.[38]

D. The Benefits of the Sole Trader Act Can Be Preserved in a Different Form.

There may be one beneficial feature of the Sole Trader Act: provision of a method (recordation of the judgment granting sole trader status) whereby third parties such as creditors are able to learn that particular spouses own property in a manner contrary to the usual rules of law. That is, the recorded judgment[39] is a public record advising third parties, particularly those extending credit to the husband, that wife's earnings are not community property and hence cannot be reached by the husband's ordinary creditors.

The extent to which an unrecorded arrangement between the spouses altering the normally applicable rules of property ownership is binding on creditors is

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37. See, e.g., Bradwell v. Illinois, 83 U.S. 130 (1873) (upholding state law ban on woman lawyers).

38. See Reppy, supra note 10, at 1062-1063, 1067-1070, 1097-1099.

39. While the 1852 and 1862 versions of the Act provided for a special index at the office of the county recorder to list married women who had become sole traders, the present statutory scheme simply provides that the judgment shall be "entered." Code Civ. Proc. § 1819. Inquiry by the California Law Revision Commission of the offices of county recorder for San Francisco, Santa Clara, and Los Angeles counties disclosed that special indices for judgments granting sole trader status are not kept. Locating a pertinent judgment may thus be no easy matter for a person considering extending credit to a husband.

not fully settled. It is a peculiarity of California marital property law that the spouses by agreement[40] binding at least between themselves may adopt forms of ownership contrary to the ownership rights under the statutory and caselaw principles of the California community property system.[41] Even where real property is involved, the agreement is valid if oral -- at least in litigation between the spouses.[42]

Historically, the type of transmutation agreement California courts have been most quick to find -- often on the flimsiest of evidence[43] -- is one where the husband agrees that the wife's income from labor will be her separate

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40. This term is somewhat misleading. No consideration is required for the inter-spousal transmutation "agreement"; nor is "delivery" required as in the case of gifts. E.g., Estate of Raphael, 91 Cal. App. 2d 931, 206 P.2d 391 (1949).

41. E.g., Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 P. 190 (1909); Nelson v. Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964); Nevins v. Nevins, 129 Cal. App. 2d 150, 276 P.2d 655 (1954).

42. E.g., Woods v. Security First National Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956). An exception is recognized for agreements changing real or personal property to the form of joint tenancy. A writing then is required (although it need not satisfy the statute of wills). Civ. Code § 683; Estate of Baglione, 65 Cal. 2d 192, 53 Cal. Rptr. 139, 416 P.2d 683 (1966); California Trust Co. v. Bennett, 33 Cal. 2d 694, 204 P.2d 324 (1949).

On its face Civil Code section 5134 requires a writing for pre-nuptial agreements altering the law applicable to classifying property as separate or community (and section 5135 requires recordation if the agreement is to affect real property). The appellate courts have for all practical purposes judicially repealed these statutes. They routinely find a prenuptial oral agreement reaffirmed or "executed" after marriage, thereby converting it into a post-nuptial contract not governed by sections 5134 and 5135. Woods v. Security First National Bank, supra; Estate of Wahlefeld, 105 Cal. App. 770, 288 P. 870 (1930). Alternatively, the courts find one or both spouses relied on the oral prenuptial agreement and that this raises an estoppel to invoke the statute of frauds applicable to such agreements. Estate of Sheldon, 75 Cal. App. 3d 364, 142 Cal. Rptr. 119 (1977).

43. The cases finding a relinquishment when H does not interfere with W's business are simply unsupportable when post-1951 community earnings of the wife are at issue, since she had control of them under former Civil Code sections 171c and 5124. See O'Connor v. Travelers Ins. Co., 169 Cal. App. 2d 763, 337 P.2d 893 (1959). Hearing was recently granted by the Supreme Court after such an erroneous decision by the Court of Appeal. Ashodian v. Ashodian, 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979).

property.[44] The courts often describe this as H "relinquishing" his community interest in such property.[45] Repeal of the Sole Trader Act would leave such agreements between the spouses as the means for making the wife's earnings her separate property.

Under the Sole Trader Act the spouses were not permitted to impeach the recorded instrument declaring property to be separately owned, and a creditor could go behind such record title (to establish that assets at issue were community property) only by showing the sole-tradership was a sham or fraud.[46] In situations not involving the Sole Trader Act record "title" or apparent ownership under the statutes defining separate and community property cannot be as readily relied on. Creditors and other third parties have been permitted freely to impeach the record or apparent title to improve their legal position vis a vis the spouses. More alarmingly, there are several cases allowing the spouses to impeach the record or apparent title to defeat creditors. The situation existing where the Sole Trader Act does not apply is almost chaotic and certainly invites litigation, as a survey of some of the cases shows.

In Lovetro v. Steers,[47] the spouses owned a promissory note which on its face stated the form of ownership to be joint tenancy. The husband released the promisor. That release affected the entire debt if the note were actually community property but could not bind W's half interest if it were owned in joint tenancy. The promisor was permitted to impeach the "title" by showing the spouses never agreed to transmute the community assets given in exchange for the note to joint tenancy property.

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44. Wren v. Wren, 100 Cal. 276, 34 P. 775 (1893); Pacific Mutual Life Ins. Co. v. Cleverdon, 16 Cal. 2d 788, 108 P.2d 405 (1940); O'Connor v. Travelers Ins. Co., 169 Cal. App. 2d 763, 337 P.2d 893 (1959); Tagus Ranch Co. v. First Nat. Bank, 7 Cal. App. 2d 457, 46 P.2d 809 (1935); Smith v. Smith, 47 Cal. App. 650, 191 P. 60 (1920).

45. E.g., Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272 (1904); Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 P. 190 (1909).

46. See notes 11 and 12, supra, and accompanying text. See also Gray v. Perlis, 76 Cal. App. 511, 245 P. 221 (1926). The wife had been adjudged a sole trader in 1916 (apparently the last reported instance of a sole trader registration). Husband's trustee in bankruptcy sought to reach the assets of her business on the ground that the sole-tradership was a sham. It was held this raised an issue of fact for the trial court (which ruled against the trustee).

47. 234 Cal. App. 2d 461, 44 Cal. Rptr. 604 (1965).

In Hansford v. Lassar,[48] Husband's creditor sought to levy on the entire interest in land which had been deeded to the spouses in joint tenancy. Creditor contended that the property was really community property, all rather than half of which would be liable for the husband's debts. Creditor prevailed by showing that the spouses did not know the difference between community property and joint tenancy and thus could not have transmuted from community to joint tenancy the funds used to buy the land.

A wife had established a joint tenancy bank account in Tinsley v. Bauer,[49] but her creditor was able to reach all of the funds in it rather than just half by proving that the wife's community earnings (liable at that time on her contract debts) had been placed in the account and that there had been no transmutation.[50]

The tables were turned against the creditor in Oak Knoll Broadcasting Corp. v. Hudgings.[51] Wife's creditor levied on a joint tenancy bank account (seeking to seize Wife's half interest). Husband resisted the levy on the theory the funds in the account were actually community property, his earnings at that time not liable for the wife's ordinary debts (i.e., not for "necessaries"). The spouses testified they didn't know what joint tenancy was, and so the holding was no transmutation had occurred and Creditor's levy caught nothing.

In similar cases where the spouses seek to impeach record title to defeat creditors the trier of fact has not been convinced,[52] but no such case has

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48. 53 Cal. App. 3d 364, 125 Cal. Rptr. 804 (1975). A similar ploy by the creditor was permitted in In re River's Collection Co., 87 Cal. App. 2d 248, 196 P.2d 803 (1948), but the court concluded the spouses did intend a joint tenancy. See also Springer v. Commissioner, 1977 T.C. Mem. No. 191. The spouses executed a formal marriage contract providing that a particular business and the profits therefrom would be wife's separate property. The I.R.S. insisted that husband was taxable on half the profits of the business not on an assignment of income theory but on the theory that "treatment" by husband and wife of the business as a community business had superceded the written contract.

49. 125 Cal. App. 2d 724, 271 P.2d 116 (1954).

50. California cases are inconsistent on the question whether merely depositing community or separate funds in a joint tenancy bank account transmutes them to joint tenancy. See Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Cal. State B.J. 452 (1979).

51. 275 Cal. App. 2d 563, 80 Cal. Rptr. 175 (1969).

52. See Snell v. Telehala, 274 Cal. App. 2d 81, 78 Cal. Rptr. 780 (1969). Husband's creditor levied on property held in joint tenancy; the court considered a "fabrication" Wife's testimony that in fact Husband had transmuted the community funds used to buy the property to Wife's separate property and that in fact the spouses intended it to be her separate property. See also O'Callaghan v. People, 165 Cal. App. 2d 358, 332 P.2d 170 (1958) (wife's attempt to defeat husband's creditor by establishing property held in joint tenancy was her separate property); Tinsley v. Bauer, 125 Cal. App. 2d 724, 271 P.2d 116 (1954) (husband's attempt to defeat wife's creditor by establishing funds in joint tenancy bank account were his community earnings).

suggested that a creditor could rely on record title or apparent ownership under the statutes defining community and separate property.

A third party's reliance on apparent title was frustrated in Diefendorff v. Hopkins.[53] Wife was operating a boarding house but was not a registered sole trader. From the profits of that operation Wife had purchased various furnishings. To raise money she sought to sell the furnishings to the plaintiff, who would then lease them to her. On advice of counsel, plaintiff requested that the bill of sale for the furniture be signed by Husband and name him as vendor (the proper form if the wife's business were community property). Later, wife's creditors seized the furniture and plaintiff's suit to establish his lessor's interest was unsuccessful. It was held the business and hence the furniture were at the time of the sale to plaintiff Wife's separate property because Husband had relinquished his community interest through a "course of conduct." Thus the bill of sale should have been signed by Wife.

The writer believes that both creditors and married persons would benefit if the repeal of the Sole Trader Act were accompanied by enactment of a statute authorizing the spouses to record instruments establishing the separate, community, or joint tenancy character of assets, now existing or to be earned or acquired in the future, which would be conclusive except if fraud were proved.[54]

The statute should provide that, at least with respect to third parties, only a written and recorded instrument could alter the terms of the instrument. The proposed statute would be much more beneficial -- in establishing the certainty of ownership and avoiding litigation -- if it also provided that it was conclusive on the spouses. If the spouses were to be able to enforce between themselves an oral (or unrecorded written) arrangement at variance with the

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53. 95 Cal. 343, 30 P. 549 (1892).

54. The present "inventory" statutes, Civil Code sections 5114 and 5115, are inadequate to achieve the desired certainty. They invite a spouse to record a list of separately owned property (§ 5114), and its recordation constitutes "prima facie evidence" of the separate nature character of such assets (§ 5115). It is dubious whether the statutes could be used to record ownershp in joint tenancy. In any event, the inventory statutes merely shift the burden of proof. Absurdly, they call for the signature of the wrong spouse -- the one claiming ownership rather than the one relinquishing any claim (as of a community half interest). Since the claimant spouse filing an inventory might list in it property that was really community and since obviously such a unilateral act could not eliminate the community character, no third party can ever rely at all on an inventory executed as directed by section 5114. Only if the spouse of the person named as separate owner signs the instrument could there be any reliance. In their present form the inventory statutes are useless and may as well be repealed.

recorded instrument, fairness to creditors would permit them to establish the existence of such an understanding if it benefited the creditors.[55]

Moreover, the spouses may find useful a scheme enabling them -- in relations between each other -- to rely on a written agreement that governs their property rights. That is impossible under existing law.[56]

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55. Under current equal management a creditor will usually benefit most if property is community. He can then reach all of it in most cases without regard to whether he is the creditor of the husband or of the wife. See Civ. Code § 5116. However, in some situations the creditor will want to establish the property is the separate property of his debtor or, to reach at least half, that it is joint tenancy property. For example, a pre-marriage contract creditor of a spouse cannot reach community property that is traceable to the earnings of the other spouse. Civ. Code § 5120. A creditor may seek to avoid the anti-deficiency judgment protection given a debtor spouse's separate property under Civil Code section 5123 by proving that the security given the creditor was really not community property but joint tenancy or some other non-community form of property. Where the "title" to the property given as security was in joint tenancy the spouses will want to impeach it and establish community ownership in order to get the protection of section 5123.

56. Apparently even an express clause in a formal contract that modifications must be in writing cannot be relied on. Civil Code section 1698 authorizes an oral modification of a written agreement if the modification is "executed," and in marital property cases the courts are quick to find such "execution." See note 42, <u>supra</u>, and authorities there cited.

The inability under present law to place reliance on formal writings stating the character of property is illustrated by Marriage of Ketscher, 79 Cal. App. 3d 527, 144 Cal. Rptr. 877 (1978) (ordered officially nonpublished). Husband, in order to double the acreage qualifying to receive water from federal projects, filed with the Bureau of Reclamation a formal declaration that certain land which he owned before marriage was community property. At divorce Husband was permitted to argue and convinced the judge that the designation was just a fraud on the U.S. Bureau of Reclamation and he really never intended to transmute his separate property to community.

E. Repeal of the Sole Trader Act Should Be Fully Retroactive With Exceptions Only to Protect Rights of Third Parties.

For the reasons stated above, the Sole Trader Act should be repealed[57] and perhaps replaced with a sex-neutral registration statute.[58] There are probably very few women now registered as sole traders.[59] It may well, then, be of little consequence to what extent the repealer is retroactive. Since the Sole Trader Act is probably unconstitutional for sex discrimination and certainly is unfair and unnecessary, the repealing act would best promote an equitable marital property system by wholly eliminating the effects of the Sole Trader Act between the spouses themselves. That is, earnings of the wife that the Act made separate property but which would otherwise be community because the husband never freely agreed to transmute them to separate property would be converted to community property. The repealer should have no effect on properties the Wife has already conveyed or otherwise managed in dealings with third parties who relied on the properties being wife's separate estate under the Sole Trader Act. Conveyances of realty by Wife alone would thus not be disturbed and a sole trader's executory contract to sell realty that would be converted to community property by the repeal would be enforceable and Husband's signature not required on Wife's deed, Civil Code section 5127 notwithstanding.

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57. Nevada enacted in 1867 a Sole Trader Act copied from California's but repealed it in the year Nevada adopted a form of equal management of community property. 1975 Nev. Stats. ch. 157, p. 190.

For many years a Louisiana statute, La. Civ. Code Art. 2386, empowered a wife but not a husband to file a declaration that made the rents and profits of her separate property also separate (i.e., as they normally are in California under Civil Code section 5107) rather than community, which is the normal rule under civil law. As part of its recent equal management reform legislation that removed most sex discrimination from marital property law, Louisiana has extended this privilege to husbands. 1979 La. Stats. act no. 709, § 1, p. 1350, enacting new La. Civ. Code art. 2339, effective 1980, which supercedes old art. 2386. The writer considers this most unwise of Louisiana, which will now have to grapple much more frequently with apportionment problems arising under the "American" community property system as well as apportionment problems in the "Civil Law System." See Reppy & De Funiak, Community Property in the United States 247-290 (1975).

58. There would be no reason whatsoever for involving the Superior Court in the proposed registration procedure as is currently the case under the Sole Trader Act. A notarized document executed by both spouses should be recordable in a separate index kept by county recorders for marital property agreements.

59. Discussions by the California Law Revision Commission with agents of the county recorder's office in Los Angeles, San Francisco, and Santa Clara counties revealed that in these three large counties the recorder's office staffs have no personal recollection of such a judgment having been recorded. Since no separate index of such judgments is kept it is virtually impossible to determine how many, if any, sole traders there are now in the state.

Such retroactive application is probably constitutional. It would result in a taking of the wife's property rights -- assuming an unconstitutional statute can vest property rights protected by the due process clause of the state and federal constitutions. The California Supreme Court has declared that at least when the effects of the taking are felt at dissolution of marriage, the police power interest in an equitable marital property division allows such a taking. It is a taking with due process.[60]

While language in some of the older cases suggests a flat rule that if the switching of property interests by retroactive statute took effect during the marriage it would be unconstitutional,[61] the Court is presently taking a much more flexible approach toward permissible retroactivity. The proposal for full retroactive repeal with exceptions to protect the rights of persons who acted in reliance under prior law should meet the demands of due process.[62]

Alternatively, the repealer statute could provide that separate property obtained by a sole trader wife under the Act remains separate but that the sole trader status of the wife is terminated.[63] To the extent future earnings of the wife are thereafter community, Civil Code section 5125(d) will still assure the married business woman exclusive control of the business (although probably husband's creditors can reach the community income).

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60. Marriage of Bouquet, 16 Cal. 3d 583, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976) (retroactivity of amendment to Civil Code section 5118 enacted to eliminate sex discrimination); Addison v. Addison, 62 Cal. 2d 558, 43 Cal. Rptr. 97, 339 P.2d 897 (1965).

The retroactive change in status from Wife's separate to community property would be a windfall to Husband's creditors and might harm Wife's creditors who would have to share the assets with creditors of the husband at so many cents on the dollar if the new characterization rendered the wife insolvent. Insofar as the rights of creditors are retroactively increased, Robertson v. Willis, 77 Cal. App. 3d 358, 143 Cal. Rptr. 523 (1978), holds there is no due process violation to the non-debtor spouse. Since it is inherent that increasing the rights of one group of creditors can, in an insolvency situation, decrease the rights of other creditors, the Robertson decision seems to indicate there is no due process problem even in an insolvency situation.

61. See Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934).

62. See Reppy, supra note 10, at pp. 1047-1052, 1097-1118.

63. This was the retroactivity provision of the 1862 amendment to the Sole Trader Act converting the procedure from filing of a declaration to obtaining a judgment. All married women then having sole trader status had to obtain the necessary judgment or else the status would be lost; however separate property acquired under pre-1862 law would remain separate. 1862 Cal. Stats. ch. 121, § 4, p. 109.

CALIFORNIA CODE OF CIVIL PROCEDURE

Title 12
OF SOLE TRADERS

§ 1811. A married woman may become a sole trader by the judgment of the Superior Court of the county in which she has resided for six months next preceding the application.

§ 1812. A person intending to make application to become a sole trader must publish notice of such intention in a newspaper published in the county, or if none, then in a newspaper published in an adjoining county, pursuant to Government Code Section 6064. The notice must specify the day upon which application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband.

§ 1813. Ten days prior to the day named in the notice, the applicant must file a verified petition, setting forth:

1. The justification for the application.

2. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.

3. That the application is not made to defraud, delay, or hinder any creditor or creditors of the husband of the applicant.

§ 1814. MAY HAVE $500 OF COMMUNITY OR HUSBAND'S PROPERTY. The applicant may invest in the business proposed to be conducted, a sum derived from the community property or of the separate property of the husband, not exceeding five hundred dollars.

§ 1815. WHO MAY OPPOSE IT, AND HOW. Any creditor of the husband may oppose the application, by filing in the Court (prior to the day named in the notice) a written opposition verified, containing either:

1. A specific denial of the truth of any material allegation of the petition; or setting forth,

2. That the application is made for the purpose of defrauding the opponent; or,

3. That the application is made to prevent, or will prevent, him from collecting his debt.

§ 1816. TRIAL OR HEARING. On the day named in the notice, or on such other day to which the hearing may be postponed by the Court, the applicant must make proof of publication of the notice hereinbefore required, and the issues of fact joined, if any, must be tried as in other cases; if no issues are joined, the Court must hear the proofs of the applicant, and find the facts in accordance therewith.

§ 1817. DECREE, WHAT IT MUST BE. If the facts found sustain the petition, the Court must render judgment, authorizing the applicant to carry on, in her own name and on her own account, the business specified in the notice and petition.

§ 1818. REPEALED BY STATS. 1967, c. 857, p. 2294, § 2.

§ 1819. When the judgment is made and entered, and a copy thereof, with the affidavit provided for in section eighteen hundred and eighteen, duly recorded, the person therein named is entitled to carry on the business specified, in her own name, and the property, revenues, moneys, and credits so by her invested, and the profits thereof, belong exclusively to her, and are not liable for any debts of her husband, and she thereafter has all the privileges of, and is liable to all legal processes provided for debtors and creditors, and may sue and be sued alone, without being joined with her husband; provided, however, that she shall not be at liberty to carry on said business in any other county than that named in the notice provided for in section eighteen hundred and twelve, until she has recorded in such other county a copy of said judgment and affidavit.

§ 1820. SOLE TRADER MUST MAINTAIN HER CHILDREN. A married woman who is adjudged a sole trader is responsible and liable for the maintenance of her minor children.

§ 1821. HUSBAND OF SOLE TRADER NOT LIABLE FOR DEBTS. The husband of a sole trader is not liable for any debts contracted by her in the course of her sole trader's business, unless contracted upon his written consent.