

## Memorandum 80-50

Subject: Study D-312 - Creditors' Remedies (Liability of Property of Married Persons--Approval to Distribute for Comment)

Attached to this memorandum is a draft of the provisions governing liability of marital property for debts, along with a preliminary portion explaining the draft. We have deferred the matter of reimbursement rights as between spouses until the fall when we will receive Professor Bruch's study concerning this matter. Nonetheless, it would be most efficient to obtain the comments of interested persons on the creditors' remedies aspects of the study, and we request that the Commission approve this tentative recommendation to distribute for the purpose of soliciting comments.

The Commission should examine Section 5120.050 (liability of property after division) to make sure it accurately reflects the Commission's decisions at the May meeting, since some of the decisions are not clear. As drafted, Section 5120.050 provides that after dissolution of marriage, former community property in the hands of the nondebtor spouse remains liable for debts of the other spouse incurred during marriage, only so long as the property is in the same form. Once the property is converted into some other form--e.g., cash into stocks--or is otherwise consumed or expended, it is no longer liable. The nondebtor spouse has the burden of proof on the character and origin of the property.

Please mark any editorial suggestions you may have on your copy of the draft to return to the staff at the meeting.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

## TENTATIVE RECOMMENDATION

relating to

## LIABILITY OF MARITAL PROPERTY FOR DEBTS

General Approach

The eight community property jurisdictions in the United States have developed three distinct systems of applying marital property to the debts of one or both spouses.<sup>1</sup> No system permits a creditor to reach all marital property--separate property of both spouses and community property.<sup>2</sup> Each system protects the marital property from creditors to varying degrees by creating exceptions to liability of the property for debts.

The system least favorable to creditors is that developed in Washington and Arizona, which requires a classification of debts as community or separate.<sup>3</sup> All community property and the debtor's separate property is liable for a "community" debt, but only separate property of the debtor spouse is liable for a "separate" debt. Since in the ordinary case a substantial portion of the marital property is community, a creditor holding a separate debt may find the debt uncollectable. A practical consequence of this system is that creditors require consent of both spouses before extending credit and courts strive to classify debts as community in order to avoid unfairness to creditors.

A system more favorable to the interests of creditors is that developed in New Mexico. Under this system, debts are classified as community or separate, community property being liable for community debts and separate property of the debtor spouse being liable for that

1. Reppy, Debt Collection From Married Persons in California, at p. 3 (1980). This is a study prepared for the California Law Revision Commission, which is hereinafter cited as "Study." Copies of the study are available from the Commission on request. The study is scheduled for publication in the San Diego Law Review in revised form in October 1980.
2. The separate property of the nondebtor spouse is ordinarily immune. In California, the separate property of a nondebtor spouse is liable for support obligations of the debtor spouse in limited situations. Civil Code §§ 5131-5132.
3. For a discussion of the debt classification system, see Study at pp. 3-5.

spouse's separate debts. In the case of a separate debt, if the separate property is exhausted and the debt remains unsatisfied, the creditor may reach the debtor's half-interest in the community property, in effect forcing a partition. The mechanical operation of such a scheme, and the subsequent readjustment of property rights between the spouse, is not clear.<sup>4</sup>

Most community property states, including California, employ a system that is most favorable to creditors. Creditors under this system may satisfy their debts out of property over which the debtor spouse has management and control. In California, this means that generally a creditor may reach the separate property of the debtor spouse and all the community property since the spouses have equal management and control of the community property.<sup>5</sup> This general rule is subject to exceptions, which are dealt with below.

Of the possible approaches to liability of marital property for debts, the managerial system (which is the present California system) is generally most sound in theory and practice. It gives greatest assurance that debts of the spouses will be satisfied, subject to exemption of property necessary for the spouses.<sup>6</sup> Systems that require characterization of type of debt and partition of community property create serious administrative problems. Moreover, liability of the property over which the debtor has management and control conforms to the reasonable expectations of both spouses and creditors. The Commission recommends that the general approach of existing California law to liability of marital property for debts be preserved.

#### Property Under Management and Control of One Spouse

Under California's managerial approach to liability of marital property, property over which a spouse has management and control is

- 
4. For a discussion of the partition system, see Study at pp. 18-19.
  5. For a discussion of the California managerial system, see Study at pp. 23-27.
  6. See discussion below under "Exemptions."

liable for the debts of the spouse.<sup>7</sup> Since both spouses have equal management and control of the community property, this yields the rule that all community property is liable for a debt of either spouse.

California law, however, prescribes two situations where community property is under the management and control of only one spouse. A spouse who is operating or managing a business that is community personal property has the sole management and control of the business.<sup>8</sup> A community property bank account in the name of a spouse is free from the control of the other spouse.<sup>9</sup> Whether these two types of community property are liable for a debt of the spouse not managing and controlling the property is not clear.<sup>10</sup>

The policy supporting liability of community property for a debt of either spouse incurred before or during marriage--maximum protection of creditors' rights with minimum procedural burdens--also supports liability of the property regardless whether it is under the management and control of one or both spouses. The law should make clear that the community property is liable for a debt of either spouse notwithstanding the concept that liability follows management and control.

#### Priority of Application of Property

Under the California approach to liability of marital property, all of the community property as well as the debtor's separate property is liable for a debt of the spouse. If the debt was incurred for community purposes, an argument can be made that the community property should be first exhausted before resort to the debtor's separate property is permitted. If the debt was incurred for separate purposes, an argument can be made that the separate property of the debtor should be first exhausted before resort to the community property is permitted.

---

7. See Study at pp. 23-27; see also 1974 Cal. Stats. ch. 1206, § 1, p. 2609:

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 . . . .

8. Civil Code § 5125(d).

9. Fin. Code § 851.

10. See Study at pp. 48-56.

Existing California law prescribes an order of priority in two situations. Civil Code Section 5122(b) requires a determination whether or not a tort judgment arises out of an activity that benefits the community--if so, the judgment must be satisfied first out of community property and then out of the separate property of the tortfeasor; if not, the judgment must be satisfied first out of the separate property of the tortfeasor and then out of community property.<sup>11</sup> Civil Code Section 5132 requires a spouse to support the other spouse out of separate property if there is no community or quasi-community property.<sup>12</sup>

A priority scheme creates a number of practical problems. It requires a procedural mechanism for determining whether the debt is community or separate in character. It requires a creditor who seeks to satisfy the debt out of one type of property to ascertain whether the other types of property have been exhausted; this may involve cumbersome court proceedings. Moreover, even if there are other types of property that have not been exhausted, a priority scheme may require the creditor to seek satisfaction from property that is likely to be exempt or that is of such a nature that the cost of applying it to the judgment will exceed its worth.

---

11. Civil Code Section 5122(b) provides:

(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.

12. Civil Code Section 5132 provides:

5132. 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.

The California statutes do not attempt to resolve these problems and there is no useful experience of operation under them.<sup>13</sup> Other jurisdictions have enacted limited priority schemes, but these schemes offer no useful guidance; apparently, elaborate court proceedings are required to make them operable.<sup>14</sup>

The Commission believes the mechanical problems caused by an order of priority of application of property are too great to justify such a scheme. A creditor should be able to reach any property that is liable for the satisfaction of the judgment without the burden of first seeking out and attempting to exhaust particular classes of assets. The existing California priority provisions should be repealed. [In place of the priority provisions, the Commission recommends adoption of a reimbursement right between spouses, which is discussed below.]

#### Reimbursement

[The Commission plans to consider adoption of a reimbursement right between spouses before introduction of legislation.]

#### Prenuptial Debts

If a person contracts a debt before marriage, the earnings of the person's spouse after marriage are not liable for the debt.<sup>15</sup> This rule implies two corollaries:

(1) Community property other than the earnings of the nondebtor spouse after marriage is liable for prenuptial contract debts.

(2) The earnings of the nondebtor spouse after marriage are liable for prenuptial tort debts.

The first corollary is correct. Since the debtor spouse has a half-interest in community property, all community property other than

---

13. See generally discussion in Note, Tort Debts Versus Contract Debts: Liability of the Community Under California's New Community Property Law, 26 Hastings L.J. 1575 (1975).

14. See Bingaman, The Community Property Act of 1973: A Commentary and Quasi-Legislative History, 5 N.M. L. Rev. 1 (1974).

15. Civil Code § 5120.

earnings of the nondebtor spouse (which is peculiarly personal) should be liable for the satisfaction of the prenuptial debt. This principle should be codified expressly.

The second corollary is not correct. There is no sound basis to distinguish prenuptial tort and contract debts. The earnings of the nondebtor spouse should not be liable for any prenuptial debts of the debtor spouse, whether based on contract or tort.

A related matter is how long the earnings of the nondebtor spouse should remain not liable for a prenuptial debt of the debtor spouse.<sup>16</sup> The Commission recommends that the earnings should lose their protection from liability upon a change in form, but that they should retain their protection so long as traceable in bank accounts. This will ensure that substantial amounts of community property are not immunized from creditors, that the judicial system is not burdened by extensive tracing requirements, and that earnings will remain exempt so long as they retain their peculiarly personal character. This will also parallel the protection given funds exempt from enforcement of judgments.<sup>17</sup>

#### Liability for Necessaries

Under existing law, separate property of a spouse is not liable for the debts of the other spouse except that the separate property is liable for the necessities of life contracted by either spouse while living together.<sup>18</sup> This exception is based on the obligation of the spouses to support one another.<sup>19</sup>

The requirement that the necessities be "contracted" is unduly restrictive. This language has the effect of immunizing the separate property from debts for necessities such as emergency medical care not

---

16. See Study at pp. 57-60.

17. See Recommendation Relating to Enforcement of Judgments, 15 Cal. L. Revision Comm'n Reports \_\_\_\_, \_\_\_\_-\_\_\_\_ (1980).

18. Civil Code § 5121.

19. Civil Code § 5132.

contracted by one of the spouses.<sup>20</sup> In such situations the separate property of the nondebtor spouse should be liable for the necessities debt regardless of the contractual nature of the debt.

The separate property of the nondebtor spouse is liable for necessities debts incurred only while the spouses are living together. After separation by agreement there is no liability unless support is stipulated in the agreement.<sup>21</sup> The provision abrogating the support obligation of the spouses in a separation by agreement penalizes spouses who need support following an informal separation and violates the policy of the Family Law Act requiring mutual support during marriage.<sup>22</sup> The presumption should be reversed--the separate property of the spouses should remain liable for the necessities obligations incurred following separation unless liability is expressly waived in the separation agreement. However, after separation the property should be liable only for debts for "common" necessities of life;<sup>23</sup> the nondebtor spouse should not be required to maintain the estranged spouse after separation in the accustomed style of life.<sup>24</sup>

Case law provides that the separate property of the nondebtor spouse may not be applied to the satisfaction of a judgment unless the nondebtor spouse is made a party to the action.<sup>25</sup> This rule is sound

---

20. See, e.g., *Credit Bureau of San Diego v. Johnson*, 61 Cal. App.2d Supp. 834, 142 P.2d 963 (1943). Cf. *St. Vincent's Institution for Insane v. Davis*, 129 Cal. 20, 61 P. 477 (1900) (earlier statute).

21. Civil Code § 5131.

22. Bruch, The Legal Import of Informed Marital Separations: A Survey of California Law and a Call for Change, 65 Calif. L. Rev., 1015, 1030-31 (1977); Study at pp. 46-47.

23. Cf. Code Civ. Proc. § 723.051 (common necessities exception to wage exemption); *Ratzlaff v. Portillo*, 14 Cal. App.3d 1013, 92 Cal. Rptr. 722 (1971) ("common" necessary is necessary required to sustain life).

24. Cf. *Wisnom v. McCarthy*, 48 Cal. App. 697, 192 P. 337 (1920) (under necessities standard, maid necessary because of economic and social position of spouses).

25. See, e.g., *Evans v. Noonan*, 20 Cal. App. 288, 128 P. 794 (1912); *Santa Monica Bay Dist. v. Terranova*, 15 Cal. App.3d 854, 93 Cal. Rptr. 538 (1971).



and should be codified. The nondebtor spouse, for due process reasons, should have the opportunity to contest the validity of the debt before his or her separate property is applied to its satisfaction.

### Interspousal Transfers

A system prescribing the liability of separate and community property for the debts of spouses is subject to the ability of the spouses to transfer property between themselves thus affecting the character and liability of the property. California law is liberal in permitting transmutation of the character of property by spouses and requires few formalities.<sup>26</sup>

The general rule appears to be that if a transfer is not fraudulent as to creditors of the transferor, the transfer can affect the right of creditors to reach the property.<sup>27</sup> Whether a transfer is fraudulent as to creditors is governed by the Uniform Fraudulent Conveyance Act.<sup>28</sup> The rules prescribed in the Uniform Act are sound as applied to interspousal transfers, and the statute should make clear that the Uniform Act governs such transfers.

A common means of transmuting property during marriage is by a premarital or other contract that affects property acquired during marriage. Such a marriage settlement contract must be executed and acknowledged or proved in the same manner as a grant of land, and must be recorded with the recorder of each county in which real estate affected by the contract is situated.<sup>29</sup> This provision is too narrow--a creditor should have notice that personal as well as real property acquired during marriage may be unavailable to satisfy a judgment pursuant to a marriage settlement contract. The provisions governing such

---

26. See, e.g., J. B. Witkin, Summary of California Law Community Property § 73 (8th ed. 1974).

27. Cf. Bailey v. Leeper, 142 Cal. App.2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); Wikes v. Smith, 465 F.2d 1142 (1972) (bankruptcy).

28. Civil Code §§ 3439-3440.

29. Civil Code §§ 5135-5136.

contracts should be amended to indicate that recordation is also necessary for the contract to effectively transmute personal property pursuant to the contract.

#### Anti-Deficiency Protection of Separate Property

Civil Code Section 5123 provides that in the case of a security interest in community property, the separate property of a spouse is not liable for any deficiency in the security unless the spouse gives express written consent to liability.<sup>30</sup> This provision is peculiar in protecting separate property of a spouse in the event of a deficiency but not other community property. It is thus inconsistent with general rules governing deficiency judgments.<sup>31</sup> Section 5123 was enacted for historical reasons that are now obsolete,<sup>32</sup> and should be repealed.

#### Liability After Division of Property

Upon separation or divorce, the community and quasi-community property and the debts are divided between the spouses.<sup>33</sup> Notwithstanding the division of property and debts, a creditor may seek to satisfy the debt out of any property that would have been liable for the debt before the division.<sup>34</sup> Thus, a creditor may reach former community

---

30. Civil Code Section 5123 provides:

5123. (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.

31. See, e.g., Code Civ. Proc. §§ 580a, 580b.

32. See Study at pp. 60-62.

33. Civil Code § 4800.

34. See, e.g., *Mayberry v. Whittier*, 144 Cal. 322, 78 P. 16 (1904); *Bank of American v. Mantz*, 4 Cal.2d 322, 49 P.2d 279 (1935); *Vest v. Superior Court*, 140 Cal. App.2d 91, 294 P.2d 988 (1956).

property awarded to a nondebtor spouse even though the property division requires that the debtor spouse pay the debt. In such a situation the nondebtor spouse has a cause of action against the debtor spouse for reimbursement.<sup>35</sup>

This scheme creates a number of procedural problems that should be resolved by statute. If the creditor obtains a judgment after division of the property, the property of the nondebtor spouse should not be liable unless the nondebtor spouse is made a party to the action; due process requires that the nondebtor spouse be afforded notice and the opportunity to be heard on the validity of the debt. After the division, the former community property should remain liable only so long as it does not undergo a change in form; funds in bank accounts should be traceable by standard community property tracing principles. Because the nondebtor spouse is in a better position than the creditor to prove the origin and character of the property, the nondebtor spouse should have the burden of proving that property seized by the creditor for the debt is not liable. If the debt was assigned for payment to the spouse other than the spouse from whose property the debt was satisfied, there should be a reimbursement right for the value of the property taken, with interest at the legal rate, as well as attorney's fees incurred in the reimbursement proceedings; this will help induce the spouse to whom the debt was assigned to pay the debt voluntarily and promptly.

#### Liability After Judgment of Nullity

The law relating to creditors' rights against property of former spouses whose marriage has been annulled as void or voidable is not clear.<sup>36</sup> The statute should make clear that creditors' rights against property of an annulled marriage are the same as against property of a valid marriage that ended in dissolution. The parties held themselves out as being married and third persons relied to their detriment. Fundamental community property principles demand that there be a community of property formed between the parties for purposes of creditors' rights even though the marriage is ultimately held invalid.

---

35. Study at pp. 70-71.

36. See Study at pp. 77-85.

Exemptions

A complex aspect of the liability of marital property for debts is the extent to which exemptions from enforcement of a judgment are recognized for community property and separate property of the nondebtor spouse. This matter is dealt with separately in the Law Revision Commission's recommendation relating to enforcement of judgments.<sup>37</sup>

---

37. 15 Cal. L. Revision Comm'n Reports \_\_\_\_, \_\_\_\_-\_\_\_\_ (1980).

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

An act to amend Sections 5131, 5132, and 5135 of, to add Section 5101 to, to add headings to Chapter 1 (commencing with Section 5100), Chapter 2 (commencing with Section 5103), Article 1 (commencing with Section 5103) and Article 2 (commencing with Section 5107) of Chapter 2, Chapter 4 (commencing with Section 5125), Chapter 5 (commencing with Section 5131), Chapter 6 (commencing with Section 5133), and Chapter 7 (commencing with Section 5138) of, and to add Chapter 3 (commencing with Section 5120.005) to, Title 8 of Part 5 of Division 4 of, and to repeal Sections 5116, 5120, 5121, 5122, and 5123 of, the Civil Code, relating to husband and wife.

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

406/456

Civil Code §§ 5100-5102 (chapter heading)

SECTION 1. A chapter heading is added immediately preceding Section 5100 of the Civil Code, to read:

CHAPTER 1. GENERAL PROVISIONS

15348

Civil Code § 5101 (added). Liability of married person for injury or damage caused by other spouse

SEC. 2. Section 5101 is added to the Civil Code, to read:

5101. A married person is not liable for any injury or damage caused by the other spouse except in cases where he or she would be liable therefor if the marriage did not exist.

Comment. Section 5101 continues without substantive change former Section 5122(a).

Civil Code §§ 5103-5119 (chapter heading)

SEC. 3. A chapter heading is added immediately preceding Section 5103 of the Civil Code, to read:

CHAPTER 2. PROPERTY RIGHTS

Civil Code §§ 5103-5106 (article heading)

SEC. 4. An article heading is added immediately preceding Section 5103 of the Civil Code, to read:

Article 1. Interests in Property

Civil Code §§ 5107-5119 (article heading)

SEC. 5. An article heading is added immediately preceding Section 5107 of the Civil Code, to read:

Article 2. Characterization of Property

Civil Code § 5116 (repealed)

SEC. 6. Section 5116 of the Civil Code is repealed.

~~5116. 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.~~

Comment. The substance of former Section 5116 is continued in Section 5120.010(a).

Civil Code § 5120 (repealed)

SEC. 7. Section 5120 of the Civil Code is repealed.

~~5120. 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.~~

Comment. The portion of former Section 5120 making separate property of a spouse not liable for the debts of the other spouse contracted before marriage is continued in Section 5120.020(b). The portion making earnings after marriage not liable is continued in Section 5120.010(b).

09591

Civil Code §§ 5120.005-5120.060 (added)

SEC. 8. Chapter 3 (commencing with Section 5120.005) is added to Title 8 of Part 5 of Division 4 of the Civil Code, to read:

CHAPTER 3. LIABILITY OF MARITAL PROPERTY

Article 1. General Rules of Liability

§ 5120.005. Debts

5120.005. (a) Unless the provision or context otherwise requires, as used in this chapter, "debt" means an obligation incurred by a spouse whether based on contract, tort, or otherwise.

(b) For the purposes of subdivision (a), a debt is "incurred" at the following time:

- (1) In the case of a contract, at the time the contract is made.
- (2) In the case of a tort, at the time the tort occurs.
- (3) In other cases, at the time the obligation arises.

Comment. Subdivision (a) of Section 5120.005 is intended to facilitate drafting. Subdivision (b) makes more precise the meaning of the time a debt is incurred.

§ 5120.010. Liability of community property

5120.010. (a) Except as otherwise expressly provided by statute, the property of the community is liable for a debt of either spouse incurred before or during marriage, regardless which spouse has the management and control of the property.

(b) The earnings of a spouse during marriage are not liable for a debt of the other spouse incurred before marriage. The earnings remain not liable if they are held uncommingled in a deposit account by or in the name of the spouse, to the extent they can be traced in the manner prescribed by statute for tracing funds exempt from enforcement of a money judgment. As used in this subdivision, "deposit account" has the meaning prescribed in Section \_\_\_\_\_ of the Code of Civil Procedure, and "earnings" means compensation for personal services performed, whether as an employee or otherwise.

Comment. Subdivision (a) of Section 5120.010 continues the substance of former Section 5116 (contracts during marriage) and the implication of former Section 5122(b) (torts), and makes clear that the community property (other than earnings of the nondebtor spouse) is liable for the prenuptial contracts of the spouses. Subdivision (a) applies regardless whether the debt was incurred prior to, on, or after January 1, 1975. For rules governing liability after division of the community property, see Section 5120.050.

The introductory and concluding clauses of subdivision (a) are intended to negate the implication of language found in 1974 Cal. Stats. ch. 1206, § 1, p. 2609, that community property is liable only for the debts of the spouse having management and control. The introductory and concluding clauses make clear that the community property is liable for all debts of either spouse absent an express statutory exception. Thus community property under the management and control of one spouse pursuant to Section 5125(d) (spouse operating or managing business) or Financial Code Section 851 (one spouse bank account) remains liable for the debts of the other spouse. For an express statutory exception from liability of community property, see subdivision (b).

The first sentence of subdivision (b) continues the substance of a portion of former Section 5120 and extends it to include all debts, not just those based on contract. The second sentence codifies the rule that, for purposes of liability, earnings may not be traced through changes in form. See, e.g., Pfunder v. Goodwin, 83 Cal. App. 551, 257 P. 119 (1927). Earnings may be traced only into deposit accounts in the same manner as funds exempt from enforcement of judgments. See Code Civ. Proc. § 703.030 (tracing).

Note. The Commission plans to consider adoption of a reimbursement right between spouses before introduction of legislation.



5120.020. Liability of separate property

5120.020. (a) The separate property of a spouse is liable for a debt of the spouse incurred before or during marriage.

(b) Except as otherwise expressly provided by statute, the separate property of a spouse is not liable for a debt of the other spouse incurred before or during marriage.

Comment. Subdivision (a) of Section 5120.020 continues the substance of a portion of former Section 5121 (contracts) and the implication of former Section 5122(b) (torts); it supersedes former Section 5123 (liability of separate property for debt secured by community property).

Subdivision (b) continues the substance of former Section 5120 (prenuptial contracts), a portion of former Section 5121 (contracts after marriage), and the implication of former Section 5122(b) (torts). For an exception to the rule of subdivision (b), see Section 5120.030 (liability for necessities).

08352

§ 5120.030. Liability for necessities

5120.030. (a) Subject to subdivision (b), the separate property of a spouse is liable for a debt of the other spouse incurred during marriage if:

(1) The debt was incurred for necessities of life of the other spouse while the spouses were living together.

(2) The debt was incurred for common necessities of life of the other spouse while the spouses were living separate and apart, unless the spouses were living separate and apart by a written agreement that waived the obligation of support.

(b) The separate property of a spouse is not subject to enforcement of a money judgment for a debt of the other spouse pursuant to subdivision (a) unless the spouse is made a judgment debtor under the judgment for the purpose of this section.

Comment. Subdivision (a)(1) of Section 5120.030 continues the substance of a portion of former Section 5121, but eliminates the implication that the necessities must have been contracted for by either spouse. See, e.g., Credit Bureau of San Diego v. Johnson, 61 Cal. App.2d Supp. 834, 142 P.2d 963 (1943) (medical care not contracted by

either spouse). Subdivision (a)(1) is consistent with Section 5132 (support obligation while spouses live together) but does not require exhaustion of community and quasi-community property before separate property of a nondebtor spouse can be reached.

Subdivision (a)(2) is an exception to the rule of Section 5131, which abrogates the obligation of support between spouses living separate and apart by agreement, unless support is stipulated in the agreement. Subdivision (a)(2) also abolishes the "station in life" test of cases such as *Wisnom v. McCarthy*, 48 Cal. App. 697, 192 P. 337 (1920) (maid necessary because of economic and social position of spouses), in determining what is a necessary of life; the separate property of the nondebtor spouse is liable only for debts for the "common" necessities of life of the other spouse while living separate and apart. Cf. Code Civ. Proc. § 723.051 (common necessities exception to wage exemption; *Ratzlaff v. Portillo*, 14 Cal. App.3d 1013, 92 Cal. Rptr. 722 (1971) ("common" necessary is necessary required to sustain life).

Subdivision (b) codifies the rule that the separate property of a spouse may not be subjected to process by necessities creditors of the other spouse unless the spouse has been made a party for the purpose of making the separate property liable. See, e.g., *Evans v. Noonan*, 20 Cal. App. 288, 128 P. 794 (1912); *Santa Monica Bay Dist. v. Terranova*, 15 Cal. App.3d 854, 93 Cal. Rptr. 538 (1971).

Note. The Commission plans to consider adoption of a reimbursement right between spouses before introduction of legislation.

968/667

§ 5120.040. Interspousal transfer

5120.040. A transfer of community or separate property between the spouses is subject to the Uniform Fraudulent Conveyance Act, Title 2 (commencing with Section 3439) of Part 2 of Division 4 of the Civil Code.

Comment. Section 5120.040 codifies existing law. Cf. *Bailey v. Leeper*, 142 Cal. App.2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); *Frankel v. Boyd*, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); *Wikes v. Smith*, 465 F.2d 1142 (1972) (bankruptcy).

968/697

§ 5120.050. Liability of property after division

5120.050. (a) Notwithstanding any other provision of this article, after division of community and quasi-community property pursuant to Section 4800:

(1) The property owned by a spouse at the time of the division and the property received by the spouse in the division is liable for a debt of the spouse incurred before or during marriage, whether or not the debt was assigned for payment by the other spouse in the division.

(2) The property owned by a spouse at the time of the division and the property received by the spouse in the division is liable for the debts of the other spouse incurred before or during marriage, whether or not assigned for payment by the spouse in the division of the property, unless the spouse shows that the property was not liable for the debt at the time of the division. The property owned by a spouse and the property received by the spouse in the division is not subject to enforcement of a money judgment for a debt of the other spouse pursuant to this paragraph if the judgment is entered after the division, unless the spouse is a judgment debtor under the judgment for the purpose of this paragraph. Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property.

(b) If the property owned by a spouse or the property received by the spouse in a division of community and quasi-community property pursuant to Section 4800 is applied to the satisfaction of a money judgment for a debt of the spouse that is assigned for payment by the other spouse in the division, the spouse has a right of reimbursement from the other spouse for the market value of the property, with interest at the legal rate, and may recover reasonable attorney's fees incurred in enforcing the right of reimbursement.

Comment. Section 5120.050 prescribes rules of liability of community and quasi-community property and separate or formerly separate property following a division of the property pursuant to a court judgment of separation, dissolution, or later division.

Subdivision (a)(1) states the rule that the rights of a creditor against the property of a debtor are not affected by assignment of the debt to the other spouse for payment pursuant to a property division. A creditor who is not paid may seek to satisfy the debt out of property of the debtor. Former law on this point was not clear. The debtor in such a case will have a right of reimbursement against the former spouse pursuant to subdivision (b).

Subdivision (a)(2) preserves the case law rule that a creditor may seek enforcement of a money judgment against the property of a nondebtor spouse after dissolution of the marriage. See, e.g., *Bank of America N.T. & S.A. v. Mantz*, 4 Cal.2d 322, 49 P.2d 279 (1935). Subdivision (a)(2) makes clear that only property of a nondebtor spouse that was liable before the property division continues to be liable afterwards,

but places the burden of proof on the nondebtor spouse. Tracing of property through changes in form is not permitted, although tracing of funds in deposit accounts may be accomplished through regular community and separate property tracing principles. In the case of a judgment entered after the division of property, the nondebtor spouse must be made a party for due process reasons. Cf. Section 5120.030(b) and Comment thereto (liability for necessities). If the property division calls for the one spouse to pay the debt and the creditor satisfies the judgment out of property of the other spouse, the other spouse will have a right of reimbursement pursuant to subdivision (b). Subdivision (a)(2) does not affect enforceability of liens on the property. See, e.g., *Kinney v. Valentyne*, 15 Cal.3d 475, 541 P.2d 537, 124 Cal. Rptr. 897 (1975).

Subdivision (b) states the rule as to reimbursement where a debt is satisfied out of the property of a spouse other than the spouse to whom the debt was assigned pursuant to a property division. Former law on this point was not clear.

968/683

5120.060. Liability of property after judgment of nullity

5120.060. After a judgment of nullity of a marriage, whether void or voidable, the property that would have been community property and the property that would have been the separate property of the parties had the marriage been valid is liable for the debts of the parties to the same extent as if the marriage were valid and the judgment of nullity were a judgment of dissolution, regardless whether the parties are declared to have the status of putative spouses and regardless whether the property is quasi-marital property.

Comment. Section 5120.060 is consistent with Section 4451 (judgment of nullity conclusive only as to parties to the proceeding). Former law was not clear.

27634

Article 2. Reimbursement

[reserved]

Article 3. Transition Provisions

[reserved]

Civil Code § 5121 (repealed)

SEC. 9. Section 5121 of the Civil Code is repealed.

~~5121. 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.~~

Comment. The substance of former Section 5121 is continued in Sections 5120.020 and 5120.030.

Civil Code § 5122 (repealed)

SEC. 10. Section 5122 of the Civil Code is repealed.

~~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 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.~~

Comment. Subdivision (a) of former Section 5122 is continued without substantive change in Section 5101.

Subdivision (b) is superseded by Sections 5120.010 (providing no order of priority for community or separate property) and 5120.020 (providing no order of priority for community or separate property).

Note. The Commission plans to consider adoption of a reimbursement right between spouses before introduction of legislation.

Civil Code § 5123 (repealed)

SEC. 11. Section 5123 of the Civil Code is repealed.

~~5123. (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.~~

Comment. Section 5123 is not continued and is superseded by Section 5120.020. It is a form of antideficiency judgment that protects some but not all assets of a spouse for obligations secured by any community property, real or personal, residential or otherwise. It is thus inconsistent with general rules governing deficiency judgments.

10166

Civil Code §§ 5125-5128 (chapter heading)

SEC. 12. A chapter heading is added immediately preceding Section 5125 of the Civil Code, to read:

CHAPTER 4. MANAGEMENT AND CONTROL

10167

Civil Code §§ 5129-5132 (chapter heading)

SEC. 13. A chapter heading is added immediately preceding Section 5129 of the Civil Code, to read:

CHAPTER 5. SUPPORT

Civil Code § 5131 (amended)

SEC. 14. Section 5131 of the Civil Code is amended to read:

5131. A Except as provided in Section 5120.030, 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.

Comment. Section 5131 is amended to recognize Section 5120.030(a)(2), which continues the liability of property of spouses for necessities after separation unless expressly waived in the separation agreement.

Civil Code § 5132 (amended)

SEC. 15. Section 5132 of the Civil Code is amended to read:

5132. (a) A spouse must support the other spouse while they are living together out of the separate property of the spouse when in the following cases:

(1) When there is no community property or quasi-community property.

(2) When the debt is one for which the separate property of the spouse is liable under Section 5120.030.

(b) 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.

Comment. Section 5132 is amended to incorporate Section 5120.030 (liability for necessities). Section 5132 is consistent with Section 5120.030(a)(1), but Section 5120.030(a)(1) does not require exhaustion of community and quasi-community property before separate property of a nondebtor spouse can be reached by a third-party creditor.

Civil Code §§ 5133-5137 (chapter heading)

SEC. 16. A chapter heading is added immediately preceding Section 5133 of the Civil Code, to read:

CHAPTER 6. MARRIAGE SETTLEMENT CONTRACTS

§ 5135

10170

Civil Code § 5135 (amended)

SEC. 17. Section 5135 of the Civil Code is amended to read:

5135. 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 and in the office of the recorder of the county in which each spouse resides if personal property is granted or affected by the contract .

Comment. Section 5135 is amended to require recordation of a marriage settlement contract in the county where the spouses reside if the contract affects personal property. This requirement will result in constructive notice to third parties such as creditors. For a comparable provision, see Section 5114 (recordation of list of separate personal property).

10171

Civil Code § 5138 (chapter heading)

SEC. 18. A chapter heading is added immediately preceding Section 5138 of the Civil Code, to read:

CHAPTER 7. MISCELLANEOUS PROVISIONS