D-312 10/28/80

Memorandum 80-93

Subject: Study D-312 - Liability of Marital Property for Debts

Attached to this memorandum is a copy of the recommendation relating to liability of marital property for debts, revised in accordance with the Commission's decisions at the October 1980 meeting.

Procedure on recommendation. The staff notes that the Commission deferred decision on a number of key points in connection with this recommendation:

--liability of former community property awarded to nondebtor spouse in dissolution of marriage;

--whether there should be different orders of satisfaction for "separate" and "community" contract obligations;

--whether there should be an order of satisfaction for prenuptial debts of all kinds;

--liability of separate property of nondebtor spouse for necessaries obligations of debtor spouse;

--whether the Uniform Fraudulent Conveyance Act requires amendment as applied to interspousal transfers.

The reason for deferring final decision on these matters is to permit Professor Bruch to complete her community property study, since her recommendations concerning reimbursement rights and division of property at dissolution may affect the Commission's decisions in these related areas.

Given the number and the significance of the decisions that have been deferred, the staff believes it would be premature to submit a recommendation relating to liability of marital property for debts at this time. However, our general enforcement of judgments recommendation is going in now, and liability of marital property is an important aspect of it. The staff recommends that the Commission submit to the Legislature for now only those aspects of the liability of marital property recommendation that are essential for the proper operation of the enforcement of judgments statute. The only matter that is essential is the addition of subdivision (b) to Civil Code Section 5121 (see

The staff believes that in order to proceed with the real property law study we must make the initial decision whether to adopt a marketable title act. The staff proposes to commence work on the study by preparing for Commission consideration a marketable title act along with a discussion of the policies involved. At that point the Commission should be in a position to make some decisions in this area.

After the marketable title act, the area most commentators felt was in need of attention was a tract indexing system for title records. See Exhibits 3, 4, 9. One commentator felt that the grantor-grantee index serves a useful function in some areas not related to transfer of title, such as judgment liens. See Exhibit 5 (Robert McNamee). Another felt that a broad-based land data records system is essential. See Exhibit 7 (Luther Avery). The staff believes this is primarily a question of politics (will the title insurance companies feel a major source of revenue is being taken away?) and money (how much will it cost to establish effective tract indexes, particularly a state-wide tract index?). These are matters the staff does not feel competent to answer at present. We plan to make inquiries of knowledgeable people before we come up with any suggestions for the Commission.

There was considerable interest in clarifying and simplifying the law governing covenants and future interests. See Exhibits 2, 3, 4. Some of the problems with estates and interests in land will probably arise and be resolved in connection with the marketable title act. To the extent the problems are not resolved in the marketable title act, the staff proposes to work clarifications of the law into the Commission's agenda as time permits on a priority basis. See, for example, Memorandum 80-89 proposing that during the coming year the Commission work on the Uniform Conservation and Historic Preservation Easements Act, which would replace these limited-purpose easements, restrictive covenants, and equitable servitudes with a single property interest serving the same functions.

Two commentators suggested that the Commission give serious consideration to adoption of a title registration (Torrens) system of title assurance. See Exhibits 2 (Prof. Rabin) and 4 (Prof. Dukeminier). The staff has doubts that a title registration scheme would stand a reasonable chance of enactment in view of the opposition of the title insurance industry and in view of California's past disastrous experience

with Torrens title. However, our commentators point out that the Torrens system could be substantially improved by statute. The staff believes that the Commission should at least investigate the possibility of adopting a title registration system and make an initial decision whether it would be feasible or desirable. At a meeting in the near future the staff will schedule a presentation of the title registration system, with viewpoints pro and con from interested people, so that the Commission can decide whether to spend its resources pursuing this matter further.

Commentators also suggested a number of other major areas they felt the Commission should look into:

(1) One commentator pointed out a number of problems with wills. See Exhibit 4 (Prof. Dukeminier). The Commission has been authorized to study the Probate Code and we will take up the problems in connection with this study.

(2) Another commentator suggests the study of real property security law. See Exhibit 6 (Prof. Maxwell). This has been suggested to the Commission before, and in fact the Commission's authority to study creditors' remedies includes authority to study "procedures under private power of sale in a trust deed or mortgage." The problems in this area are significant and this would require substantial Commission and staff resources which are not available at this time. The staff recommends that we continue to defer this matter but that we take it up sometime later, perhaps after the enforcement of judgments law is enacted.

(3) A third commentator suggested that we investigate new economic and legal rights in real estate and land use restrictions. See Exhibit 7 (Luther Avery). The staff suggests that when we finish our study title and conveyancing matters we might turn our attention to these other areas if specific problems in them are apparent or have been pointed out to us.

(4) A final commentator suggests that we study inverse condemnation law. See Exhibit 8 (Allen Kent). The Commission is already authorized to study inverse condemnation and has done some work in the area. However, the Commission has felt that it is not possible to draft acceptable legislation in this area, except perhaps with respect to

procedural aspects of inverse condemnation. We have placed this study on the back burner.

There are numerous other aspects of Professor Blawie's study that are not mentioned in this memorandum. The staff feels it is premature to schedule Commission consideration of these matters until we are further along in the study. We will have our hands full for the time being with a marketable title act, investigation of tract indexing, convenant and future interest reform, and title registration. Some of the smaller problems we may be able to work into the agenda on a piecemeal basis as staff and Commission time permits.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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OUR FILE NUMBER
8207-9-4

September 16, 1980

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMoully:

The Uniform Probate Code Subcommittee of the Estate Planning, Trust and Probate Law Section of the California State Bar divided itself into two sub-subcommittees for the purpose of responding to the Law Revision Commission's request for comments concerning the two sections of the Uniform Probate Code presently under consideration by the Commission. These sections deal with non-probate transfers and the durable power of attorney. The purpose of this letter is to pass on to the Commission the comments concerning the non-probate transfer section. In a separate letter you will receive comments concerning the durable power of attorney section.

In general, we believe that the non-probate transfer section is well drafted and its adoption in California would be an improvement in California laws. We do have the following specific recommendations:

(1) We do not favor inclusion of Section 6-107 to the extent that such section gives a creditor the ability

share for a surviving spouse. The drafters of the Uniform Probate Code did not propose that such elective share concept be adopted in community property estates. As a result, the reference in Section 6-106 to Section 2-201 thru 2-207 should be eliminated.

As a final and general comment we note that there is a need to coordinate these new sections dealing with non-probate transfers with other statutory provisions which now exist which pertain to bank and savings and loan accounts. We have not made any attempt to isolate these other statutory provisions for the reason that we have great confidence that the California Law Review Commission will do so in due course.

I would be pleased to amplify on or clarify any of the matters set forth in this letter.

With best regards,

Ronald E. Gother

REG/vef
cc:Colleen M. Claire
Joyce Parsons
Mary Flett
All Members of Uniform
Probate Code Subcommittee

Exhibit 2

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REPLY TO: MERCED

August 8, 1980

California Law Revision Commission
400 Middlefield Rd., Room D-2
Palo Alto, California 94306

RE: Your letter of June 20, 1980
Requesting Comments Concerning Enactment
in California of Article VI of the
Uniform Probate Code

Dear Sir:

The adoption of article VI of the Uniform Probate Code in California would be a significant advantage to the very liquid if not small estate, allowing for the disposition of cash very simply and with little or no interference from the county or state.

However, I have a few concerns which must be voiced. Since Section 6-104 conferrs immediate ownership of these accounts without apparent amount limitations, how will the inheritance taxes be accounted for on large amounts released? Since no probate court will grant a petition for distribution without the inheritance taxes having been paid in full, what provisions will be made for collecting the inheritance tax from such a beneficiary? Will remaining property be "frozen" or have a lien imposed to the possible detriment of other beneficiaries to satisfy the taxes owed by an insolvent (having squandered his fortune) or one who had abscondent with his or her account?

I suggest appropriate changes be made to the Probate and Revenue and Taxation codes to allow distribution on an estate when the taxable estate results in inheritance taxes due from a party receiving assets from such survivorship accounts who has no interest in the probate estate. Payment of inheritance taxes on the probate assets, or on other assets received from decedent by parties to the probate, would still be required

contract.

Very truly yours,

ALLEN, IVEY, CORNELL, MASON,
& CASTELLUCCI

BY KENNETH M. ROBBINS

KMR:kt

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IN REPLY PLEASE REFER TO:

July 16, 1980

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Uniform Probate Code

Dear Mr. DeMoully:

I have received a copy of the tentative recommendation of the California Law Revision Commission regarding enactment of Article VI of the Uniform Probate Code.

I believe that the number of types of accounts contemplated by the legislation is insufficient. For example, express provision should be made for holding accounts as community property and as tenants in common.

Express recognition should also be given to the problem of elderly parents who, typically, will name one child as a joint tenant with regard to a bank account so as to allow that child to manage funds should the parents become incapacitated. Under such arrangements, the child usually promises the parents that upon the death of the surviving parent, he will divide the account proceeds equally with the other children. This form of oral trust has been widely accepted, on an informal basis, by the State Controller's office for California inheritance tax purposes.

Very truly yours,

Paul Gordon Hoffman

PGH:mz

California Superior Court

San Francisco

JOHN B. O'DONNELL
COURT COMMISSIONER
CITY HALL

August 14, 1980

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Rd, Room D-2
Palo Alto, California 94306

Re: Article VI of Proposed Uniforn Probate Code

Dear Mr. DeMoully:

Our Probate Judge John A. Ertola has referred to me a copy of your memo of June 20 addressed to persons interested in probate law.

On a quick review I am struck by (1) the drastic impact that the proposal would have on joint tenancy accounts which are frequently used as formal or informal estate planning devises to avoid probate administration, and (2) the lack of specific reference to community property.

If community property is included in "Multiple-Party Accounts," then proposed Section 6-107 would seem to be in conflict with portions of the present Probate Code (See e.g., Secs 202, 650) whereby community property may not be subject to administration.

To make multiple party accounts, especially joint tenancies, subject to rights of creditors, etc. under 6-107, and to questions as to the degree or amount of ownership under 6-103, are of course matters of policy, but will certainly have far-reaching effects on present assumptions and rules, and should be well considered and publicized before adoption.

Sincerely yours,

John B. O'Donnell

JOHN B. O'DONNELL
Probate Commissioner

Memo 80-86 Exhibit 5

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July 24, 1980

OUR FILE NUMBER

John H. Demoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

PROBATE LAW

Dear Mr. Demoully:

I would support the enactment of the substance of Article VI (Non-Probate Transfers) of the Uniform Probate Code (UPC) with the necessary technical revisions. I do not have the time to go through the law seeking all inconsistent provisions of existing California law. I would be happy to review such an analysis if one is prepared.

Conceptually, I have no strong opinion favoring "Totten Trusts" or a P.O.D. account and I question the social wisdom of encouraging banks or other financial institutions to institute such plans in California. As a "legal matter" I have no problem with these two new types of accounts, but I imagine there will need to be extensive change in the Financial Code and in the regulations of financial institutions. I question the value of such new laws if the banking industry is not strongly advocating such change.

An interesting aspect of the multiple-party accounts is the effect upon unmarried cohabitors. I wonder whether the multiple-party accounts will further confuse an already confused area. Also, I believe the multiple-party account will need review by family law practitioners to see if it creates added problems at the time of marital dissolution.

I believe Part 2 "Provision Relating to Effect of Death" is a welcome addition to the law. I assume there will be need for revision of the Insurance Code and regulations and possibly other general statutes. The operative language ". . .a contract, gift, conveyance or trust is deemed to be nontestamentary,. . ." seems wrong. Usually it is intended that the relevant provisions operate at death. Therefore, the provisions are "testamentary." I believe the language "deemed to be nontestamentary. . ." should be ". . .deemed to be legally operative. . .".

Yours sincerely,

Luther J. Avery

LJA:ble

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KENNETH C. TWISSELMAN II

PLEASE REPLY TO
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BAKERSFIELD, CA. 93303

OUR FILE NO.

July 30, 1980

California Law Revision Commission
4000 Middlefield Rd., Room D-2
Palo Alto, California 94306

Re: Article VI of the Uniform Probate Code - Recommendations

Dear Sirs:

My comments are in response to your letter of June 20, 1980, concerning the enactment of Article VI of the Uniform Probate Code in California.

The proposed sections on multiple-party accounts appear to be workable and useful.

The proposed section 6-201, provisions for payment or transfer at death, would seem to be inviting substantial litigation as to the formalities required for an instrument with testamentary effect. Conservative estate planning would require a careful review of all such "non-testamentary" documents, and it is likely that many such documents would be inconsistent with the recommended estate plan. Amendments to such "non-testamentary" documents may not be possible, and the cost of carrying out such amendments where possible might be substantial. In short, in the interest of economy and flexibility, it would seem preferable to retain the will as the principal testamentary instrument. The formalities required for a will tend to promote informed estate planning and tend to discourage ignorant error, undue influence, and fraud.

Very truly yours,

Kenneth C. Twisselman II

KCT:mc

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

June 11, 1980

Mr. John H. DeMoully
Executive Secretary
Calif. Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. DeMoully:

I thoroughly approve of the adoption of Article VI of the Uniform Probate Code. There is simply no convincing reason why payable-on-death designations on a bank account are not permitted while Totten Trusts and joint bank accounts are. The possibility of fraud is exactly the same in all three cases, as the bank records are equally reliable, or not reliable, in all three cases. It makes mischief, with unwanted consequences, for bankers to have to force people artificially into either Totten Trusts or joint bank accounts when what they really want is a p-o-d account. Why can't the depositor have what he wants?

As for payable-on-death designations on other written contracts, there is no convincing reason why these should not be valid. Death designees are valid on life insurance contracts, on pension plans, and on government bonds. The appropriate analysis is that these are third party beneficiary contracts, and the fact that economic benefits pass at death rather than during the life of a contracting party does not bring the contracts within the statute of wills, just as the fact that economic benefits shift at the death of a trust beneficiary does not bring the trust within the statute of wills. The real issues are whether the acts of the contracting parties indicate a firm intent to be bound and whether the evidence is reliable. The UPC believes binding written contracts are reliable, and so do I.

Sincerely,

Jesse Dukeminier

Jesse Dukeminier
Professor of Law

JD:bd

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IN REPLY REFER TO:

July 17, 1980

John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: June 20, 1980 memorandum regarding
Article VI of the Uniform Probate Code

Dear Mr. DeMoully:

I am not current on what the Commission is doing to revise California probate law. I did receive the June 20, 1980 memo referred to above and couldn't help but write to comment on California probate law.

I practiced in Wisconsin for six years and lived through that state's revision of its probate and inheritance tax laws. Compared with Wisconsin's probate and inheritance tax laws, California's laws, as former Ninth Circuit Chief Judge Chambers would say, "are downright crummy."

I hope that the Commission is going to do more than tentatively recommend adoption of Article VI. Article VI is a pimple on a gnat.

Best regards,

ELMER DEAN MARTIN III

EDM/aw

Memo 80-86 Exhibit 9

NATIONAL RETIRED TEACHERS ASSOCIATION

AMERICAN ASSOCIATION OF RETIRED PERSONS

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Frank Freeland, Member & Chairman, Taxation Subcommittee
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Aug. 7, 1980

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Rd. Room D-2
Palo Alto, Ca. 94306

Dear Mr. DeMoully:

This is in response to your June 20 & June 26, 1980 transmittals and to your inviting of comments pertaining to your Commission's publications titled:

ANALYSIS OF ARTICLE VI OF UNIFORM PROBATE CODE
Copy of ARTICLE VI NON-PROBATE TRANSFERS
TENTATIVE RECOMMENDATION relating to LIABILITY OF MARITAL PROPERTY FOR DEBTS

Not being an attorney, and commenting from a layman's point of view, it seems that the contents of those papers are very complicated and involved. However, I feel that we should appreciate your efforts and attentions in composing the details which we should be aware of, and we are pleased to see that your study is in progress. I did note a number of comments by the Joint Editorial Board in the copy of ARTICLE VI, and am also pleased in knowing that its input is being considered in the work which your Commission is doing.

Sincerely,

Frank Freeland

Frank Freeland

Staff Draft

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

LIABILITY OF MARITAL PROPERTY FOR DEBTS

November 1980

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Staff Draft

Letter of Transmittal

November 14, 1980

To: The Honorable Edmund G. Brown Jr.
Governor of California and
The Legislature of California

Pursuant to the legislative directives of Resolution Chapter 45 of the Statutes of 1974 to study creditors' remedies and Resolution Chapter 65 of the Statutes of 1978 to study community property, the Law Revision Commission submits herewith its recommendations on one aspect of these studies--liability of marital property for debts. The Commission generally recommends the clarification and codification of existing law. The Commission has deferred recommendations on a number of related matters, such as liability of property for debts after dissolution of marriage and reimbursement rights between spouses, pending completion of the major portion of its study on management and control and division of community property.

Respectfully submitted,

Beatrice P. Lawson
Chairperson

Staff Draft

#D-300

11/14/80

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.[1] Each system protects the marital property from creditors to varying degrees by creating exceptions to liability of the property for debts.[2]

The system least favorable to creditors is that developed in Washington and Arizona, which requires a classification of debts as community or separate.[3] 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

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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. Marital property consists of the community property and the separate property of either of the spouses, but 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.

community or separate, community property being liable for community debts and separate property of the debtor spouse being liable for that 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.[4]

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.[5] 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 the statutory scheme of exemptions which will preserve property necessary for basic needs of the spouses.[6] 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.

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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."

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 liable for the debts of the spouse.[7] 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 three 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.[8] A community property bank account in the name of a spouse is free from the control of the other spouse.[9] If one spouse has a conservator, the other spouse having legal capacity has exclusive management and control of the community property.[10] Whether these types of community property are liable for a debt of the spouse not managing and controlling the property is not clear.[11]

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.

---

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. Prob. Code § 3051.

11. See Study at pp. 48-56.

Order of Satisfaction Against 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.

Existing California law prescribes an order of satisfaction 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.[12] 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.[13]

12. 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.

13. 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.

An order of satisfaction creates a number of practical problems. It requires a procedural mechanism for determining whether the debt is community or separate in character, whether the property levied upon is community or separate, and whether the other types of property have been exhausted in the order of satisfaction. The California statutes do not attempt to resolve these problems and there is no useful experience of operation under them.[14] Other jurisdictions have enacted limited priority schemes, but these schemes offer no useful guidance; apparently, elaborate court proceedings are required to make them operable.[15]

The Commission believes that the order of satisfaction of tort debts should be preserved and implemented by a workable procedure. The Commission has reserved judgment whether the order of satisfaction for necessaries debts should be preserved and whether orders of satisfaction should be extended to contract debts generally.

The procedural scheme for the order of satisfaction of tort debts recommended by the Commission is modeled upon the scheme for claiming exemptions.[16] [Further discussion to be supplied.]

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.[17] This rule implies two corollaries:

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

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14. 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).

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

16. See Code Civ. Proc. § 690.50

17. Civil Code § 5120.

(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 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.[18] 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 the Commission recommends be given to funds exempt from enforcement of judgments.[19]

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 necessaries of life contracted by either spouse while living together.[20] This exception is based on the obligation of the

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18. See Study at pp. 57-60.

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

20. Civil Code § 5121.

spouses to support one another.[21] The separate property of the nondebtor spouse is liable for necessaries debts incurred only while the spouses are living together. After separation by agreement there is no liability unless support is stipulated in the agreement.[22] The extent to which these provisions should be preserved or modified is a matter to which the Commission is giving further study.

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.[23] This rule is sound 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.[24]

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

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21. Civil Code § 5132.

22. Civil Code § 5131.

23. 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).

24. See, e.g., 7 B. Witkin, Summary of California Law Community Property § 73 (8th ed. 1974).

creditors to reach the property.[25] Whether a transfer is fraudulent as to creditors is governed by the Uniform Fraudulent Conveyance Act.[26] 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.[27]

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.[28] This provision is peculiar in

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25. 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).

26. Civil Code §§ 3439-3440.

27. The Commission is currently studying the general rules governing transmutation of community and separate property between the spouses.

28. 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.

protecting separate property of a spouse in the event of a deficiency but not other community property. It is thus inconsistent not only with general rules governing deficiency judgments,[29] but also with general rules governing liability of property of a married person obligated on a debt.[30] Section 5123 was enacted at a time when the separate property of a married woman was not ordinarily liable for a debt; this is no longer the law. The historical reasons that led to its enactment are now obsolete,[31] and the section 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.[32] 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.[33] Thus, a creditor may reach former community 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.[34] The Commission has reserved judgment whether this scheme should be preserved pending completion of its general study of division of community property upon dissolution.

However, the law should be clear that a judgment is not enforceable against separate property of a person on the ground that the property

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

30. See, e.g., Civil Code § 5121 (liability of separate property of spouse.

31. See Study at pp. 60-62.

32. Civil Code § 4800.

33. 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).

34. Study at pp. 70-71.

was formerly community property unless the nondebtor spouse is made a party. This preserves the due process rights of the nondebtor spouse after division by providing the nondebtor spouse the opportunity to contest the validity of the debt, raise defenses, and take other necessary actions.

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.[35] 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.

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.[36]

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35. See Study at pp. 77-85.

36. 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 5121 and 5122 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 5120.010) to, Title 8 of Part 5 of Division 4 of, and to repeal Sections 5116, 5120, and 5123 of, the Civil Code, and to amend Section 27251 of the Government 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).

406/457

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

406/458

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

406/459

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

406/460 N/Z

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.~~

406/462 N/Z

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 5120.130(b). The portion making earnings after marriage not liable is continued in Section 5120.120(b).

09591

Civil Code §§ 5120.110-5120.150 (added)

SEC. 8. Chapter 3 (commencing with Section 5120.110) 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

§ 5120.110. Debts

5120.110. (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 5120.110 is intended to facilitate drafting. Subdivision (b) makes more precise the meaning of the time a debt is incurred.

31449

§ 5120.120. Liability of community property

5120.120. (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 9105 of the Commercial Code, and "earnings" means compensation for personal services performed, whether as an employee or otherwise.

Comment. Subdivision (a) of Section 5120.120 continues the substance of former Section 5116 (contracts during marriage) and the implication of Section 5122 (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.

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), Financial Code Section 851 (one spouse bank account), or Probate Code Section 3051 (conservatorship) 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).

9949

§ 5120.130. Liability of separate property

5120.130. (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 5120.130 continues the substance of a portion of Section 5121 (contracts) and the implication of Section 5122 (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 Section 5121 (contracts after marriage), and the implication of Section 5122 (torts). For an exception to the rule of subdivision (b), see Section 5121 (liability for necessaries).

968/667

§ 5120.140. Interspousal transfer

5120.140. 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 5120.140 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).

968/683

§ 5120.150. Liability of property after judgment of nullity

5120.150. 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 5120.150 is consistent with Section 4451 (judgment of nullity conclusive only as to parties to the proceeding). Former law was not clear.

Civil Code § 5121 (amended)

SEC. 9. Section 5121 of the Civil Code is amended to read:

5121. (a) 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.

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

Comment. The substance of the portion of subdivision (a) of Section 5121 that related to nonnecessaries debts is continued in Section 5120.030. Subdivision (b) codifies the rule that the separate property of a spouse may not be subjected to process by necessaries or other 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). This provision applies to separate property that is liable on the ground that it was formerly community property liable before division pursuant to Section 4800, as well as to separate property liable pursuant to subdivision (a).

406/465

Article 2. Order of Satisfaction

Civil Code § 5122 (amended)

SEC. 10. Section 5122 of the Civil Code is amended to read:

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. Former subdivision (a) of Section 5122 is continued without substantive change in Section 5101.

406/466 N/Z

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 5120.130. 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

09582

Civil Code §§ 5133-5137 (chapter heading)

SEC. 14. A chapter heading is added immediately preceding Section 5133 of the Civil Code, to read:

CHAPTER 6. MARRIAGE SETTLEMENT CONTRACTS

10171

Civil Code § 5138 (chapter heading)

SEC. 15. A chapter heading is added immediately preceding Section 5138 of the Civil Code, to read:

CHAPTER 7. MISCELLANEOUS PROVISIONS

3429

Government Code § 27251 (amended)

SEC. 16. Section 27251 of the Government Code is amended to read:

27251. The recorder shall keep an index of the separate property of married ~~women~~ persons , labeled: "Separate property," each page divided into five columns, headed respectively: "Names of married ~~women~~ persons ," "Names of their ~~husbands~~ spouses ," "Nature of instruments recorded," "When recorded," and "Where recorded."

Comment. Section 27251 of the Government Code is amended to conform to Civil Code Sections 5114 and 5115 which permit husbands as well as married women to record an inventory of separate personal property.

Transition Provision

SEC. 17. The provisions of this act govern the liability of separate and community property for a debt enforced on or after the operative date of this act, regardless whether the debt was incurred before, on, or after the operative date.